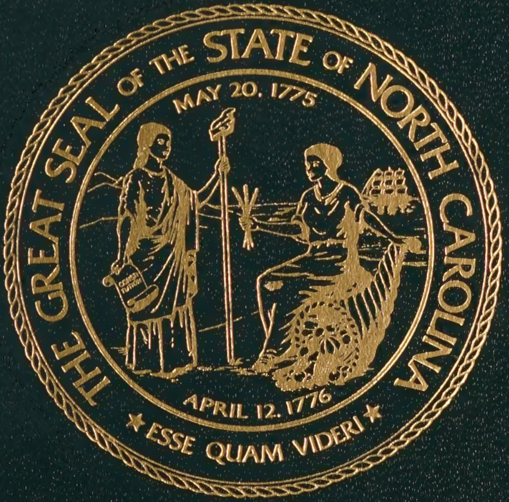
GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED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GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

Volume 7

Chapters 31A Through 48

Prepared Under the Supervision of
The Department of Justice
of the State of North Carolina
by
The Editorial Staff of the Publisher

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Preface

This volume contains the general laws of a permanent nature enacted by the General Assembly through the 2007 Regular Session and 1st Extra Session that are within Chapters 31A through 48, and brings to date the annotations included therein.

A majority of the Session Laws are made effective upon becoming law, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 60 days after the adjournment of the session" in which passed.

A ready reference index is included at the back of this volume. This index is intended to give the user a quick reference to larger bodies of statutes within this volume only. For detailed research on any subject, both within this volume and the General Statutes as a whole, see the General Index to the General Statutes.

Beginning with formal opinions issued by the North Carolina Attorney General on July 1, 1969, selected opinions which construe a specific statute are cited in the annotations to that statute. For a copy of an opinion or of its headnotes, write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

This recompiled volume has been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any suggestions they may have for improving the General Statutes to the Department, or to LexisNexis, Charlottesville, Virginia.

Roy Cooper
Attorney General

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 2007 Regular Session and 1st Extra Session affecting Chapters 31A through 48 of the General Statutes.

Annotations:

This publication contains annotations taken from decisions of the North Carolina Supreme Court, decisions of the North Carolina Court of Appeals, and decisions of the appropriate federal courts posted through September 21, 2007. These cases will be printed in the following reporters:

South Eastern Reporter 2nd Series.
Federal Reporter 3rd Series.
Federal Supplement 2nd Series.
Federal Rules Decisions.
Bankruptcy Reports.
Supreme Court Reporter.

Additionally, annotations have been taken from the following sources:

North Carolina Law Review.
Wake Forest Law Review.
Campbell Law Review.
Duke Law Journal.
North Carolina Central Law Journal.
Opinions of the Attorney General.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1 for the complete User's Guide.

Abbreviations

(The abbreviations below are those found in the General Statutes that refer to prior codes.)

P.R.	Potter's Revisal (1821, 1827)
R.S.	Revised Statutes (1837)
R.C.	Revised Code (1854)
C.C.P.	Code of Civil Procedure (1868)
Code	Code (1883)
Rev.	Revisal of 1905
C.S.	Consolidated Statutes (1919, 1924)

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

December 2007

I, Roy Cooper, Attorney General of North Carolina, do hereby certify that the foregoing 2007 Replacement Code to the General Statutes of North Carolina was prepared and published by LexisNexis under the supervision of the Department of Justice of the State of North Carolina.

Roy Cooper

Attorney General of North Carolina

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31A-13. Record determining slayer admissible in evidence.
31A-14. Revised Simultaneous Death Act not applicable.
31A-15. Chapter to be broadly construed.

ARTICLE 1.

Rights of Spouse.

§ 31A-1. Acts barring rights of spouse.

(a) The following persons shall lose the rights specified in subsection (b) of this section:

(1) A spouse from whom or by whom an absolute divorce or marriage annulment has been obtained or from whom a divorce from bed and board has been obtained; or

(2) A spouse who voluntarily separates from the other spouse and lives in adultery and such has not been condoned; or

(3) A spouse who wilfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death; or

(4) A spouse who obtains a divorce the validity of which is not recognized under the laws of this State; or

(5) A spouse who knowingly contracts a bigamous marriage.

(b) The rights lost as specified in subsection (a) of this section shall be as follows:

(1) All rights of intestate succession in the estate of the other spouse;

(2) All right to claim or succeed to a homestead in the real property of the other spouse;

(3) All right to petition for an elective share of the estate of the other spouse and take either the elective intestate share provided or the life interest in lieu thereof;

(4) All right to any year's allowance in the personal property of the other spouse;

(5) All right to administer the estate of the other spouse; and

(6) Any rights or interests in the property of the other spouse which by a settlement before or after marriage were settled upon the offending spouse solely in consideration of the marriage.

(c) Any act specified in subsection (a) of this section may be pleaded in bar of any action or proceeding for the recovery of such rights, interests or estate as set forth in subsection (b) of this section.

(d) The spouse not at fault may sell and convey his or her real and personal property without the joinder of the other spouse, and thereby bar the other spouse of all right, title and interest therein in the following instances:

(1) During the continuance of a separation arising from a divorce from bed and board as specified in subsection (a)(1) of this section, or

(2) During the continuance of a separation arising from adultery as specified in subsection (a)(2) of this section, or during the continuance of a separation arising from an abandonment as specified in subsection (a)(3) of this section, or

(3) When a divorce is granted as specified in subsection (a)(4) of this section, or a bigamous marriage contracted as specified in subsection (a)(5) of this section. (1961, c. 210, s. 1; 1965, c. 850; 2000-178, s. 6.)

Cross References. — As to right of elective share, see G.S. 30-3.1 et seq.

Legal Periodicals. — For article discussing this Chapter, section by section, see 40 N.C.L. Rev. 175 (1962).

For note on forfeitures of property rights by slayers, see 12 Wake Forest L. Rev. 448 (1976).

CASE NOTES

History. — See Misenheimer v. Misenheimer, 62 N.C. App. 506, 303 S.E.2d 415 (1983), aff'd, 312 N.C. 692, 325 S.E.2d 195 (1985).

Legislative Intent. — See Misenheimer v. Misenheimer, 62 N.C. App. 506, 303 S.E.2d 415 (1983), aff'd, 312 N.C. 692, 325 S.E.2d 195 (1985).

The apparent purpose of the full statute is to bar the benefits of certain types of property rights and interests otherwise accruing to a person but for his wrongful acts or a divorce or annulment. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Right to Take under Will Not Forfeited by Abandonment. — The right of the widow to take under her husband's will that which he saw fit to bequeath or devise to her is not among the rights which this section declares forfeited by her abandonment of him. Abbott v. Abbott, 269 N.C. 579, 153 S.E.2d 39 (1967).

Divorce Does Not Annul or Revoke Designation of Insurance Beneficiary. — Neither G.S. 50-11 which provides that "all rights arising out of the marriage shall cease and determine," nor this section which bars rights to "any rights or interests in the property of the other spouse" discloses a legislative intent that divorce should annul or revoke the beneficiary designation in a garden-variety insurance certificate. DeVane v. Travelers Ins. Co., 8 N.C. App. 247, 174 S.E.2d 146 (1970).

Presumption of Adultery. — Adultery is presumed if the following can be shown: (1) the adulterous disposition, or inclination, of the parties; and (2) the opportunity created to satisfy their mutual adulterous inclinations. In re Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991).

Wife's Behavior as Inference of Adultery. — A married woman's refusal to testify about the nature of her relationship with two unmarried men, with whom she admitted cohabiting, and her failure to refute the charge of adultery logically gave rise to an inference of adultery. In re Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991).

"Living in Adultery." — Considering the legislative history and the purpose of this section, "living in adultery" means a spouse engages in repeated acts of adultery within a reasonable period of time preceding the death of her spouse; therefore, "living in adultery" requires a showing of something more than "committing adultery," or a single act of adultery, and something less than "residing" in adultery because the latter construction would permit spouses to engage in habitual adultery with those with whom they do not reside and nevertheless be qualified to administer their decedent spouse's estate under section 28A-6-1. In re Estate of Montgomery, 137 N.C. App. 564, 528 S.E.2d 618, 2000 N.C. App. LEXIS 422 (2000).

Subdivision (b)(6) is inapplicable to separation agreements entered into by parties contemplating a separation or divorce from a valid marriage. Taylor v. Taylor, 321 N.C. 244, 362 S.E.2d 542 (1987).

Negligence Is Not Ground for Forfeiture. — The surviving spouse does not lose his right of inheritance because the claim arose on account of the negligence of the surviving spouse since negligence is not one of the grounds for forfeiture of marital rights as set out in this section. Wilson v. Miller, 20 N.C. App. 156, 201 S.E.2d 55 (1973).

Failure to Provide Support Tantamount to Abandonment. — Where the husband made his wife leave, or where she had to leave because he would not give her anything to eat, it was held that his conduct amounted to abandonment. High v. Bailey, 107 N.C. 70, 12 S.E. 45 (1890), construing former § 28-12.

Summary judgment was appropriate for the defendant under this section where the evidence failed to support a finding of willful abandonment of the deceased, and that any failure to care for, or cohabit with, her was due to the advanced age and deteriorating health of both spouses. Meares v. Jernigan, 138 N.C. App. 318, 530 S.E.2d 883, 2000 N.C. App. LEXIS 612 (2000).

Proceeding to set aside invalid divorce decree is not barred by death of one of the spouses where property rights are involved. Allred v. Tucci, 85 N.C. App. 138, 354 S.E.2d 291, cert. denied, 320 N.C. 166, 358 S.E.2d 47 (1987).

Wrongful Death Action. — In a wrongful death action, the real parties in interest were the beneficiaries as defined in the Wrongful Death Act, who were the same persons who would have received property had the decedent died intestate; where a widow, who was the decedent's sole intestate beneficiary, had abandoned the decedent before his death, she was not entitled to a wrongful death recovery, and since the remaining beneficiaries did not succeed to a full 100 percent, but only received their original percentage, there were no beneficiaries to the wrongful death claim. Locust v. Pitt County Mem'l Hosp., 154 N.C. App. 103, 571 S.E.2d 668, 2002 N.C. App. LEXIS 1410 (2002), cert. denied, 356 N.C. 673, 579 S.E.2d 272 (2003).

Where decedent's ex-spouse abandoned her interest in the decedent's estate at the time of death, decedent's siblings were entitled to share in any wrongful death proceeds, distribution was dictated by the laws of intestacy, and decedent's sister, as administratrix had standing to file the action. Locust v. Pitt County Mem'l Hosp., Inc., 358 N.C. 113, 591 S.E.2d 543, 2004 N.C. LEXIS 20 (2004).

Cited in In re Estate of Perry, 256 N.C. 65, 123 S.E.2d 99 (1961); Durham Bank & Trust Co. v. Pollard, 256 N.C. 77, 123 S.E.2d 104 (1961); Brinson v. Brinson, 334 F.2d 155 (4th Cir. 1964); Imperial Tobacco Group Ltd. v. Peoples Bank & Trust Co., 7 N.C. App. 202, 171 S.E.2d 807 (1970); In re Estate of Cox, 97 N.C. App. 312, 388 S.E.2d 199 (1990); Coombs v. Coombs, 121 N.C. App. 746, 468 S.E.2d 807 (1996).

ARTICLE 2.

Parents.

§ 31A-2. Acts barring rights of parents.

Any parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except —

(1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or

(2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child. (1961, c. 210, s. 1.)

Legal Periodicals. — For note on forfeitures of property rights by slayers, see 12 Wake Forest L. Rev. 448 (1976).

For comment, "In re Estate of Lunsford and Statutory Ambiguity: Trying to Reconcile Child Abandonment and the Intestate Succession Act," 81 N.C.L. Rev. 1149 (2003).

For casenote: "McKinney v. Richitelli: Abandoning Parents and Presumptive Penalties," see 26 N.C. Cent. L.J. 116 (2003).

CASE NOTES

Intestate Succession Act Modified by Chapter. — When the legislature, in G.S. 28A-18-2, provided that the proceeds of an action for wrongful death "shall be disposed of as provided in the Intestate Succession Act," and when it provided in G.S. 97-40 that the order of priority among claimants to death benefits payable under the Workers' Compensation Act "shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate," it had in mind the same law; i.e., the Intestate Succession Act as modified by this Chapter, entitled, "Acts Barring Property Rights." Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975).

Section Also Modifies § 29-15(3). — This section must be deemed a part of the Intestate Succession Act and a modification of G.S. 29-15(3), as fully as if it had been written thereinto or specifically designated as an amendment thereto. Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975).

Construction. — G.S. 31A-2, precluding an abandoning parent from taking anything from the abandoned child's intestate estate, was ambiguous because nowhere in Chapter 31A was the term "child" defined, nor was the meaning of the term clear from its context, so "child" here could reasonably mean either a minor offspring or an offspring of any age. McKinney v. Richitelli, 357 N.C. 483, 586 S.E.2d 258, 2003 N.C. LEXIS 1097 (2003).

Meaning of Abandonment. — Abandonment is defined as any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

Logically, G.S. 31A-2, prohibiting a parent who abandoned a child from taking anything from the child's intestate estate, had to apply to an abandonment that initially occurred while the child was a minor as a parent could not abandon an emancipated or adult child when the parent had no further responsibility for the child. McKinney v. Richitelli, 357 N.C. 483, 586 S.E.2d 258, 2003 N.C. LEXIS 1097 (2003).

Applicability to Estate of Adult Child. — This section applies to the estate of any son or daughter of an individual, even after that child has reached the age of majority. In re Estate of Lunsford, 143 N.C. App. 646, 547 S.E.2d 483, 2001 N.C. App. LEXIS 326 (2001), cert. granted, 353 N.C. 727, 550 S.E.2d 779 (2001).

Abandonment has been defined as willful neglect and refusal to perform the natural and legal obligations of parental care and support; if a parent withholds his presence, his love, his care, and the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

North Carolina Supreme Court had implicitly held that G.S. 31A-2 applied to a dispute as to a father's rights to share in his daughter's estate even though she was not a minor at the time of her death. In re Estate of Lunsford, 160 N.C. App. 125, 585 S.E.2d 245, 2003 N.C. App. LEXIS 1764 (2003).

North Carolina General Assembly adequately demonstrated an unwillingness to allow an abandoning parent to take from an abandoned adult child as the result of a mechanical application of the rules of intestate succession. McKinney v. Richitelli, 357 N.C. 483, 586 S.E.2d 258, 2003 N.C. LEXIS 1097 (2003).

When a deceased child's mother filed a declaratory judgment action against the child's father, seeking a determination of the parties' rights to share in the child's estate, including the proceeds of a wrongful death suit on the child's behalf, under G.S. 31A-2, because the father did not support or communicate with the child from age four until almost age 20, the father's motion to dismiss, under G.S. 1A-1, Rule 12(b)(6), was properly denied; while the father resumed support of and contact with the child before the child's death, support had to be resumed at least one year before the end of the father's legal obligation to support the child, which ended at age 18, to apply the exception to G.S. 31A-2's preclusion, found in G.S. 31A-2(1), so that exception did not apply to the father. McKinney v. Richitelli, 357 N.C. 483, 586 S.E.2d 258, 2003 N.C. LEXIS 1097 (2003).

Legislative intent behind G.S. 31A-2, precluding an abandoning parent from sharing in the abandoned child's intestate estate, was both to discourage parents from shirking their responsibility of support to their children and to prevent an abandoning parent from reaping an undeserved bonanza, and if G.S. 31A-2 had no application once a child reached majority, a parent who had abandoned his or her child would nevertheless automatically inherit if the still-abandoned child died intestate after reaching the age of 18 so such an interpretation would frustrate the statute's purpose and effectively forgive the abandoning parent's dereliction; G.S. 31A-2 applied to any abandoned child dying intestate regardless of the child's age at death. McKinney v. Richitelli, 357 N.C. 483, 586 S.E.2d 258, 2003 N.C. LEXIS 1097 (2003).

Critical inquiry as to G.S. 31A-2(1), allowing a parent who had abandoned a child to share in the child's intestate estate if the parent had resumed supporting the child, was not whether a parent could resume a relationship with a child, but whether a parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death so the exception required that the parent resume both the care and maintenance of the child, and these requirements could not be read in the disjunctive; while "care" pertained to love and concern for the child, "maintenance" referred to the financial support of a child during minority, and North Carolina jurisprudence established that the authority of a court to require support for a normal child ceased when the legal obligation to support no longer existed so the parents' duty to support ceased upon emancipation, and the age of emancipation was precisely fixed at 18. McKinney v. Richitelli, 357 N.C. 483, 586 S.E.2d 258, 2003 N.C. LEXIS 1097 (2003).

G.S. 31A-2, precluding an abandoning parent from sharing in the abandoned child's intestate estate, pertained to the estate of a child of any age, and under the logic of that analysis — that a parent who abandoned a child should benefit from the death of the child only if the parent had resumed a parental relationship with the child — an abandoning parent who sought to come under the exception in G.S. 31A-2(1), allowing an abandoning parent to share in the abandoned child's intestate estate if support of the child was resumed, had to renew both the care and the maintenance of the child during the child's minority, when care and maintenance were most valuable; under the terms of the statute, the care and maintenance had to continue for a year before the child's death so, in order to benefit from this provision, a parent had to renew such care and maintenance at least one year before the child reached the age of 18. McKinney v. Richitelli, 357 N.C. 483, 586 S.E.2d 258, 2003 N.C. LEXIS 1097 (2003).

Legislative intent behind G.S. 31A-2, precluding an abandoning parent from inheriting from an abandoned child, is both to discourage parents from shirking their responsibility of support to their children and to prevent an abandoning parent from reaping an undeserved bonanza, and the general assembly demonstrated its unwillingness to allow an abandoning parent to take from an abandoned adult child as the result of a mechanical application of the rules of intestate succession. In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

Willful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence. Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986).

Abandoning Parent Does Not Share Death Benefits under § 97-38. — Where the father wilfully abandoned the care and maintenance of the deceased during the latter's minority, this section provides that the father loses all right to intestate succession in the distribution of the personal estate of his intestate deceased child and consequently, he does not share in the death benefits for which the employer or its carrier is liable under G.S. 97-38. Smith v. Allied Exterminators, Inc., 279 N.C. 583, 184 S.E.2d 296 (1971).

Operative language in G.S. 31A-2, precluding an abandoning parent from inheriting from an abandoned child, is nearly identical to that in G.S. 97-40, precluding the receipt of workers' compensation benefits by an abandoning parent due to the death of an abandoned child, as both statutes provide that a parent who has abandoned the "care and maintenance" of a child loses the right to receive a specified benefit upon the child's death, and both provide an exception when the parent has resumed the "care and maintenance" of the child at least one year prior to the child's death or majority. In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

Or Wrongful Death Proceeds. — This section acts to preclude a parent who comes within its provisions from sharing in wrongful death proceeds. Williford v. Williford, 26 N.C. App. 61, 214 S.E.2d 787, aff'd, 288 N.C. 506, 219 S.E.2d 220 (1975); Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), aff'd, Havee v. Belk, 775 F.2d 1209 (4th Cir. 1985).

Plaintiff father, having abandoned the deceased when the latter was a minor child, could not share in the proceeds of the settlement of the claim for wrongful death now in the hands of the administratrix. Williford v. Williford, 288 N.C. 506, 219 S.E.2d 220 (1975).

Construction of Exception. — Exception contained in G.S. 31A-2(2) must be construed in accordance with the policy underlying Chapter 31A; the exception contained in G.S. 31A-2(2) essentially states that if a court takes away custody of a child and decides the specifics of support, then a parent should not be denied the right to participate in intestate succession if he limits his role in his child's life to the parameters set out by a court. In re Estate of Lunsford, 160 N.C. App. 125, 585 S.E.2d 245, 2003 N.C. App. LEXIS 1764 (2003).

Exception in G.S. 31A-2(2) to precluding an abandoning parent from inheriting from an abandoned child essentially states that a parent should not be denied the right to participate in intestate succession if he limits his role in his child's life to the parameters set out by a court, at least when the abandoning parent complies with the express terms of a court order requiring contribution to the support of the child, so an exception to the general rule of disinheritance is justified under such circumstances, because the legislative intent underlying G.S. 31A-2 is not effectuated by the disinheritance of a non-custodial parent who provides the court-ordered level of material support; put simply, a parent who limits his role in his child's life to the parameters set out by a court has not shirked his responsibility to that child. so, construing G.S. 31A-2(2) to apply it only to a parent who was ordered to provide support effectuates the legislative intent behind that exception. In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

If a parent voluntarily provides adequate "care and maintenance" to a child, for purposes of G.S. 31A-2, that parent cannot be said to have abandoned the child in the first instance, and, as an exception to the general rule of disinheritance, G.S. 31A-2(2) comes into play only when a parent has failed to provide care and support of his or her own volition, so the exception provides that a parent should not be penalized for his or her failure to exceed the terms of a judicial child support order, and the statute should not be applied to the disadvantage of a parent who voluntarily provides adequate care and support. In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

When a father was not ordered to pay support for his child, when custody of the child was awarded to the child's mother, and the father did not voluntarily provide an adequate level of support for the child during the 17 years following the mother's and father's divorce, when the child died, the father was precluded from sharing in the proceeds of the child's estate because he wilfully abandoned her, and the exception to such preclusion in G.S. 31A-2(2), which applied to non-custodial parents who complied with court orders to support a child, did not apply to him because he was not ordered to pay support for the child, and he did not voluntarily provide an adequate amount of such support. In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

Exception in Subsection 2 Applied. — Trial court erred in concluding that a father did not fall within the scope of G.S. 31A-2(2) where: (1) the father was deprived of custody under the divorce decree, (2) the decree did not grant the father any visitation rights, and (3) because the district court in its divorce judgment considered the issue of child support but elected not to require the father to pay support, the father complied with the only order in existence addressing the question of child support. In re Estate of Lunsford, 160 N.C. App. 125, 585 S.E.2d 245, 2003 N.C. App. LEXIS 1764 (2003).

G.S. 31A-2(2) provides that an abandoning parent may inherit from an abandoned child if the parent has substantially complied with all orders of the court requiring contribution to the support of the child, so, by its express language, this statutory exception to the preclusion of an abandoning parent's inheritance from an abandoned child may not be invoked where a court order has not "required" the payment of child support. In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

Abandonment Found. — Where respondent/mother never provided child support for her daughters, rarely visited them, and voluntarily relinquished custody a year before a divorce judgment, a jury could conclude that she had abandoned her daughters. Hixson v. Krebs, 136 N.C. App. 183, 523 S.E.2d 684, 1999 N.C. App. LEXIS 1311 (1999).

A father abandoned his daughter and, therefore, could not inherit from her, where he paid no more than $ 100 toward her support after the divorce and visited her less than a dozen times over a 17-year period. In re Estate of Lunsford, 143 N.C. App. 646, 547 S.E.2d 483, 2001 N.C. App. LEXIS 326 (2001), cert. granted, 353 N.C. 727, 550 S.E.2d 779 (2001).

Trial court's findings of fact supported its conclusion that a father wilfully abandoned the care and maintenance of his child, under G.S. 31A-2, because, even assuming the child and her mother refused to accept the father's occasional offers of financial assistance, the trial court could reasonably find that the father's sporadic contacts with his daughter over 17 years did not show the degree of "presence," "love," "care," and "opportunity to display filial affection" that defined non-abandoning parents. In re Estate of Lunsford, 359 N.C. 382, 610 S.E.2d 366, 2005 N.C. LEXIS 358 (2005).

No Abandonment Found. — Trial court erred in concluding that a father had willfully abandoned his child for purposes of G.S. 31A-2 where: (1) the mother was awarded sole custody of the child in a divorce decree that did not address visitation rights or any child support obligation of the father, (2) the father offered to help pay for the child's expenses on occasion, but his offers were refused by the mother, (3) the father sporadically visited the child, (4) as the child grew older, either the child or the father would initiate phone calls, visits, or other relational contact, and (5) the father attended the child's high school graduation, and both had initiated plans for furthering their father-daughter relationship. In re Estate of Lunsford, 160 N.C. App. 125, 585 S.E.2d 245, 2003 N.C. App. LEXIS 1764 (2003).

Applied in In re Peacock, 261 N.C. 749, 136 S.E.2d 91 (1964).

Cited in Lessard v. Lessard, 68 N.C. App. 760, 316 S.E.2d 96 (1984).

ARTICLE 3.

Willful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.

As used in this Article, unless the context otherwise requires, the term —

(1) "Decedent" means the person whose life is taken by the slayer as defined in subdivision (3) of this section.

(2) "Property" means any real or personal property and any right or interest therein.

(3) "Slayer" means any of the following:

a. A person who, by a court of competent jurisdiction, is convicted as a principal or accessory before the fact of the willful and unlawful killing of another person.

b. A person who has entered a plea of guilty in open court as a principal or accessory before the fact of the willful and unlawful killing of another person.

c. A person who, upon indictment or information as a principal or accessory before the fact of the willful and unlawful killing of another person, has tendered a plea of nolo contendere which was accepted by the court and judgment entered thereon.

d. A person who is found by a preponderance of the evidence in a civil action brought within two years after the death of the decedent to have willfully and unlawfully killed the decedent or procured the killing of the decedent. If a criminal proceeding is brought against the person to establish the person's guilt as a principal or accessory before the fact of the willful and unlawful killing of the decedent within two years after the death of the decedent, the civil action may be brought within 90 days after a final determination is made by a court of competent jurisdiction in that criminal proceeding or within the original two years after the death of the decedent, whichever is later. The burden of proof in the civil action is on the party seeking to establish that the killing was willful and unlawful for the purposes of this Article.

e. A juvenile who is adjudicated delinquent by reason of committing an act that, if committed by an adult, would make the adult a principal or accessory before the fact of the willful and unlawful killing of another person.

The term "slayer" does not include a person who is found not guilty by reason of insanity of being a principal or accessory before the fact of the willful and unlawful killing of another person. (1961, c. 210, s. 1; 2006-107, s. 1.)

Effect of Amendments. — Session Laws 2006-107, s.1, effective July 13, 2006, and applicable to property passing from decedents dying on or after that date, in subdivision (1), added "of this section" at the end; in subdivision (3), added "any of the following" at the end of the introductory language; rewrote subdivision (1)d; added subdivision (1)e; and made minor stylistic and punctuation changes throughout the section.

Legal Periodicals. — For note on the beneficiary's rights to the proceeds of an insurance policy when he takes the life of the insured, see 54 N.C.L. Rev. 1085 (1976).

For note on forfeitures of property rights by slayers, see 12 Wake Forest L. Rev. 448 (1976).

For comment, "The Need for a New Slayer Statute in North Carolina," see 24 Campbell L. Rev. 295 (2002).

CASE NOTES

The public policy sought to be fostered by the enactment of this Article is predicated upon the theory that the murderer himself will not profit by his own wrongdoing; however, this principle does not extend to those related to the slayer. Misenheimer v. Misenheimer, 62 N.C. App. 506, 303 S.E.2d 415 (1983), aff'd, 312 N.C. 692, 325 S.E.2d 195 (1985).

As to legislative history of subdivision (3)a, see Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

This Article, the "slayer statute," applies only to felonious killings; it does not prevent the common law doctrine that no person will be allowed to profit from his own wrong from being applied in actions not under its provisions. In re Estate of Cox, 97 N.C. App. 312, 388 S.E.2d 199 (1990).

"Willful" as used in subdivision (3)a refers to an "intentional" homicide. Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

The crime of involuntary manslaughter is not a "willful" killing within the meaning of subdivision (3)a. Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

A person who has been convicted of involuntary manslaughter of another has not been convicted of a "willful" killing within the meaning of subdivision (3)a and thus is not a slayer who is barred by this Chapter from receiving the proceeds of a life insurance policy on the life of the deceased. Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975).

Proof of conviction of involuntary manslaughter does not, per se, disqualify defendant from receiving the insurance proceeds under G.S. 31A-11. Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

Subdivision (3)a envisions a conviction of unlawful homicide. Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975).

Which Is a Felony. — See Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975).

Finding by Court Was Not Conviction. — The finding made by a district court judge that "this child did willfully and with malice aforethought murder his mother and father" did not constitute a conviction as envisioned by subdivision (3)a; therefore, the "barring" provisions of this Chapter did not apply. Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975).

Acquittal of Murder Avoids Forfeiture. — A plea by widow that she has been acquitted of the murder of her husband states a complete defense to the claim that she has forfeited her property rights as his widow. McMichael v. Proctor, 243 N.C. 479, 91 S.E.2d 231 (1956), decided under former § 28-10.

Section 31A-13 has no applicability where the alleged wrongdoer has not been determined a "slayer" within the purview of subdivision (3). Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

But Common Law Barred Person Found Responsible by Preponderance of Evidence from Receiving Insurance Proceeds. — Although plaintiff did not fit the statutory definition of "slayer" under subdivision (3) of this section because she had not been convicted of killing deceased, she was nonetheless barred by the common law from receiving the proceeds of deceased's life insurance, where the jury found by a preponderance of the evidence that she had killed him or procured his death. Jones v. All Am. Life Ins. Co., 68 N.C. App. 582, 316 S.E.2d 122 (1984), aff'd, 312 N.C. 725, 325 S.E.2d 237 (1985).

Failure to Proceed Within One Year. — Plaintiff's failure to proceed under the slayer statute within one year did not bar him from attempting to show that intestate's culpable negligence proximately contributed to the deaths of the decedents and that her estate could not profit from those wrongs. Lynch v. Newsom, 96 N.C. App. 53, 384 S.E.2d 284, cert. denied, 326 N.C. 48, 389 S.E.2d 90 (1990).

Summary Judgment Improper. — Trial court committed reversible error in granting motion for summary judgment in favor of wife, where wife sought to collect insurance proceeds from her husbands death, although she stabbed him to death. State Farm Life Ins. Co. v. Allison, 128 N.C. App. 74, 493 S.E.2d 329 (1997), cert. denied, 347 N.C. 584, 502 S.E.2d 616 (1998).

Applied in Tew v. Durham Life Ins. Co., 1 N.C. App. 94, 160 S.E.2d 117 (1968); Homanich v. Miller, 28 N.C. App. 451, 221 S.E.2d 739 (1976); Jones v. All Am. Life Ins. Co., 312 N.C. 725, 325 S.E.2d 237 (1985); Atwater v. Nortel Networks, Inc., 388 F. Supp. 2d 610, 2005 U.S. Dist. LEXIS 29823 (M.D.N.C. Sept. 6, 2005).

Cited in State v. Misenheimer, 304 N.C. 108, 282 S.E.2d 791 (1981); Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992); Locust v. Pitt County Mem'l Hosp., Inc., 358 N.C. 113, 591 S.E.2d 543, 2004 N.C. LEXIS 20 (2004).

§ 31A-4. Slayer barred from testate or intestate succession and other rights.

The slayer shall be deemed to have died immediately prior to the death of the decedent and the following rules shall apply:

(1) The slayer shall not acquire any property or receive any benefit from the estate of the decedent by testate or intestate succession or by common law or statutory right as surviving spouse of the decedent.

(2) Where the decedent dies intestate as to property which would have passed to the slayer by intestate succession and the slayer has living issue who would have been entitled to an interest in the property if the slayer had predeceased the decedent, the property shall be

distributed to such issue, per stirpes. If the slayer does not have such issue, then the property shall be distributed as though the slayer had predeceased the decedent.

(3) Where the decedent dies testate as to property which would have passed to the slayer pursuant to the will, the devolution of such property shall be governed by G.S. 31-42(a) notwithstanding the fact the slayer has not actually died before the decedent. (1961, c. 210, s. 1; 1999-296, s. 1.)

Legal Periodicals. — For note on forfeitures of property rights by slayers, see 12 Wake Forest L. Rev. 448 (1976).

CASE NOTES

The slayer statute applies in conjunction with the anti-lapse statute, § 31-42. Misenheimer v. Misenheimer, 62 N.C. App. 506, 303 S.E.2d 415 (1983), aff'd, 312 N.C. 692, 325 S.E.2d 195 (1985).

Estate of Decedent Determined at Date of Her Actual Death. — This section makes no attempt artificially to alter the date of the death of the decedent but provides instead that the actual date of death of the slayer is to be disregarded. Therefore, if the language of the statute is followed, the estate of the decedent is determined at the date of her actual death, and the law calls the roll of the class immediately as of that time; those who can then answer, take. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

This section provides in part that, for purposes of distributing the estate of the decedent, "the slayer shall be deemed to have died immediately prior to the death of the decedent." In view of this express statutory presumption, it is clear that the words "the estate of the wife" as the same were used in former G.S. 31A-5(2) meant the estate of the murdered wife as the same came into existence at the instant of her death, and the title to the entireties property at that moment passed to those persons who would be entitled to succeed to her interest in such property as of the moment of her death if she had in fact survived her husband, subject only to recognized right to "hold" the property during his lifetime. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Presumption in Subdivision (3) Equivalent to Actual Death. — It was the intent of the General Assembly that the presumption in subdivision (3) of this section be equivalent to actual death for all purposes of determining the disposition of property of the testator. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Slayer's Legacy Distributed in Accord with § 31-42(a). — Because of the failure of a slayer's legacy, the property that would have gone to him under the will had he not been convicted of killing the testator must be distributed in accord with G.S. 31-42(a). Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Order of Death Not Established for Purposes of Distributing Slayer's Estate. — The clause in this section which deems the slayer to have predeceased the victim does not establish the order of death between the slayer and the victim for purposes of distributing the slayer's estate. Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

Section Does Not Authorize Victim's Participation in Estate. — The plain language of this section clearly bars the slayer from participating in the victim's estate; however, it does not authorize the victim to participate in the slayer's estate; that may or may not occur. Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

Section Merely Establishes Presumption to Exclude Slayer. — This section does not indulge the fiction that the slayer's date of death is other than the actual date of death, but merely establishes a presumption to exclude the slayer. Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

Where slayer's two children are alive and would have been heirs of testator had he died intestate, slayer's failed legacy must pass by substitution to them in accordance with G.S. 31-42(a). Because of the conclusive presumption in subdivision (3) of this section that the slayer predeceased the testator, G.S. 31-42(a), not G.S. 31-42(c)(2), applies. Misenheimer v. Misenheimer, 312 N.C. 692, 325 S.E.2d 195, rehearing denied, 313 N.C. 515, 334 S.E.2d 778 (1985).

Where a husband has taken out a policy of life insurance on his own life with his wife as beneficiary and has feloniously killed his wife and then himself, under this section (former G.S. 28-10), his heirs may not claim under him the proceeds of the policy, since the law will not allow a man or those claiming under him to benefit by his own wrong, and the proceeds of the policy are descendible to the next of kin of the wife and not to the husband's heirs at law. Parker v. Potter, 200 N.C. 348, 157 S.E. 68 (1931).

Heir Murdering Ancestor Excluded from Beneficial Interest in Estate. — The fact that this (former G.S. 28-10) and other sections forfeiting a murder's interest in the estate of his victim apply only to the relation of husband and wife does not deprive equity of the power of excluding an heir who has murdered his ancestor from all beneficial interest in the estate of his victim. Garner v. Phillips, 229 N.C. 160, 47 S.E.2d 845 (1948). For suggested revisal of this section and related statutes, see 26 N.C.L. Rev. 232.

Wrongful Act Bars Husband from Share of Wrongful Death Recovery. — In an action by an administrator under the Wrongful Death Act where a husband caused the death of his wife, the award must be reduced by the statutory share of the wrongdoer. St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583 (4th Cir. 1973).

This result is not precluded by this section, which excludes the wrongdoer from taking by declaring him to have constructively died prior to the deceased, since the slayer's exclusion by this section appears to apply only to inheritance from the decedent's "estate," while wrongful death awards have consistently been deemed not to pass through the personal estate of the deceased, but rather to arise out of a right of action belonging peculiarly to the personal representative for the benefit of the intestate successors. St. Paul Fire & Marine Ins. Co. v. Lack, 476 F.2d 583 (4th Cir. 1973).

Former Law. — See Owens v. Owens, 100 N.C. 240, 6 S.E. 794 (1888).

Cited in Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975); State v. Gilmore, 330 N.C. 167, 409 S.E.2d 888 (1991).

§ 31A-5. Entirety property.

Where the slayer and decedent hold property as tenants by the entirety, one half of the property shall pass upon the death of the decedent to the decedent's estate, and the other one half shall be held by the slayer during his or her life, subject to pass upon the slayer's death to the slain decedent's heirs or devisees as defined in G.S. 28A-1-1. (1961, c. 210, s. 1; 1979, c. 572.)

Legal Periodicals. — For comment on tenancy by the entirety in North Carolina, see 59 N.C.L. Rev. 997 (1980).

CASE NOTES

This section is not unconstitutional. Since tenancy by the entirety is a purely voluntary method of acquiring and retaining realty, there is no discriminatory State action in violation of U.S. Const., Amend. XIV. Homanich v. Miller, 28 N.C. App. 451, 221 S.E.2d 739, cert. denied, 289 N.C. 614, 223 S.E.2d 392 (1976).

The different solutions depending upon whether husband or wife is the slayer is not discretionary against the wife-slayer. Such disposition was deemed necessary in order to prevent the slayer-husband from having his vested property right forfeited for crime or taken without due process, because North Carolina is one of only three states that have retained the common-law incident of tenancy by the entirety that "the husband has the control and use of the property and is entitled to the possession, income, and usufruct thereof during their joint lives." Homanich v. Miller, 28 N.C. App. 451, 221 S.E.2d 739, cert. denied, 289 N.C. 614, 223 S.E.2d 392 (1976).

The legislature knowingly subjected established policy to provide for a fair disposition of entirety property where the wife slays the husband. Homanich v. Miller, 28 N.C. App. 451, 221 S.E.2d 739, cert. denied, 289 N.C. 614, 223 S.E.2d 392 (1976).

"Estate." — The word "estate" as used in this section means those persons, other than the slayer, who succeed to the rights of the decedent either by testate or intestate succession as the case may be. To accomplish the purpose of this section and consistent with the clear language of G.S. 31A-4, the slayer cannot be included in this class. In cases in which the decedent has made testamentary disposition of the real property involved, this interpretation gives effect to the decedent's will. If there is no will, or if the decedent left a will but made no disposition therein of the real property involved, the decedent's "estate" consists of those persons who become entitled to succeed to the decedent's property under the intestate succession laws. In either event under G.S. 31A-4 the slayer is not included. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The correctness of the interpretation of the words "estate of the wife" in former subdivision (2) as meaning the estate as it came into existence at the moment of her actual death was strengthened by an examination of former subdivision (1) of this section, which dealt with the situation when the wife is the slayer. In such case the statute provided that "one half of the property shall pass upon the death of the husband to his estate, and the other one half shall be held by the wife, subject to pass upon her death to the estate of the husband." It was not reasonable to suppose that the legislature in former subdivision (1) intended the word "estate" to have one meaning as to one half of the property and another meaning as to the other one half. Rather, it is more reasonable to suppose that the word "estate" as twice used in the same sentence was intended to have the same meaning, and that it refers to the estate of the deceased as such estate comes into existence at the moment of actual death. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

"The Estate of the Wife." — Section 31A-4 provides in part that, for purposes of distributing the estate of the decedent, "the slayer shall be deemed to have died immediately prior to the death of the decedent." In view of this express statutory presumption, it was clear that the words "the estate of the wife" as the same were used in former subdivision (2) meant the estate of the murdered wife as the same came into existence at the instant of her death, and the title to the entireties property at that moment passed to those persons who would be entitled to succeed to her interest in such property as of the moment of her death if she had in fact survived her husband, subject only to his recognized right to "hold" the property during his lifetime. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The language "he shall hold all of the property during his life" was employed by the legislature, not for the purpose of barring any alienation of the property until after the slayer-husband's death, but in order to recognize and preserve the husband's lifetime rights in the property. The legislature clearly intended that even the slayer-husband should not forfeit what was always recognized as his — the right to possession and income from the property for his lifetime. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The words "shall hold," as used in this section were not intended to effect a complete restraint on alienation during the husband's lifetime. On the contrary, the word "hold," as used in the statute, is used in the same sense as when used in the habendum clause of a deed. Certainly the word "hold" as used in the habendum clause of a deed is never construed to place a restraint on alienation, and the very words used in this statute, "hold all of the property during his life subject to pass upon his death to the estate of the wife," if used in a deed, would not prevent the husband from selling his life interest in the property. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The words "pass upon his death" refer exclusively to possession and enjoyment of the property and not to vesting in interest. In effect, the slayer-husband holds a life estate in the property with a vested remainder in the estate of his deceased wife, and the persons entitled to succeed to her estate are to be determined as of the actual date of her death, not as of the subsequent date when the husband's life estate terminates upon his death. This interpretation is further supported by the express language of this chapter as well as by reference to the purposes to be achieved by the statute. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Section recognizes distinction in rights held by husband as compared with rights held by wife in entirety property by providing that the slayer-husband shall hold all of the property during his life subject to pass upon his death to the estate of the wife, whereas the slayer-wife is to hold only one half of the property during her lifetime subject to pass upon her death to the estate of the husband, while the other one half of the property in such case shall pass upon the death of her husband to his estate. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The slayer-husband holds the interest of his deceased wife in the property as a trustee for her heirs at law. He should be perpetually enjoined from conveying the property in fee; the plaintiffs should be adjudged the sole owners, upon the decedent's death, of the entire property as the heirs of their deceased mother. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Slayer-Husband Has Right to Lifetime Possession, Income and Usufruct. — In preserving the slayer-husband's right to hold all of the property during his life, former subdivision (2) of this section recognized his right to the lifetime possession, income, and usufruct, of the property, and thereby avoided the possibility that the statute might be considered unconstitutional as working a forfeiture of a vested property right for crime. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Where husband and wife own real property as tenants by the entirety, the husband is solely entitled, to the exclusion of the wife, to the possession, income, and usufruct of such property during their joint lives. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Estate of Decedent Determined at Date of Her Actual Death. — Section 31A-4 makes no attempt artificially to alter the date of the death of the decedent, but provides instead that the actual date of death of the slayer is to be disregarded. Therefore, if the language of the statute is followed, the estate of the decedent is determined at the date of her actual death, and the law calls the roll of the class immediately as of that time; those who can then answer, take. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

This section does not bar the alienation of the entire title to the property by joint conveyance of the slayer-husband and the heirs of the decedent. To so interpret the statute would run contrary to the established policy of North Carolina law, which is to prevent undue restraint upon or suspension of the right of alienation. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

The slayer-husband cannot convey more than his own interest in the entirety property and certainly no conveyance of his can work a detriment to the rights of the estate of his deceased wife. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

Where there is a bequest to one for life, and after his decease to the testator's next of kin, the next of kin who are to take are the persons who answer that description at the death of the testator, and not those who answer that description at the death of the first taker. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

§ 31A-6. Survivorship property.

(a) Where the slayer and the decedent hold property with right of survivorship as joint tenants, joint owners, joint obligees or otherwise, the decedent's share thereof shall pass immediately upon the death of the decedent to his estate, and the slayer's share shall be held by the slayer during his lifetime and at his death shall pass to the estate of the decedent. During his lifetime, the slayer shall have the right to the income from his share of the property subject to the rights of creditors of the slayer.

(b) Where three or more persons, including the slayer and the decedent, hold property with right of survivorship as joint tenants, joint owners, joint obligees or otherwise, the portion of the decedent's share which would have accrued to the slayer as a result of the death of the decedent shall pass to the estate of the decedent. If the slayer becomes the final survivor, one half of the property then held by the slayer shall pass immediately to the estate of the decedent, and upon the death of the slayer the remaining interest of the slayer shall pass to the estate of the decedent. During his lifetime the slayer shall have the right to the income from his share of the property subject to the rights of creditors of the slayer. (1961, c. 210, s. 1.)

CASE NOTES

The slayer-husband should have only the income during his lifetime from his one-half share of a joint bank account, subject to the rights of his creditors, and at his death the principal should pass to the estate of his deceased wife. Porth v. Porth, 3 N.C. App. 485, 165 S.E.2d 508 (1969).

§ 31A-7. Reversions and vested remainders.

(a) Where the slayer holds a reversion or vested remainder in property subject to a life estate in the decedent and the slayer would have obtained the right of present possession upon the death of the decedent, such property shall pass to the estate of the decedent during the period of the life expectancy of the decedent.

(b) Where the slayer holds a reversion or vested remainder in property subject to a life estate in a third person which is measured by the life of the decedent, such property shall remain in the possession of the third person during the period of the life expectancy of the decedent. (1961, c. 210, s. 1.)

§ 31A-8. Contingent remainders and executory interests.

As to any contingent remainder or executory or other future interest held by the slayer subject to become vested in him or increased in any way for him upon the condition of the death of the decedent:

(1) If the interest would not have become vested or increased if he had predeceased the decedent, he shall be deemed to have so predeceased the decedent; but

(2) In any case, the interest shall not be vested or increased during the period of the life expectancy of the decedent. (1961, c. 210, s. 1.)

§ 31A-9. Divesting of interests in property.

Where the slayer holds any interest in property, whether vested or not, subject to be divested, diminished in any way or extinguished if the decedent survives him or lives to a certain age, such interest shall be held by the slayer during his lifetime or until the decedent would have reached such age but shall then pass as if the decedent had died immediately after the death of the slayer or the reaching of such age. (1961, c. 210, s. 1.)

§ 31A-10. Powers of appointment and revocation.

(a) As to any exercise in the will of the decedent of a power of appointment in favor of the slayer, the slayer shall be deemed to have predeceased the decedent and the slayer shall not acquire any property or receive any benefit by virtue of such appointment and the appointed property shall pass in accordance with the applicable lapse statute, if any.

(b) Property held either presently or in remainder by the slayer subject to be divested by the exercise by the decedent of a power of revocation or a general power of appointment shall pass to the estate of the decedent; and property so held by the slayer subject to be divested by the exercise by the decedent of a power of appointment to a particular person or persons or to a class of persons shall pass to such person or persons or in equal shares to the members of such class of persons, exclusive of the slayer. (1961, c. 210, s. 1.)

§ 31A-11. Insurance benefits.

(a) Insurance and annuity proceeds payable to the slayer:

(1) As the beneficiary or assignee of any policy or certificate of insurance on the life of the decedent, or

(2) In any other manner payable to the slayer by virtue of his surviving the decedent, shall be paid to the person or persons who would have been entitled thereto as if the slayer had predeceased the decedent. If no alternate beneficiary is named, insurance and annuity proceeds shall be paid into the estate of the decedent.

(b) If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the estate of the decedent upon the death of the slayer, unless the policy names some person other than the slayer or his estate as alternative beneficiary.

(c) Any insurance or annuity company making payment according to the terms of its policy or contract shall not be subjected to additional liability by the terms of this chapter if such payment or performance is made without notice of circumstances tending to bring it within the provisions of this Chapter. (1961, c. 210, s. 1; 1989, c. 485, s. 3.)

Legal Periodicals. — For note on the beneficiary's rights to the proceeds of an insurance policy when he takes the life of the insured, see 54 N.C.L. Rev. 1085 (1976).

CASE NOTES

Proof of conviction of involuntary manslaughter does not, per se, disqualify defendant from receiving the insurance proceeds under this section. Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

But Culpable Negligence Does. — Under the common law of this State defendant was disqualified from receiving any insurance proceeds from the policy insuring her deceased husband's life, since the killing, although unintentional, nonetheless resulted from her culpable negligence, that is, conduct incompatible with a proper regard for human life. Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

Culpable negligence proximately resulting in death comes within the purview of the common-law maxim that no one shall be permitted to profit by his own wrong. Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

Evidence Sufficient to Support Conclusion That Beneficiary Was Disqualified. — Evidence not objected to that a defendant beneficiary had been convicted of the involuntary manslaughter of the insured was sufficient to support the court's conclusion that defendant is disqualified under the common law from receiving the proceeds of the insurance policy. Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975).

Legislature specifically included in subsection (b) a proviso to deal with alternative beneficiaries. Gardner v. Nationwide Life Ins. Co., 22 N.C. App. 404, 206 S.E.2d 818, cert. denied, 285 N.C. 658, 207 S.E.2d 753 (1974).

"Some Person" Should Not Be Narrowly Construed. — The term "some person" contained within the proviso in subsection (b) should not be narrowly construed. Gardner v. Nationwide Life Ins. Co., 22 N.C. App. 404, 206 S.E.2d 818, cert. denied, 285 N.C. 658, 207 S.E.2d 753 (1974).

Those Related to Slayer Named as Alternative Beneficiaries May Benefit. — The public policy sought to be fostered by the enactment of this Chapter is predicated upon the theory that the murderer himself will not profit by his own wrongdoing; however, this principle does not extend to those related to the slayer, when they are named in the insurance contract as alternative beneficiaries. Gardner v. Nationwide Life Ins. Co., 22 N.C. App. 404, 206 S.E.2d 818, cert. denied, 285 N.C. 658, 207 S.E.2d 753 (1974).

§ 31A-12. Persons acquiring from slayer protected.

The provisions of this Chapter shall not affect the right of any person who, before the interests of the slayer have been adjudicated, acquires from the slayer for adequate consideration property or an interest therein which the slayer would have received except for the terms of this Chapter, provided the same is acquired without notice of circumstances tending to bring it within the provisions of this Chapter; but all consideration received by the slayer shall be held by him in trust for the persons entitled to the property under the provisions of this Chapter, and the slayer shall also be liable both for any portion of such consideration which he may have dissipated, and for any difference between the actual value of the property and the amount of such consideration. (1961, c. 210, s. 1.)

CASE NOTES

Cited in Mothershed v. Schrimsher, 105 N.C. App. 209, 412 S.E.2d 123 (1992).

§ 31A-12.1. Remedies to be exclusive.

This Article wholly supplants the common law rule preventing a person whose culpable negligence causes the death of a decedent from succeeding to any property passing by reason of the death of the decedent. (2006-107, s. 2.)

Editor's Note. — Session Laws 2006-107, s. 3, made this section effective July 13, 2006, and applicable to property passing from decedents dying on or after that date.

ARTICLE 4.

General Provisions.

§ 31A-13. Record determining slayer admissible in evidence.

The record of the judicial proceeding in which the slayer was determined to be such, pursuant to G.S. 31A-3 of this Chapter, shall be admissible in evidence for or against a claimant of property in any civil action arising under this Chapter. (1961, c. 210, s. 1.)

Legal Periodicals. — For note on the beneficiary's rights to the proceeds of an insurance policy when he takes the life of the insured, see 54 N.C.L. Rev. 1085 (1976).

CASE NOTES

This section is simply a statutory exception to the universal rule that the record of a conviction in a criminal proceeding is not admissible in a subsequent civil action to prove the guilt or innocence of the person tried. Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

It has no applicability where the alleged wrongdoer has not been determined a "slayer" within the purview of G.S. 31A-3(3). Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

If the party seeking to disqualify the beneficiary cannot proceed under this Chapter. — as when the jury in the criminal proceeding finds the wrongdoer guilty of involuntary manslaughter — then his only remaining remedy is to proceed under the common law. Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

Where Wrongdoer Convicted of Crime Not Amounting to "Willful and Unlawful Killing". — When the wrongdoer is not disqualified by this Chapter from receiving the insurance proceeds, and the common law must be relied on for such disqualification, the record of a criminal conviction of the wrongdoer for a crime not amounting to a "willful and unlawful killing," such as a conviction for involuntary manslaughter, is not admissible, and it is necessary to prove at the trial the factual circumstances relating to the killing from which the court can determine the issue. Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975).

Cited in Durham Bank & Trust Co. v. Pollard, 256 N.C. 77, 123 S.E.2d 104 (1961); Tew v. Durham Life Ins. Co., 1 N.C. App. 94, 160 S.E.2d 117 (1968).

§ 31A-14. Revised Simultaneous Death Act not applicable.

The Revised Simultaneous Death Act, Article 24 of Chapter 28A of the General Statutes, shall not apply to cases governed by this Chapter. (1961, c. 210, s. 1; 1979, c. 107, s. 5; 2007-132, s. 4.)

Effect of Amendments. — Session Laws 2007-132, s. 4, effective October 1, 2007, and applicable to determinations of title to or devolution of property dependent upon the death of an individual occurring on or after that date, substituted "Revised" for "Uniform" in the section heading and near the beginning of the section and substituted "Article 24 of Chapter 28A of the General Statutes" for "G.S. 28A-24-1 through G.S. 28A-24-7."

§ 31A-15. Chapter to be broadly construed.

This Chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong. As to all acts specifically provided for in this

Chapter, the rules, remedies, and procedures herein specified shall be exclusive, and as to all acts not specifically provided for in this Chapter, all rules, remedies, and procedures, if any, which now exist or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise, shall be applicable. (1961, c. 210, s. 1.)

Legal Periodicals. — For note on the beneficiary's rights to the proceeds of an insurance policy when he takes the life of the insured, see 54 N.C.L. Rev. 1085 (1976).

CASE NOTES

As to legislative history, see Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

This section preserved the common law, both substantively and procedurally, as to all acts not specifically provided for in this Chapter. Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975); Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975).

This Chapter does not wholly supplant the common law, which prevents a beneficiary in a policy of life insurance whose culpable negligence caused the death of the insured from collecting the proceeds of the policy. Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975); Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 258 S.E.2d 864 (1979).

The provisions of this Chapter do not completely supplant the common-law principle prevailing in North Carolina that a person should not be allowed to profit by his own wrong. Lofton v. Lofton, 26 N.C. App. 203, 215 S.E.2d 861 (1975).

Public Policy Applied. — Father's failure to pay child support when a divorce court considered the issue of child support but decided not to order him to pay child support was consistent with the only pertinent order and with the mother's wishes and could not be deemed wrong in the sense of the public policy expressed in G.S. 31A-15 and could not prevent the father from sharing in his daughter's intestate estate under G.S. 31A-2(2). In re Estate of Lunsford, 160 N.C. App. 125, 585 S.E.2d 245, 2003 N.C. App. LEXIS 1764 (2003).

If the party seeking to disqualify the beneficiary cannot proceed under this Chapter, as when the jury in the criminal proceeding finds the wrongdoer guilty of involuntary manslaughter, then his only remaining remedy is to proceed under the common law. Quick v. United Benefit Life Ins. Co., 287 N.C. 47, 213 S.E.2d 563 (1975).

Applied in Homanich v. Miller, 28 N.C. App. 451, 221 S.E.2d 739 (1976); Misenheimer v. Misenheimer, 62 N.C. App. 506, 303 S.E.2d 415 (1983); Jones v. All Am. Life Ins. Co., 312 N.C. 725, 325 S.E.2d 237 (1985); In re Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991); In re Estate of Montgomery, 137 N.C. App. 564, 528 S.E.2d 618, 2000 N.C. App. LEXIS 422 (2000).

Cited in Durham Bank & Trust Co. v. Pollard, 256 N.C. 77, 123 S.E.2d 104 (1961); Brinson v. Brinson, 334 F.2d 155 (4th Cir. 1964); In re Trogdon, 101 N.C. App. 323, 399 S.E.2d 396 (1991); Meares v. Jernigan, 138 N.C. App. 318, 530 S.E.2d 883, 2000 N.C. App. LEXIS 612 (2000).

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Chapter 31B.

Renunciation of Property and Renunciation of Fiduciary Powers Act.

Sec.
31B-1. Right to renounce succession.
31B-1A. Right to renounce fiduciary powers.
31B-2. Time and place of filing renunciation.
31B-3. Effect of renunciation.
31B-4. Waiver and bar.
31B-5. Exclusiveness of remedy.
31B-6. Application of Chapter.
31B-7. Short title.

§ 31B-1. Right to renounce succession.

(a) A person who succeeds to a property interest as:

(1) Heir, or
(2) Next of kin, or
(3) Devisee, or
(4) Legatee, or
(5) Beneficiary of a life insurance policy who did not possess the incidents of ownership under the policy at the time of death of the insured, or
(6) Person succeeding to a renounced interest, or
(7) Beneficiary under a testamentary trust or under an inter vivos trust, or
(8) Appointee under a power of appointment exercised by a testamentary instrument or a nontestamentary instrument, or
(9) Repealed by Session Laws 1989, c. 684, s. 2,
(9a) Surviving joint tenant, surviving tenant by the entireties, or surviving tenant of a tenancy with a right of survivorship, or
(9b) Person entitled to share in a testator's estate under the provisions of G.S. 31-5.5, or
(9c) Beneficiary under any other testamentary or nontestamentary instrument, including a beneficiary under:
  a. Any qualified or nonqualified deferred compensation, employee benefit, retirement or death benefit, plan, fund, annuity, contract, policy, program or instrument, either funded or unfunded, which is established or maintained to provide retirement income or death benefits or results in, or is intended to result in, deferral of income;
  b. An individual retirement account or individual retirement annuity; or
  c. Any annuity, payable on death, account, or other right to death benefits arising under contract; or
(9d) The duly authorized or appointed guardian with the prior or subsequent approval of the clerk of superior court, or of the resident judge of the superior court, of any of the above.
(10) The personal representative appointed under Chapter 28A of any of the above,

or the attorney-in-fact of any of the above may renounce in whole or in part the right of succession to any property or interest therein, including a future interest, by filing a written instrument under the provisions of this Chapter. A renunciation may be of a fractional share or any limited interest or estate. Provided, however, there shall be no right of partial renunciation if the decedent or donee cf the power expressly so provided in the instrument creating the interest.

(b) This Chapter shall apply to all renunciations of present and future interests, whether qualified or nonqualified for federal and State inheritance, estate, and gift tax purposes, unless expressly provided otherwise in the instrument creating the interest.

(c) The instrument shall (i) describe the property or interest renounced, (ii) declare the renunciation and extent thereof, (iii) be signed and acknowledged by the person authorized to renounce. (1975, c. 371, s. 1; 1983, c. 66, s. 1; 1989, c. 684, s. 2; 1998-148, s. 1.)

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

Public policy of this State permits renunciation of property interests transferred by will. Sedberry v. Johnson, 62 N.C. App. 425, 302 S.E.2d 924, cert. denied, 309 N.C. 322, 307 S.E.2d 167 (1983).

Wrongful Death Recoveries. — The legislature did not intend for the renouncement statute to apply to wrongful death recoveries. The language of the renouncement statute, contains a long and specific list of the capacities in which one must succeed to an interest which may be renounced and that list, as exhaustive as it was obviously intended to be, does not include beneficiaries of wrongful death recoveries. Evans v. Diaz, 333 N.C. 774, 430 S.E.2d 244 (1993).

Other Renunciation Procedures Not Abridged. — While a statutory method for accomplishing renunciation is provided in this section and G.S. 31B-2, such provision expressly does not abridge the right to waive, release, disclaim or renounce property or an interest therein under any other statute or as otherwise provided by law. Sedberry v. Johnson, 62 N.C. App. 425, 302 S.E.2d 924, cert. denied, 309 N.C. 322, 307 S.E.2d 167 (1983).

When Release by Heir of Expectant Share Is Binding. — The release by an heir of an expectant share is binding if the release is given for a valuable consideration and the consideration given for the release is not "grossly inadequate," or procured by fraud or undue influence. In re Will of Edgerton, 29 N.C. App. 60, 223 S.E.2d 524, cert. denied, 290 N.C. 308, 225 S.E.2d 832 (1976).

Separation Agreement as Renunciation. — Where a husband executes a will divising and bequeathing all his property to his wife, the spouses thereafter enter a separation agreement in which each "waives and renounces all rights ... under any previously executed will of the other," and the husband subsequently dies without having revoked or modified his will, the separation agreement constitutes a valid renunciation which adeems the devise and bequest to the wife. Sedberry v. Johnson, 62 N.C. App. 425, 302 S.E.2d 924, cert. denied, 309 N.C. 322, 307 S.E.2d 167 (1983).

Beneficiary of a spendthrift trust created by trustor's will, who had only a life estate in the trust fund, while his unborn children and brothers and sisters had a contingent interest in the remainder, could renounce his life estate, but could not renounce the interest of his unborn children or accelerate the remainder for the benefit of his brothers and sisters. Stewart v. Johnson, 88 N.C. App. 277, 362 S.E.2d 849 (1987), cert. denied, 373 S.E.2d 124 (1988).

§ 31B-1A. Right to renounce fiduciary powers.

(a) Except as otherwise provided in the testamentary or nontestamentary instrument, a fiduciary under a testamentary or nontestamentary instrument may renounce, in whole or in part, fiduciary rights, privileges, powers, and immunities by executing and by delivering, filing, or recording a written renunciation pursuant to the provisions of G.S. 31B-2. A fiduciary may not renounce the rights of beneficiaries unless the instrument creating the fiduciary relationship authorizes such a renunciation.

(b) The instrument of renunciation shall (i) describe any fiduciary right, power, privilege, or immunity renounced, (ii) declare the renunciation and the extent thereof, and (iii) be signed and acknowledged by the fiduciary authorized to renounce. (1989, c. 684, s. 3.)

§ 31B-2. Time and place of filing renunciation.

(a) To be a qualified disclaimer for federal and State inheritance, estate, and gift tax purposes, an instrument renouncing a present interest shall be filed within the time period required under the applicable federal statute for a renunciation to be given effect as a disclaimer for federal estate and gift tax purposes. If there is no such federal statute the instrument shall be filed not later than nine months after the date the transfer of the renounced interest to the renouncer was complete for the purpose of such taxes.

(b) An instrument renouncing a future interest shall be filed not later than six months after the event by which the taker of the property or interest is finally ascertained and his interest indefeasibly vested and he is entitled to possession even though such renunciation may not be recognized as a disclaimer for federal estate tax purposes.

(c) The renunciation shall be filed with the clerk of court of the county in which proceedings have been commenced for the administration of the estate of the deceased owner or deceased donee of the power or, if they have not been commenced, in which they could be commenced. A copy of the renunciation shall be delivered in person or mailed by registered or certified mail to any personal representative, or other fiduciary of the decedent or donee of the power. If the property interest renounced includes any proceeds of a life insurance policy being renounced pursuant to G.S. 31B-1(a)(5) the person renouncing shall mail, by registered or certified mail, a copy of the renunciation to the insurance company issuing the policy. If the property or property interest renounced is created by nontestamentary instrument, a copy of the renunciation shall be delivered in person, or mailed by registered or certified mail, to the trustee or other person who has legal title to, or possession of, the property or property interest renounced.

(d) If real property or an interest therein is renounced, a copy of the renunciation shall also be filed for recording in the office of the register of deeds of all counties wherein any part of the interest renounced is situated. The renunciation shall be indexed in the grantor's index under (i) the name of the deceased owner or donee of the power, and (ii) the name of the person renouncing. The renunciation of an interest, or a part thereof, in real property shall not be effective to renounce such interest until a copy of the renunciation is filed for recording in the office of the register of deeds in the county wherein such interest or part thereof is situated. A spouse of a person renouncing real property or an interest in real property shall have no statutory dower, inchoate marital rights, or any other interest in the real property or real property interest renounced. (1975, c. 371, s. 1; 1979, c. 525, s. 7; 1983, c. 66, s. 2; 1989, c. 684, s. 4; 1991, c. 744, s. 1; 1998-148, s. 2.)

Editor's Note. — Session Laws 1998-148, which amended subsection (a) of this section by adding language regarding qualified disclaimers for federal and state inheritance, estate, and gift tax purposes, provides in s. 6: "This act is effective when it becomes law and applies to all renunciations executed on or after the effective date of this act, whether qualified or nonqualified for federal and State inheritance, estate, and gift tax purposes. This act shall not apply to any renunciation executed before the effective date of this section whether qualified or nonqualified for federal and State inheritance, estate, and gift tax purposes, of an interest in a testamentary or inter vivos trust, unless the trustee within six months after the effective date of this act executes and records with the clerk of court of the county in which probate proceedings have been commenced, if any, or the county in which the property is located, an instrument evidencing the acceleration of the possession and enjoyment of the renounced interest to persons in esse at the time of the filing of the renunciation. This act shall not apply to remove the rights of a current beneficiary who has received an interest in a trust between the date of the filing of a renunciation and the date of the filing by a trustee pursuant to the preceding sentence."

Legal Periodicals. — See legislative survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

Other Renunciation Procedures Not Abridged. — While a statutory method for accomplishing renunciation is provided in G.S. 31B-1 and this section, such provision expressly does not abridge the right to waive, release, disclaim or renounce property or an interest therein under any other statute or as otherwise provided by law. Sedberry v. Johnson, 62 N.C. App. 425, 302 S.E.2d 924, cert. denied, 309 N.C. 322, 307 S.E.2d 167 (1983).

Cited in Fraser v. Littlejohn, 96 N.C. App. 377, 386 S.E.2d 230 (1989).

§ 31B-3. Effect of renunciation.

(a) Unless the decedent, donee of a power of appointment, or creator of an interest under an inter vivos instrument has otherwise provided in the instrument creating the interest, the property or interest renounced devolves as follows:

(1) If the renunciation is filed within the time period described in G.S. 31B-2(a), the property or interest renounced devolves as if the renouncer had predeceased the date the transfer of the renounced interest to the renouncer was complete for federal and State inheritance, estate, and gift tax purposes, or, in the case of the renunciation of a fiduciary right, power, privilege, or immunity, the property or interest subject to the power devolves as if the fiduciary right, power, privilege, or immunity never existed. Any such renunciation relates back for all purposes to the date the transfer of the renounced interest to the renouncer was complete for the purpose of those taxes.

(2) If the renunciation is not filed within the time period described in G.S. 31B-2(a), the property or interest devolves as if the renouncer had died on the date the renunciation is filed, or, in the case of the renunciation of a fiduciary right, power, privilege, or immunity, the property or interest subject to the power devolves as if the fiduciary right, power, privilege, or immunity ceased to exist as of the date the renunciation is filed.

(3) Any future interest that takes effect in possession or enjoyment after the termination of the estate or interest renounced takes effect as if the renouncer had died on the date determined under subdivision (1) or (2) of this subsection, and upon the filing of the renunciation the persons in being as of the time the renouncer is deemed to have died will immediately become entitled to possession or enjoyment of any such future interest.

(b) In the event that the property or interest renounced was created by testamentary disposition, the devolution of the property or interest renounced shall be governed by G.S. 31-42(a) notwithstanding that in fact the renouncer has not actually died before the testator.

(c) In the event that the decedent dies intestate, or the ownership or succession to property or to an interest is to be determined as though a decedent had died intestate, and the renouncer has living issue who would have been entitled to an interest in the property or interest if the renouncer had predeceased the decedent, then the property or interest renounced shall be distributed to such issue, per stirpes. If the renouncer does not have such issue, then the property or interest shall be distributed as though the renouncer had predeceased the decedent. (1975, c. 371, s. 1; 1979, c. 525, s. 6; 1989, c. 684, s. 5; 1993, c. 308, ss. 1, 2; 1998-148, s. 3.)

Editor's Note. — Session Laws 1998-148, which rewrote subsection (a) of this section, provides in s. 6: "This act is effective when it becomes law and applies to all renunciations executed on or after the effective date of this act, whether qualified or nonqualified for federal and State inheritance, estate, and gift tax purposes. This act shall not apply to any renunciation executed before the effective date of this section whether qualified or nonqualified for federal and State inheritance, estate, and gift tax purposes, of an interest in a testamentary or inter vivos trust, unless the trustee within six months after the effective date of this act executes and records with the clerk of court of the county in which probate proceedings have been commenced, if any, or the county in which the property is located, an instrument evidencing the acceleration of the possession and enjoyment of the renounced interest to persons in esse at the time of the filing of the renunciation. This act shall not apply to remove the rights of a current beneficiary who has received an interest in a trust between the date of the filing of a renunciation and the date of the filing by a trustee pursuant to the preceding sentence."

CASE NOTES

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Applied in Evans v. Diaz, 333 N.C. 774, 430 S.E.2d 244 (1993).

§ 31B-4. Waiver and bar.

(a) The right to renounce property or an interest therein is barred by:

(1) An assignment, conveyance, encumbrance, pledge, or transfer of the property or interest, or a contract therefor by the person authorized to renounce,

(2) A written waiver of the right to renounce, or

(3) Repealed by Session Laws 1998-148, s. 4.

(4) A sale of the property or interest under judicial sale made before the renunciation is effected.

(b) The renunciation or the written waiver of the right to renounce is binding upon the renouncer or person waiving and all persons claiming through or under him.

(c) A fiduciary's application for appointment or assumption of duties as fiduciary does not waive or bar the fiduciary's right to renounce a right, power, privilege, or immunity.

(d) No person shall be liable for distributing or disposing of property in reliance upon the terms of a renunciation that is invalid for the reason that the right of renunciation has been waived or barred, if the distribution or disposition is otherwise proper, and the person has no actual knowledge of the facts that constitute a waiver or bar to the right of renunciation.

(e) The right to renounce property or an interest in property pursuant to this Chapter is not barred by an acceptance of the property, interest, or benefit thereunder; provided, however, an acceptance of the property, interest, or benefit thereunder may preclude such renunciation from being a qualified renunciation for federal and State inheritance, estate, and gift tax purposes. (1975, c. 371, s. 1; 1989, c. 684, s. 6; 1998-148, ss. 4, 5; 2000-140, s. 8.)

Editor's Note. — Session Laws 1998-148, which repealed subdivision (a)(3) of this section regarding acceptance of property, interest, or benefit, and added subsection (e) of this section, provides in s. 6: "This act is effective when it becomes law and applies to all renunciations executed on or after the effective date of this act, whether qualified or nonqualified for federal and State inheritance, estate, and gift tax purposes. This act shall not apply to any renunciation executed before the effective date of this section whether qualified or nonqualified for federal and State inheritance, estate, and gift tax purposes, of an interest in a testamentary or inter vivos trust, unless the trustee within six months after the effective date of this act executes and records with the clerk of court of the county in which probate proceedings have been commenced, if any, or the county in which the property is located, an instrument evidencing the acceleration of the possession and enjoyment of the renounced interest to persons in esse at the time of the filing of the renunciation. This act shall not apply to remove the rights of a current beneficiary who has received an interest in a trust between the date of the filing of a renunciation and the date of the filing by a trustee pursuant to the preceding sentence."

§ 31B-5. Exclusiveness of remedy.

This Chapter does not exclude or abridge any other rights or procedures existing under any other statute or otherwise provided by law to waive, release, refuse to accept, disclaim or renounce property or an interest therein, or any fiduciary right, power, privilege, or immunity. (1975, c. 371, s. 1; 1989, c. 684, s. 7.)

CASE NOTES

A renunciation is not a grant of legal title by the renouncer. It merely triggers a set of statutorily defined legal rights which ultimately determine ownership. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A renunciation relates back to the death of the testator or intestate. The renouncer never actually holds legal title to the property. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A beneficiary's right to renounce exists irrespective of statutory authority. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Other Renunciation Procedures Not Abridged. — While a statutory method for accomplishing renunciation is provided in G.S. 31B-1 and 31B-2, such provision expressly does not abridge the right to waive, release, disclaim or renounce property or an interest therein under any other statute or as otherwise provided by law. Sedberry v. Johnson, 62 N.C. App. 425, 302 S.E.2d 924, cert. denied, 309 N.C. 322, 307 S.E.2d 167 (1983).

Time for Renunciation. — A devisee may disclaim or renounce a right under a will, but he or she must do so within a reasonable time. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

A parol trust may not be engrafted upon a renounced interest. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

Action Seeking Constructive Trust. — Plaintiff, who sought to assert that defendant unduly influenced his decision to sign a "Petition to Renounce" his interest in will, could maintain an action seeking the declaration of a constructive trust. Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986), decided under § 29-10 as it read prior to Oct. 1, 1975.

§ 31B-6. Application of Chapter.

A present interest in property existing on October 1, 1975, as to which the time for filing a renunciation under this Chapter has not expired may be renounced within six months after October 1, 1975. A future interest in property existing on October 1, 1975, as to which the time for filing a renunciation under this Chapter has not expired may be renounced within six months after October 1, 1975, or within six months after the future interest has become indefeasibly vested and the taker is entitled to possession, whichever is later. (1975, c. 371, s. 1.)

§ 31B-7. Short title.

This Chapter may be cited as the Renunciation of Property and Renunciation of Fiduciary Powers Act. (1975, c. 371, s. 1; 1989 (Reg. Sess., 1990), c. 1024, s. 11.)

Chapter 31C.

Uniform Disposition of Community Property Rights at Death Act.

Sec.
31C-1. Application.
31C-2. Rebuttable presumptions.
31C-3. Disposition of community property upon death.
31C-4. Perfection of title of surviving spouse.
31C-5. Perfection of title of personal representative, heir or devisee; duty of personal representative.
31C-6. Written demand.
31C-7. Purchaser for value or lender.
31C-8. Creditors' rights.
31C-9. Severing or altering of married persons.
31C-10. Limitations on testamentary disposition.
31C-11. Uniformity of application and construction.
31C-12. Short title.

§ 31C-1. Application.

This Chapter applies to the disposition at death of the following property acquired by a married person:

(1) All personal property, wherever situated:
  a. Which was acquired as or became, and remained, community property under the laws of another jurisdiction; or
  b. All or the proportionate part of that property acquired with the rents, issues, or income of, or the proceeds from, or in exchange for, that community property; or
  c. Traceable to that community property;

(2) All or the proportionate part of any real property situated in this State which was acquired with the rents, issues or income of, the proceeds from, or in exchange for, property acquired as or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property. (1981, c. 882, s. 1.)

Legal Periodicals. — For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

§ 31C-2. Rebuttable presumptions.

In determining whether this Chapter applies to specific property the following rebuttable presumptions apply:

(1) Property acquired during marriage by a spouse of that marriage while domiciled in a jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as or to have become, and remained, property to which this Chapter applies; and

(2) Real property situated in this State and personal property wherever situated, acquired by a married person while domiciled in a jurisdiction under whose laws property could not then be acquired as community property, title to which was taken in a form which created rights of survivorship, is presumed not to be property to which this Chapter applies. (1981, c. 882, s. 1.)

§ 31C-3. Disposition of community property upon death.

Upon death of a married person, one half of the property to which this Chapter applies is the property of the surviving spouse and is not subject to testamentary disposition by the decedent or distribution under the laws of succession of this State. One half of that property is the property of the decedent and is subject to testamentary disposition or distribution under the laws of succession of this State. With respect to property to which this Chapter applies, the one half of the property of the decedent is not subject to the surviving spouse's right to petition for an elective share under the provisions of Article 1A of Chapter 30, and is not subject to the right to elect a life estate under the provisions of Article 8 of Chapter 29. (1981, c. 882, s. 1; 2000-178, s. 7.)

Cross References. — As to right of elective share, see G.S. 30-3.1 et seq.

§ 31C-4. Perfection of title of surviving spouse.

If the title to any property to which this Chapter applies was held by the decedent at the time of death, or by a trustee of a revocable inter vivos trust created by the decedent, title of the surviving spouse may be perfected by an order of the clerk of superior court who appointed the decedent's personal representative or by execution of an instrument by the personal representative or the heirs or devisees of the decedent with the approval of the said clerk. Neither the personal representative nor the court in which the decedent's estate is being administered has a duty to discover or attempt to discover whether property held by the decedent is property to which this Chapter applies, unless a written demand is made by the surviving spouse or the spouse's successor in interest. (1981, c. 882, s. 1.)

§ 31C-5. Perfection of title of personal representative, heir or devisee; duty of personal representative.

If the title to any property to which this Chapter applies is held by the surviving spouse at the time of the decedent's death, the personal representative or an heir or devisee of the decedent may institute an action to perfect title to the property. The personal representative has no fiduciary duty to discover or attempt to discover whether any property held by the surviving spouse is property to which this Chapter applies, unless a written demand is made by an heir, devisee, or creditor of the decedent. (1981, c. 882, s. 1.)

§ 31C-6. Written demand.

(a) Written demand in this Chapter shall be made by a surviving spouse, the spouse's successor in interest, or the decedent's heirs or devisees not later than six months after the decedent's will has been admitted to probate, or not later than six months after the appointment of an administrator if there is no will, or not later than six months after the decedent's death if the property to which this Chapter applies is held in an inter vivos trust created by the decedent; and written demand by a creditor of the decedent shall be made within the period for presentation of a claim against the decedent's estate as set out in Article 19 of Chapter 28A.

(b) Written demand in this Chapter shall be delivered in person or by registered mail to the personal representative. As used in this Chapter, the personal representative may also mean the trustee of an inter vivos trust created by the decedent who has legal title to, or possession of, the property to which this Chapter applies. (1981, c. 882, s. 1.)

§ 31C-7. Purchaser for value or lender.

(a) If a surviving spouse has apparent title to property to which this Chapter applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the personal representative or an heir or devisee of the decedent.

(b) If a personal representative or an heir or devisee of the decedent has apparent title to property to which this Chapter applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the surviving spouse.

(c) A purchaser for value or a lender need not inquire whether a vendor or borrower acted properly.

(d) The proceeds of a sale or creation of a security interest shall be treated in the same manner as the property transferred to the purchaser for value or a lender. (1981, c. 882, s. 1.)

§ 31C-8. Creditors' rights.

This Chapter does not affect rights of creditors with respect to property to which this Chapter applies. (1981, c. 882, s. 1.)

§ 31C-9. Severing or altering of married persons.

This Chapter does not prevent married persons from severing or altering their interests in property to which this Chapter applies. (1981, c. 882, s. 1.)

§ 31C-10. Limitations on testamentary disposition.

This Chapter does not authorize a person to dispose of property by will if it is held under limitations imposed by law preventing testamentary disposition by that person. (1981, c. 882, s. 1.)

§ 31C-11. Uniformity of application and construction.

This Chapter shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among those states which enact it. (1981, c. 882, s. 1.)

§ 31C-12. Short title.

This Chapter may be cited as the Uniform Disposition of Community Property Rights at Death Act. (1981, c. 882, s. 1.)

Chapter 32.

Fiduciaries.

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ARTICLE 1.

Uniform Fiduciaries Act.

§ 32-1. Short title.

This Article may be cited as the Uniform Fiduciaries Act. (1923, c. 85, s. 14; C.S., s. 1864(d); 1965, c. 628, s. 2.)

Cross References. — For provisions as to investment securities under the Uniform Commercial Code, see G.S. 25-8-101 through 25-8-406.

Legal Periodicals. — For article on continuing power of attorney, see 5 Campbell L. Rev. 305 (1983).

CASE NOTES

Purpose of Act. — The purpose of the Uniform Fiduciaries Act was to relax the common-law standard of care owed by banks to principals when dealing with their fiduciaries. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979), aff'd, 53 N.C. App. 492, 281 S.E.2d 86 (1981).

Prior Law. — For cases decided prior to the enactment of the statute codified as this Article as to pledge or sale of trust assets as security for or in payment of fiduciary's own debt, see Powell v. Jones, 36 N.C. 337 (1841); Lockhart v. Phillips, 36 N.C. 342 (1841); Exum v. Bowden, 39 N.C. 281 (1846); Gray v. Armistead, 41 N.C. 74 (1849); Bradshaw v. Simpson, 41 N.C. 243 (1849); Wilson v. Doster, 42 N.C. 231 (1851); Hendrick v. Gidney, 114 N.C. 543, 19 S.E. 598 (1894).

For cases decided under prior law as to rights and liabilities where a party united with fiduciary in a breach of trust or circumstances put him on guard, see Buning v. Ricks, 22 N.C. 130 (1838); Dancy v. Duncan, 96 N.C. 111, 1 S.E. 455 (1887).

For cases decided under prior law as to purchaser of legal title as trustee for cestui que trust, see Maples v. Medlin, 5 N.C. 220 (1809).

Cited in Williams v. Randolph, 94 N.C. App. 413, 380 S.E.2d 553 (1989).

§ 32-2. Definition of terms.

(a) In this Article unless the context or subject matter otherwise requires:

"Bank" includes any person or association of persons, whether incorporated or not, carrying on the business of banking.

"Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

"Person" includes a corporation, partnership, or other association, or two or more persons having a joint or common interest.

"Principal" includes any person to whom a fiduciary as such owes an obligation.

(b) A thing is done "in good faith" within the meaning of this Article when it is in fact done honestly, whether it be done negligently or not. (1923, c. 85, s. 1; C.S., s. 1864(e); 1965, c. 628, s. 2.)

Cross References. — As to what constitutes business of banking, see G.S. 53-1.

Legal Periodicals. — For article on constructive trusts in North Carolina, see 45 N.C.L. Rev. 424 (1967).

For note on workers' compensation and retaliatory discharge, see 58 N.C.L. Rev. 629 (1980).

CASE NOTES

"Fiduciary Relationship." — A fiduciary relationship exists where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and in due regard to the one reposing confidence. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

It is not necessary that there be a technical or legal relationship for a fiduciary relationship to exist. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

If as an executor, as a cotenant or simply as an individual, a person undertook to manage and generally control a tract of land for the benefit of his co-owners, causing them to repose special faith, confidence and trust in him to represent their best interest with respect to the property, he occupied a fiduciary relationship to them. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

While a fiduciary relationship ordinarily does not arise between tenants in common from the simple fact of their cotenancy, such a relationship may be created by their conduct, as where one cotenant assumes to act for the benefit of his cotenants. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

Fiduciaries must act in good faith. They can never paramount their personal interest over the interest of those for whom they have assumed to act. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

Interests May Not Conflict. — A person occupying a place of trust and confidence may not place himself in a position where his own interest may conflict with the interest of those for whom he acts. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

A fiduciary who acquires an outstanding title adverse to his cestuis que trustent is considered in equity as having acquired it for their benefit. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

An executor acts in a fiduciary capacity. Moore v. Bryson, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

"Good Faith." — By defining "good faith" in subsection (b) of this section in terms of an act done honestly although perhaps negligently, the drafters of the act implicitly revealed their intention that the term "bad faith" requires a showing of some indicia of dishonest conduct or a showing of facts and circumstances so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979), aff'd, 53 N.C. App. 492, 281 S.E.2d 86 (1981).

Liability of Executor. — An executor, in performing those duties related to managing the estate's assets, acts as a trustee to beneficiaries of the estate. As such, the executor is liable for the depreciation of assets which an ordinarily prudent fiduciary would not have allowed to occur. Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987), rev'd on other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

Cited in Allen v. Currie, 254 N.C. 636, 119 S.E.2d 917 (1961); Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965); Williams v. Randolph, 94 N.C. App. 413, 380 S.E.2d 553 (1989); In re Estate of Armfield, 113 N.C. App. 467, 439 S.E.2d 216 (1994).

§ 32-3. Application of payments made to fiduciaries.

A person who in good faith pays or transfers to a fiduciary any money or other property, which the fiduciary as such is authorized to receive, is not responsible for the proper application thereof by the fiduciary; and any right or title acquired from the fiduciary in consideration of such payment or transfer is not invalid in consequence of a misapplication by the fiduciary. (1923, c. 85, s. 2; C.S., s. 1864(f).)

Legal Periodicals. — For discussion of section, see 1 N.C.L. Rev. 291 (1923).

§ **32-4:** Repealed by Session Laws 1977, c. 814, s. 8.

§ 32-5. Transfer of negotiable instrument by fiduciary.

If any negotiable instrument payable or indorsed to a fiduciary as such is indorsed by a fiduciary, or if any negotiable instrument payable or indorsed to his principal is indorsed by a fiduciary empowered to indorse such instrument on behalf of his principal, the indorsee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in indorsing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is transferred by the fiduciary in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is transferred in any transaction known by the transferee to be for the personal benefit of the fiduciary, the creditor or other transferee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in transferring the instrument. (1923, c. 85, s. 4; C.S., s. 1864(h).)

Legal Periodicals. — For discussion of section, see 1 N.C.L. Rev. 291 (1923).

CASE NOTES

Prior to enactment of the Uniform Commercial Code, G.S. 25-1-101 et seq., the uniform application of the N.I.L. was followed. See Setzer v. Deal, 135 N.C. 428, 47 S.E. 466 (1904); J.L. Smathers & Co. v. Toxaway Hotel Co., 162 N.C. 346, 78 S.E. 224 (1913); J.L. Smathers & Co. v. Toxaway Hotel Co., 167 N.C. 469, 83 S.E. 844 (1914).

§ 32-6. Check drawn by fiduciary payable to third person.

If a check or other bill of exchange is drawn by a fiduciary as such, or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument. (1923, c. 85, s. 5; C.S., s. 1864(i).)

CASE NOTES

Section Illustrates General Rule of Liability. — The history of this provision indicates that it was intended to illustrate the general rule of liability rather than to create an exception to it. Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

Payee's Liability. — For the payee to become liable under this section it must be found either that it had actual knowledge of the misappropriation or that it acted in bad faith. Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

Contributory Negligence of Principal. — Liability is based on payee's conscious conduct or "bad faith" and contributory neglect of principal would not negate such fault. Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

Test for Determining Bad Faith. — In determining "bad faith" courts ask whether it was "commercially" unjustifiable for the payee to disregard and refuse to learn facts readily available. Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

Bad faith in taking commercial paper does not necessarily involve furtive motives, for it exists when the creditor has notice of facts which, if unexplained, would show that he was taking the property of one who owed him nothing, in payment of a claim that he held against someone else. Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

When Remaining Passive Is Bad Faith. — At some point, obvious circumstances become so cogent that it is "bad faith" to remain passive. Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

Neither criminal fraud nor downright corruption is an essential ingredient of legal "bad faith." Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

Agreement Protecting Bank Void When Bank Acts in Bad Faith. — Any agreement protecting a bank from liability for assisting a fiduciary in a misappropriation when the bank acts in "bad faith" or with "actual knowledge" of the fiduciary's breach is void. Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

Fact That Bank Is Designated Payee Not Enough to Attribute "Actual Knowledge" or "Bad Faith." — The bank is not liable for cashing the first check in the series and paying the proceeds to the fiduciary, since the mere fact that the bank was designated as payee was not enough to attribute to it either "actual knowledge" or "bad faith," but it did act in "bad faith," even if it lacked "actual knowledge," when it received the second check in the series and credited the proceeds to the fiduciary's debt. Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

"Actual knowledge" means express factual information that funds are being used for private purposes. Maryland Cas. Co. v.

Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

The crediting of checks to fiduciary's private debts constitutes either "actual knowledge" or "bad faith." Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

While a bank may have acted innocently in cashing a first check, it lost this innocence when a second check was received and used to pay fiduciary's personal obligation. Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

A bank, having gained "actual knowledge" of a breach of a fiduciary obligation when it received a second check in series and applied it in reduction of fiduciary's personal debt, could not divest itself of its continuing knowledge of the faithlessness of the fiduciary. Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

Creditor's Liability for "Actual Knowledge." — If the crediting of checks to fiduciary's private debts constitutes "actual knowledge," the creditor is liable because from the circumstances it would necessarily have "actual knowledge" that the fiduciary was misappropriating his principal's funds. Maryland Cas. Co. v. Bank of Charlotte, 340 F.2d 550 (4th Cir. 1965).

Evidence Sufficient for Jury. — Admissions by defendant that it entered into contracts for the sale of certain lands to an individual and that in payment of the sum due upon the execution of the contracts it accepted checks drawn on the funds of a corporation by the individual as president of the corporation, together with evidence that the individual had no authority to so use the corporate funds, that the corporation was not indebted to him, and that the transaction was not made for the corporation, was sufficient to be submitted to the jury in an action by the receiver of the corporation under the provisions of this section. LaVecchia v. North Carolina Joint Stock Land Bank, 218 N.C. 35, 9 S.E.2d 489 (1940).

Judgment on Pleadings. — Allegations of defendant's acceptance of a corporate check in payment of individual obligation of the president does not entitle the plaintiff to judgment on the pleadings. LaVecchia v. North Carolina Joint Stock Land Bank, 216 N.C. 28, 3 S.E.2d 276 (1939).

§ 32-7. Check drawn by and payable to fiduciary.

If a check or other bill of exchange is drawn by a fiduciary as such or in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, payable to the fiduciary personally, or payable to a third person and by him transferred to the fiduciary, and is thereafter transferred by the fiduciary, whether in payment of a personal debt of the fiduciary or otherwise, the transferee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in transferring the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that his action in taking the instrument amounts to bad faith. (1923, c. 85, s. 6; C.S., s. 1864(j).)

§ 32-8. Deposit in name of fiduciary as such.

If a deposit is made in a bank to the credit of a fiduciary as such, the bank is authorized to pay the amount of the deposit or any part thereof upon the check of the fiduciary, signed with the name in which such deposit is entered, without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith.

If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check. (1923, c. 85, s. 7; C.S., s. 1864(k).)

Legal Periodicals. — For discussion of section, see 1 N.C.L. Rev. 291 (1923).

§ 32-9. Deposit in name of principal.

If a check is drawn upon the account of his principal in a bank by a fiduciary who is empowered to draw checks upon his principal's account, the bank is authorized to pay such check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in drawing such check, or with knowledge of such facts that its action in paying the check amounts to bad faith. If, however, such a check is payable to the drawee bank and is delivered to it in payment of or as security for a personal debt of the fiduciary to it, the bank is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the check. (1923, c. 85, s. 8; C.S., s. 1864(l).)

CASE NOTES

Distinction Between Negligence and Bad Faith. — The distinction between negligence and bad faith is that bad faith, or dishonesty, unlike negligence, is willful. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

Showing of mere negligence is clearly not sufficient to establish "bad faith." Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

Mere failure to make inquiry, even though there be suspicious circumstances, does not constitute bad faith, unless such failure is due to the deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a vice or defect in the transaction — that is to say, where there is an intentional closing of the eyes or stopping of the ears. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

What Constitutes "Bad Faith." — By defining "good faith" in G.S. 32-2(b) in terms of an act done honestly although perhaps negligently, the drafters of the act implicitly revealed their intention that the term "bad faith" requires a showing of some indicia of dishonest conduct or a showing of facts and circumstances so cogent and obvious that to remain passive would amount to a deliberate desire to evade knowledge because of a belief or fear that inquiry would disclose a defect in the transaction. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979).

Bank's violation of this section of the Uniform Fiduciaries Act was held not to constitute an unfair or deceptive trade practice where the breach of fiduciary duty was committed by a trustee, and there was an absence of actual knowledge or bad faith by the bank. Moretz v. Miller, 126 N.C. App. 514, 486 S.E.2d 85 (1997).

Applied in Edwards v. Northwestern Bank, 53 N.C. App. 492, 281 S.E.2d 86 (1981).

§ 32-10. Deposit in fiduciary's personal account.

If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his own name as fiduciary or of checks payable to him as fiduciary or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or checks payable to his principal and indorsed by him, if he is empowered to indorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts that its action in receiving the deposit or paying the check amounts to bad faith. (1923, c. 85, s. 9; C.S., s. 1864(m).)

§ 32-11. Deposit in names of two or more trustees.

When a deposit is made in a bank in the name of two or more persons as trustees and a check is drawn upon the trust account by any trustee or trustees authorized by the other trustee or trustees to draw checks upon the trust account, neither the payee nor other holder nor the bank is bound to inquire whether it is a breach of trust to authorize such trustee or trustees to draw checks upon the trust account, and is not liable unless the circumstances be such that the action of the payee or other holder or the bank amounts to bad faith. (1923, c. 85, s. 10; C.S., s. 1864(n).)

Legal Periodicals. — For discussion of section, see 1 N.C.L. Rev. 292 (1923).

§ 32-12. Cases not provided for in Article.

In any case not provided for in this Article the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments and banking, shall continue to apply. (1923, c. 85, s. 12; C.S., s. 1864(p); 1965, c. 628, s. 2.)

§ 32-13. Uniformity of interpretation.

This Article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1923, c. 85, s. 13; C.S., s. 1864(q); 1965, c. 628, s. 2.)

Article 2.

Security Transfers.

§§ 32-14 through 32-24: Repealed by Session Laws 1997-181, s. 23.

Article 3.

Powers of Fiduciaries.

§ 32-25. Definition.

As used in this Article, the term "fiduciary" means the one or more executors of the estate of a decedent, or the one or more trustees of a testamentary or inter vivos trust estate, whichever in a particular case shall be appropriate. (1965, c. 628, s. 1.)

Legal Periodicals. — For note, "The North Carolina Fiduciary Powers Act and the Duty of Loyalty," see 45 N.C.L. Rev. 1141 (1967).

CASE NOTES

Cited in Williams v. Randolph, 94 N.C. App. 413, 380 S.E.2d 553 (1989); Melvin v. Home Fed. Sav. & Loan Ass'n, 125 N.C. App. 660, 482 S.E.2d 6 (1997), cert. denied, 346 N.C. 281, 487 S.E.2d 551 (1997).

§ 32-26. Incorporation by reference of powers enumerated in § 32-27; restriction on exercise of such powers.

(a) By an express intention of the testator or settlor so to do contained in a will, or in an instrument in writing whereby a trust estate is created inter vivos, any or all of the powers or any portion thereof enumerated in G.S. 32-27, as they exist at the time of the signing of the will by the testator or at the time of the signing by the first settlor who signs the trust instrument, may be, by appropriate reference made thereto, incorporated in such will or other written instrument, with the same effect as though such language were set forth verbatim in the instrument. Incorporation of one or more of the powers contained in G.S. 32-27 by reference to that section shall be in addition to and not in limitation of the common law or statutory powers of the fiduciary.

(b) No power of authority conferred upon a fiduciary as provided in this Article shall be exercised by such fiduciary in such a manner as, in the aggregate, to deprive the trust or the estate involved of an otherwise available tax exemption, deduction or credit, expressly including the marital deduction, or operate to impose a tax upon a donor or testator or other person as owner of any portion of the trust or estate involved. "Tax" includes, but is not limited to, any federal, State, or local income, gift, estate or inheritance tax.

(c) Nothing herein shall be construed to prevent the incorporation of the powers enumerated in G.S. 32-27 in any other kind of instrument or agreement. (1965, c. 628, s. 1.)

CASE NOTES

Cited in Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

§ 32-27. Powers which may be incorporated by reference in trust instrument.

The following powers may be incorporated by reference as provided in G.S. 32-26:

(1) Retain Original Property. — To retain for such time as the fiduciary shall deem advisable any property, real or personal, which the fiduciary may receive, even though the retention of such property by reason of its character, amount, proportion to the total estate or otherwise would not be appropriate for the fiduciary apart from this provision.

(2) Sell and Exchange Property. — To sell, exchange, give options upon, partition or otherwise dispose of any property or interest therein which the fiduciary may hold from time to time, with or without order of court, at public or private sale or otherwise, upon such terms and conditions, including credit, and for such consideration as the fiduciary shall deem advisable, and to transfer and convey the property or interest therein which is at the disposal of the fiduciary, in fee simple absolute or otherwise, free of all trust; and the party dealing with the fiduciary shall not be under a duty to follow the proceeds or other consideration received by the fiduciary from such sale or exchange.

(3) Invest and Reinvest. — To invest and reinvest, as the fiduciary shall deem advisable, in stocks (common or preferred), bonds, debentures, notes, mortgages or other securities, in or outside the United States; in insurance contracts on the life of any beneficiary or of any person in whom a beneficiary has an insurable interest, or in annuity contracts

for any beneficiary, in any real or personal property, in investment trusts; in participations in common trust funds, and generally in such property as the fiduciary shall deem advisable, even though such investment shall not be of the character approved by applicable law but for this provision.

(4) Invest without Diversification. — To make investments which cause a greater proportion of the total property held by the fiduciary to be invested in investments of one type or of one company than would be considered appropriate for the fiduciary apart from this provision.

(5) Continue Business. — To the extent and upon such terms and conditions and for such periods of time as the fiduciary shall deem necessary or advisable, to continue or participate in the operation of any business or other enterprise, whatever its form of organization, including but not limited to the power:

a. To effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

b. To dispose of any interest therein or acquire the interest of others therein;

c. To contribute thereto or invest therein additional capital or to lend money thereto, in any such case upon such terms and conditions as the fiduciary shall approve from time to time;

d. To determine whether the liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate or trust set aside for use in the business or to the estate or trust as a whole; and

e. In all cases in which the fiduciary is required to file accounts in any court or in any other public office, it shall not be necessary to itemize receipts and disbursements and distributions of property but it shall be sufficient for the fiduciary to show in the account a single figure or consolidation of figures, and the fiduciary shall be permitted to account for money and property received from the business and any payments made to the business in lump sum without itemization.

(6) Form Corporation or Other Entity. — To form a corporation or other entity and to transfer, assign, and convey to such corporation or entity all or any part of the estate or of any trust property in exchange for the stock, securities or obligations of any such corporation or entity, and to continue to hold such stock and securities and obligations.

(7) Operate Farm. — To continue any farming operation received by the fiduciary pursuant to the will or other instrument and to do any and all things deemed advisable by the fiduciary in the management and maintenance of such farm and the production and marketing of crops and dairy, poultry, livestock, orchard and forest products including but not limited to the following powers:

a. To operate the farm with hired labor, tenants or sharecroppers;

b. To lease or rent the farm for cash or for a share of the crops;

c. To purchase or otherwise acquire farm machinery and equipment and livestock;

d. To construct, repair, and improve farm buildings of all kinds needed in the fiduciary's judgment, for the operation of the farm;

e. To make or obtain loans or advances at the prevailing rate or rates of interest for farm purposes such as for production, harvesting, or marketing, or for the construction, repair, or improvement of farm buildings, or for the purchase of farm machinery or equipment or livestock;

f. To employ approved soil conservation practices in order to conserve, improve, and maintain the fertility and productivity of the soil;

g. To protect, manage and improve the timber and forest on the farm and sell the timber and forest products when it is to the best interest of the estate;
h. To ditch, dam and drain damp or wet fields and areas of the farm when and where needed;
i. To engage in the production of livestock, poultry or dairy products, and to construct such fences and buildings and plant such pastures and crops as may be necessary to carry on such operations;
j. To market the products of the farm; and
k. In general, to employ good husbandry in the farming operation.

(8) Manage Real Property. —

a. To improve, manage, protect, and subdivide any real property;
b. To dedicate or withdraw from dedication parks, streets, highways, or alleys;
c. To terminate any subdivision or part thereof;
d. To borrow money for the purposes authorized by this subdivision for such periods of time and upon such terms and conditions as to rates, maturities and renewals as the fiduciary shall deem advisable and to mortgage or otherwise encumber any such property or part thereof, whether in possession or reversion;
e. To lease any such property or part thereof to commence at the present or in the future, upon such terms and conditions, including options to renew or purchase, and for such period or periods of time as the fiduciary deems advisable although such period or periods may extend beyond the duration of the trust or the administration of the estate involved;
f. To make gravel, sand, oil, gas and other mineral leases, contracts, licenses, conveyances or grants of every nature and kind which are lawful in the jurisdiction in which such property lies;
g. To manage and improve timber and forests on such property, to sell the timber and forest products, and to make grants, leases, and contracts with respect thereto;
h. To modify, renew or extend leases;
i. To employ agents to rent and collect rents;
j. To create easements and release, convey, or assign any right, title, or interest with respect to any easement on such property or part thereof;
k. To erect, repair or renovate any building or other improvement on such property, and to remove or demolish any building or other improvement in whole or in part; and
l. To deal with any such property and every part thereof in all other ways and for such other purposes or considerations as it would be lawful for any person owning the same to deal with such property either in the same or in different ways from those specified elsewhere in this subdivision (8).

(8a) Comply with environmental law. —

a. To inspect property held by the fiduciary, including interests in sole proprietorships, partnerships, or corporations and any assets owned by any such business enterprise, for the purpose of determining compliance with environmental law affecting such property and to respond to any actual or threatened violation of any environmental law affecting property held by the fiduciary;
b. To take, on behalf of the estate or trust, any action necessary to prevent, abate, or otherwise remedy any actual or threatened violation of any environmental law affecting property held by the

fiduciary, either before or after the initiation of an enforcement action by any governmental body;

c. To refuse to accept property in trust if the fiduciary determines that any property to be donated to the trust either is contaminated by any hazardous substance or is being used or has been used for any activity directly or indirectly involving hazardous substance which could result in liability to the trust or otherwise impair the value of the assets held therein;

d. To settle or compromise at any time any and all claims against the trust or estate which may be asserted by any governmental body or private party involving the alleged violation of any environmental law affecting property held in trust or in an estate;

e. To disclaim any power granted by any document, statute, or rule of law which, in the sole discretion of the fiduciary, may cause the fiduciary to incur personal liability under any environmental law;

f. To decline to serve as a fiduciary if the fiduciary reasonably believes that there is or may be a conflict of interest between it in its fiduciary capacity and in its individual capacity because of potential claims or liabilities which may be asserted against it on behalf of the trust or estate because of the type or condition of assets held therein.

g. For purposes of this subsection "environmental law" means any federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment or human health. For purposes of this subsection, "hazardous substances" means any substance defined as hazardous or toxic or otherwise regulated by any environmental law. The fiduciary shall be entitled to charge the cost of any inspection, review, abatement, response, cleanup, or remedial action authorized herein against the income or principal of the trust or estate. A fiduciary shall not be personally liable to any beneficiary or other party for any decrease in value of assets in trust or in an estate by reason of the fiduciary's compliance with any environmental law, specifically including any reporting requirement under such law. Neither the acceptance by the fiduciary of property or a failure by the fiduciary to inspect property shall be deemed to create any inference as to whether or not there is or may be any liability under any environmental law with respect to such property.

(9) Pay Taxes and Expenses. — To pay taxes, assessments, compensation of the fiduciary, and other expenses incurred in the collection, care, administration, and protection of the trust or estate.

(10) Receive Additional Property. — To receive additional property from any source and administer such additional property as a portion of the appropriate trust or estate under the management of the fiduciary; provided the fiduciary shall not be required to receive such property without the fiduciary's consent.

(11) Deal with Other Trusts. — In dealing with one or more fiduciaries:

a. To sell property, real or personal, to, or to exchange property with, the trustee of any trust which the decedent or the settlor or his spouse or any child of his shall have created, for such estates and upon such terms and conditions as to sale price, terms of payment, and security as to the fiduciary shall seem advisable; and the fiduciary shall be under no duty to follow the proceeds of any such sale; and

b. To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals and securities as the fiduciary shall deem advisable from any trust created by the decedent, his spouse, or any child of his, for the purpose of paying debts of the decedent, taxes, the costs of the administration of the estate, and like charges against the estate, or any part thereof, or discharging the liability of any fiduciary thereof and to mortgage, pledge or otherwise encumber such portion of the estate or any trust as may be required to secure such loan or loans and to renew such loans.

(12) Borrow Money. — To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the fiduciary shall deem advisable, including the power of a corporate fiduciary to borrow from its own banking department, for the purpose of paying debts, taxes, or other charges against the estate or any trust, or any part thereof, and to mortgage, pledge or otherwise encumber such portion of the estate or any trust as may be required to secure such loan or loans; and to renew existing loans either as maker or endorser.

(13) Make Advances. — To advance money for the protection of the trust or estate, and for all expenses, losses and liabilities sustained in the administration of the trust or estate or because of the holding or ownership of any trust or estate assets, for which advances with any interest the fiduciary shall have a lien on the assets of the trust or estate as against a beneficiary.

(14) Vote Shares. — To vote shares of stock owned by the estate or any trust at stockholders meetings in person or by special, limited, or general proxy, with or without power of substitution.

(15) Register in Name of Nominee. — To hold a security in the name of a nominee or in other form without disclosure of the fiduciary relationship so that title to the security may pass by delivery, but the fiduciary shall be liable for any act of the nominee in connection with the stock so held.

(16) Exercise Options, Rights, and Privileges. — To exercise all options, rights, and privileges to convert stocks, bonds, debentures, notes, mortgages, or other property into other stocks, bonds, debentures, notes, mortgages, or other property; to subscribe for other or additional stocks, bonds, debentures, notes, mortgages, or other property; and to hold such stocks, bonds, debentures, notes, mortgages, or other property so acquired as investments of the estate or trust so long as the fiduciary shall deem advisable.

(17) Participate in Reorganizations. — To unite with other owners of property similar to any which may be held at any time in the decedent's estate or in any trusts in carrying out any plan for the consolidation or merger, dissolution or liquidation, foreclosure, lease, or sale of the property, incorporation or reincorporation, reorganization or readjustment of the capital or financial structure of any corporation, company or association the securities of which may form any portion of an estate or trust; to become and serve as a member of a stockholders or bondholders protective committee; to deposit securities in accordance with any plan agreed upon; to pay any assessments, expenses, or sums of money that may be required for the protection or furtherance of the interest of the distributees of an estate or beneficiaries of any trust with reference to any such plan; and to receive as investments of an estate or any trust any securities issued as a result of the execution of such plan.

(18) Reduce Interest Rates. — To reduce the interest rate from time to time on any obligation, whether secured or unsecured, constituting a part of an estate or trust.

(19) Renew and Extend Obligations. — To continue any obligation, whether secured or unsecured, upon and after maturity with or without renewal or extension upon such terms as the fiduciary shall deem advisable, without regard to the value of the security, if any, at the time of such continuance.

(20) Foreclose and Bid in. — To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed of trust, or other lien securing such bond, note or other obligation, and to bid in the property at such foreclosure sale, or to acquire the property by deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(21) Insure. — To carry such insurance coverage, including public liability, for such hazards and in such amounts, either in stock companies or in mutual companies, as the fiduciary shall deem advisable.

(22) Collect. — To collect, receive, and receipt for rents, issues, profits, and income of an estate or trust.

(23) Litigate, Compromise or Abandon. — To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate or trust as the fiduciary shall deem advisable, and the fiduciary's decision shall be conclusive between the fiduciary and the beneficiaries of the estate or trust and the person against or for whom the claim is asserted, in the absence of fraud by such persons; and in the absence of fraud, bad faith or gross negligence of the fiduciary, shall be conclusive between the fiduciary and the beneficiaries of the estate or trust.

(24) Employ and Compensate Agents, etc. — To employ and compensate, out of income or principal or both and in such proportion as the fiduciary shall deem advisable, persons deemed by the fiduciary needful to advise or assist in the proper settlement of the estate or administration of any trust, including, but not limited to, agents, accountants, brokers, attorneys-at-law, attorneys-in-fact, investment brokers, rental agents, realtors, appraisers, and tax specialists; and to do so without liability for any neglect, omission, misconduct, or default of such agent or representative provided he was selected and retained with due care on the part of the fiduciary.

(25) Acquire and Hold Property of Two or More Trusts Undivided. — To acquire, receive, hold and retain the principal of several trusts created by a single instrument undivided until division shall become necessary in order to make distributions; to hold, manage, invest, reinvest, and account for the several shares or parts of shares by appropriate entries in the fiduciary's books of account, and to allocate to each share or part of share its proportionate part of all receipts and expenses; provided, however, that the provisions of this subdivision shall not defer the vesting in possession of any share or part of share of the estate or trust.

(25a) Divide One Trust into Several Trusts and Make Distributions From Those Trusts. —

a. To divide the funds and properties constituting any trusts into two or more identical separate trusts that represent two or more fractional shares of the funds and properties being divided, or to hold any addition or contribution to an existing trust as a separate, identical trust, and to make distributions of income and principal by a method other than pro rata from the separate trusts so created as the fiduciary determines to be in the best interests of the trust beneficiaries. In any case where two separate, identical trusts are created pursuant to this sub-subdivision, one of which is fully exempt from the federal generation-skipping transfer tax and one of which is fully subject to that tax, the fiduciary may thereafter, to the extent possible consistent with the terms of the governing instrument, determine the value of any mandatory or discretionary distributions to trust beneficiaries on the basis of the combined value of both trusts, but may satisfy such distributions from the separate trusts in a manner designed to minimize the current and potential generation-skipping transfer tax.

b. To divide the funds and properties constituting any trusts into two or more separate, nonidentical trusts if (i) the new trusts so created are not inconsistent with the terms of the governing instrument; and (ii) the terms of the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust.

c. To fund the new trusts created pursuant to the authority granted under this subdivision either (i) by pro rata allocation of the assets of the original trust; (ii) based upon the fair market value of the assets at the date of division; or (iii) in a manner fairly reflecting the net appreciation or depreciation of the trust assets measured from the valuation date to the date of division.

(25b) Consolidate Similar Trusts. — When the trustee is trustee of more than one trust, the terms of which are substantially similar and the beneficiaries of which are identical, to consolidate the assets of those trusts and administer the assets as one trust under the terms of one of the trusts.

(26) Establish and Maintain Reserves. — To set up proper and reasonable reserves for taxes, assessments, insurance premiums, depreciation, obsolescence, amortization, depletion of mineral or timber properties, repairs, improvements, and general maintenance of buildings or other property out of rents, profits, or other income received; and to set up reserves also for the equalization of payments to or for beneficiaries; provided, however, that the provisions of this subdivision shall not affect the ultimate interests of beneficiaries in such reserves.

(27) Distribute in Cash or Kind. — To make distribution of capital assets of the estate or trust in kind or in cash, or partially in kind and partially in cash, in divided or undivided interests, either pro rata or by a method other than pro rata among all distributees, without regard to the income tax basis or other special tax attributes of such assets, as the fiduciary finds to be most practicable and for the best interests of the distributees; and to determine the value of capital assets for the purpose of making distribution thereof if and when there be more than one distributee thereof, which determination shall be binding upon the distributees unless clearly capricious, erroneous and inequitable; provided, however, that the fiduciary shall not exercise any power under this subdivision unless the fiduciary holds title to or an interest in the property to be distributed and is required or authorized to make distribution thereof.

(28) Pay to or for Minors or Incompetents. — To make payments in money, or in property in lieu of money, to or for a minor or incompetent in any one or more of the following ways:

a. Directly to such minor or incompetent;

b. To apply directly in payment for the support, maintenance, education, and medical, surgical, hospital, or other institutional care of such minor or incompetent;

c. To the legal or natural guardian of such minor or incompetent;

d. To any other person, whether or not appointed guardian of the person by any court, who shall, in fact, have the care and custody of the person of such minor or incompetent.

The fiduciary shall not be under any duty to see to the application of the payments so made, if the fiduciary exercised due care in the selection of the person, including the minor or incompetent, to whom such payments were made; and the receipt of such person shall be full acquittance to the fiduciary.

(28a) Pay to Custodian Under Uniform Gifts or Transfers to Minors Act. — To make any distribution of income or principal, including real property, for the benefit of any distributee to a custodian under the North Carolina Uniform Transfers to Minors Act, Chapter 33A of the General Statutes, or under the provisions of any similar statute in the state where the minor or the custodian resides. Unless a custodian is specifically named in the governing instrument, the fiduciary shall have absolute discretion to nominate any qualified individual or financial institution, including the fiduciary, to serve as custodian, and to nominate one or more substitute custodians.

(29) Apportion and Allocate Receipts and Expenses. — Where not otherwise provided by the Uniform Principal and Income Act of 2003 as contained in Chapter 37A of the General Statutes, to determine:

a. What is principal and what is income of any estate or trust and to allocate or apportion receipts and expenses as between principal and income in the exercise of the fiduciary's discretion, and, by way of illustration and not limitation of the fiduciary's discretion, to charge premiums on securities purchased at a premium against principal or income or partly against each;

b. Whether to apply stock dividends and other noncash dividends to income or principal or apportion them as the fiduciary shall deem advisable; and

c. What expenses, costs, taxes (other than estate, inheritance, and succession taxes and other governmental charges) shall be charged against principal or income or apportioned between principal and income and in what proportions.

(30) Make Contracts and Execute Instruments. — To make contracts and to execute instruments, under seal or otherwise, as may be necessary in the exercise of the powers herein granted.

(31) The foregoing powers shall be limited as follows for any trust which shall be classified as a "private foundation" as that term is defined by section 509 of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws (including each nonexempt charitable trust described in section 4947(a)(1) of the code which is treated as a private foundation) or nonexempt split-interest trust described in section 4947(a)(2) of the Internal Revenue Code of 1954 or corresponding provisions of any subsequent federal tax laws (but only to the extent that section 508(e) of the code is applicable to such nonexempt split-interest trust under section 4947(a)(2)):

a. The fiduciary shall make distributions of such amounts, for each taxable year, at such time and in such manner as not to become subject to the tax imposed by section 4942 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

b. No fiduciary shall engage in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

c. No fiduciary shall retain any excess business holdings as defined in section 4943(c) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

d. No fiduciary shall make any investments in such manner as to subject the trust to tax under section 4944 of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws.

e. No fiduciary shall make any taxable expenditures as defined in section 4945(d) of the Internal Revenue Code of 1954, or corresponding provisions of any subsequent federal tax laws. (1965, c. 628, s. 1; 1967, c. 24, s. 15; c. 956; 1971, c. 1136, s. 3; 1977, c. 30; 1989, c. 652, s. 20; 1991, c. 192, s. 1; 1995, c. 235, ss. 1-3; 1997-456, s. 27; 1999-144, s. 1; 2003-232, s. 3.)

Editor's Note. — Session Laws 2003-232, s. 8, provides that the amendments to this section by s. 3 of the act are effective January 1, 2004, and applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes, as enacted in Session Laws 2003-232.

Legal Periodicals. — For legislative survey of trusts and estates, see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Sale of Real Property Devised to Testator's Son. — Where a will granted the executor all of the power set forth in this section, neither the will nor this section gave the executor the authority to sell real property devised to the testator's minor son without prior court approval, since the title to the real property vested in the devisee son upon the testator's death, and the executor did not "hold" the property and it was not "at his disposal" within the meaning of this section. Montgomery v. Hinton, 45 N.C. App. 271, 262 S.E.2d 697 (1980).

Power of Executor. — As the executor had the sole power to settle claims, plaintiff had no right under the deed of separation, the escrow agreement, or the buy-sell agreement to challenge the purchase price of stock. Long v. Long, 119 N.C. App. 500, 459 S.E.2d 58 (1995).

Attorney-Client Privilege. — Deceased client's widow, who was also the executrix of his estate, and who was granted all the powers contained in G.S. 32-27, had no authority under G.S. 32-27(23) to waive the client's attorney-client privilege, as there was no existing claim by or against the client's estate, nor did she have such authority under any other provision of G.S. 32-27. In re Investigation of the Death of Miller, 357 N.C. 316, 584 S.E.2d 772, 2003 N.C. LEXIS 831 (2003).

Deed of Trust. — In the determination of whether a deed of trust conveyed by the executor is a debt of the estate, the burden is on the party asserting the validity of the debt as an obligation of the estate to show that the executor acted within his authority as executor. Hunter v. Newsom, 121 N.C. App. 564, 468 S.E.2d 802 (1996).

Applied in Smith v. Central Carolina Bank & Trust Co., 59 N.C. App. 712, 297 S.E.2d 783 (1982).

Cited in Tyson v. North Carolina Nat'l Bank, 305 N.C. 136, 286 S.E.2d 561 (1982).

§ **32-28:** Repealed by Session Laws 2005-192, s. 4, effective January 1, 2006.

§§ **32-29 through 32-33:** Reserved for future codification purposes.

ARTICLE 4.

Restrictions on Exercise of Power for Fiduciary's Benefit.

§ **32-34:** Repealed by Session Laws 2005-192, s. 4, effective January 1, 2006.

§§ **32-35 through 32-49:** Reserved for future codification purposes.

ARTICLE 5.

Compensation.

§§ 32-50 through 32-52: Repealed by Session Laws 2004-139, s. 1, effective January 1, 2005, and applicable to payments made to a fiduciary on or after that date.

Cross References. — For present provisions relating to compensation of trustees and other fiduciaries, see G.S. 32-53 et seq.

ARTICLE 6.

Compensation of Trustees and Other Fiduciaries.

§ 32-53. Definitions.

The following definitions apply in this Article:

(1) Legal disability. — A person under a legal disability is a person who is a minor, incompetent, or unborn individual, or whose identity or location is unknown.

(2) Qualified beneficiary. — As defined in G.S. 36C-1-103(15). With respect to a charitable trust defined in G.S. 36C-1-103(4), the term includes (i) a charitable organization described in G.S. 36C-1-110 as having the rights of a qualified beneficiary; or (ii) if there is no such charitable organization, the Attorney General.

(3) Representative. — A person who may represent and bind another as provided in Article 3 of Chapter 36C of the General Statutes, the provisions of which shall apply for purposes of this Article.

(4) Trust. — A trust to which Chapter 36C of the General Statutes applies as provided in G.S. 36C-1-102. (2004-139, s. 2; 2007-106, s. 38.)

Editor's Note. — Session Laws 2004-139, s. 6, makes this article effective January 1, 2005, and applicable to payments made to a fiduciary on or after that date.

This Article was enacted as Article 5A by Session Laws 2004-139, s. 2. It has been renumbered as Article 6 at the direction of the Revisor of Statutes.

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 38, effective October 1, 2007, rewrote the section. See Editor's note for applicability.

§ 32-54. Compensation of trustees.

(a) If the terms of the trust do not specify the trustee's compensation, the trustee is entitled to receive from the assets of the trust compensation that is reasonable under the circumstances.

(b) All of the following factors shall be considered in determining reasonableness of compensation:

(1) The degree of difficulty and novelty of the tasks required of the trustee.

(2) The responsibilities and risks involved.
(3) The amount and character of the trust assets.
(4) The skill, experience, expertise, and facilities of the trustee.
(5) The quality of the trustee's performance.
(6) Comparable charges for similar services.
(7) Time devoted to administering the trust.
(8) Time constraints imposed upon the trustee in administering the trust.
(9) Nature and costs of services delegated to others by the trustee.
(10) Where more than one trustee is serving, the reasonableness of the total fees paid to all trustees.
(11) Other factors which the trustee or the clerk of superior court deems to be relevant. (2004-139, s. 2.)

CASE NOTES

Editor's Note. *— The cases cited below were decided under former G.S. 32-50.*

Actions of Trustee Not Shown by Increase in Money. — The mere fact that a trust made money is not sufficient to prove that defendant trustee acted openly, fairly and honestly. Estate of Smith ex rel. Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 (1997), cert. denied, 347 N.C. 398, 494 S.E.2d 410 (1997).

§ 32-55. Notice.

(a) If the terms of the trust do not specify the trustee's compensation, the trustee may, in the trustee's discretion, give written notice to all qualified beneficiaries of each proposed payment of compensation if the annual amount of compensation exceeds four-tenths of one percent (4/10 of 1%) of the principal value of the assets of the trust on the last day of the trust accounting year. The notice shall contain a statement that the qualified beneficiaries have 20 days from when notice is given to file a proceeding for review of the reasonableness of the compensation with the clerk of superior court in accordance with Article 2 of Chapter 36C of the General Statutes.

(b) In lieu of giving written notice of each proposed payment of compensation under subsection (a) of this section, the trustee may give written notice to all qualified beneficiaries of the amount of compensation to be paid to the trustee on a periodic basis or of the method of computation of the compensation. The trustee shall not be required to give additional notice to the qualified beneficiaries unless the amount to be paid to the trustee on a periodic basis or the method of computation of the compensation changes.

(c) If a qualified beneficiary is under a legal disability, notice shall be given to the representative of the beneficiary. If a representative of a qualified beneficiary is not available without court order, notice shall be deemed given under this section if there is at least (i) one qualified beneficiary described in G.S. 36C-1-103(15) a. or b. who is not under a legal disability or a representative of a qualified beneficiary so described; and (ii) one qualified beneficiary described in G.S. 36C-1-103(15)c. who is not under a legal disability or a representative of a qualified beneficiary so described.

(d) The provisions of G.S. 36C-1-109 regarding notices to persons under Chapter 36C of the General Statutes shall apply for purposes of notices under this Article. (2004-139, s. 2; 2006-259, s. 13(m); 2007-106, s. 39.)

Editor's Note. — Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(m), effective October 1, 2006, substituted "Article 2 of Chapter 36C" for "Article 3 of Chapter 36A" in subsection (a). See Editor's note for applicability.

Session Laws 2007-106, s. 39, effective October 1, 2007, inserted "qualified" throughout in subsections (a) and (b); in subsection (a), substituted "If the terms of the trust do not specify the trustee's compensation, the trustee may, in the trustee's discretion" for "The trustee shall"; and rewrote subsections (c) and (d). See Editor's note for applicability.

§ 32-56. Payment of compensation without court order.

The trustee is authorized to pay the compensation provided for in G.S. 32-54 without prior approval of the clerk of superior court only if:

(1) The annual amount of compensation does not exceed four-tenths of one percent (4/10 of 1%) of the principal value of the assets of the trust on the last day of the trust accounting year; or

(2) Notice has been given pursuant to G.S. 32-55 and no qualified beneficiary or representative of a qualified beneficiary has initiated a proceeding under G.S. 32-57 for review of the reasonableness of the compensation within 20 days after notice has been given by the trustee in accordance with G.S. 32-55. (2004-139, s. 2; 2007-106, s. 40.)

Editor's Note. — As enacted, this section contained a subsection (a) but no (b). This section has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 40, effective October 1, 2007, substituted "Notice has been given pursuant to G.S. 32-55 and no qualified beneficiary or representative of a qualified beneficiary" for "No beneficiary" at the beginning of subdivision (2). See Editor's note for applicability.

§ 32-57. Judicial review; payment of compensation and other payments with court order.

(a) If the terms of the trust do not specify the trustee's compensation, the trustee or any qualified beneficiary, or representative of a qualified beneficiary, may initiate a proceeding under Article 2 of Chapter 36C of the General Statutes for review of the reasonableness of any compensation or expense reimbursement and for the approval or denial of the payment of compensation or expense reimbursement. A beneficiary may initiate a proceeding even though the 20-day period referred to in G.S. 32-56(2) has expired.

(b) In connection with reviewing the reasonableness of any compensation or expense reimbursement, the clerk of superior court may order the trustee to make appropriate refunds if the clerk determines upon review that a trustee has received excessive compensation or expense reimbursement. (2004-139, s. 2; 2006-259, s. 13(n); 2007-106, s. 41.)

Editor's Note. — Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(n), effective October 1, 2006, substituted "Article 2 of Chapter 36C" for "Article 3 of Chapter 36A" in subsection (a). See Editor's note for applicability.

Session Laws 2007-106, s. 41, effective October 1, 2007, substituted "If the terms of the trust do not specify the trustee's compensation, the trustee or any qualified beneficiary, or representative of a qualified beneficiary," for "The trustee or any beneficiary" at the beginning of subsection (a). See Editor's note for applicability.

§ 32-58. Reimbursement for expenses incurred.

In addition to the compensation referred to in G.S. 32-54, the trustee shall be entitled to reimbursement out of the assets of the trust for expenses properly incurred or advanced in the administration of the trust and shall be empowered to pay the expenses from the assets of the trust without prior approval of the clerk of superior court. The court may allow reimbursement of other expenses incurred or advanced to which the trustee is entitled in equity and good conscience. The trustee shall have a lien on trust property to secure reimbursement, with reasonable interest, of expenses owed under this section. (2004-139, s. 2; 2007-106, s. 42.)

Editor's Note. — Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 42, effective October 1, 2007, inserted "or advanced" following "expenses properly incurred" and added the last two sentences. See Editor's note for applicability.

§ 32-59. Compensation of other fiduciaries.

Unless otherwise provided by the General Statutes or by the instrument creating the fiduciary relationship, fiduciaries other than trustees under a trust shall be entitled, upon written request to the clerk of superior court, to reasonable compensation in an amount to be determined by the clerk after taking into consideration the factors set forth in G.S. 32-54(b) and to reimbursement for expenses properly incurred in the administration of the fiduciary relationship. (2004-139, s. 2.)

§ 32-60. Effect of provisions in instrument.

In those instances where the instrument creating the trust or other fiduciary relationship provides that the compensation of the fiduciary shall be the amount "provided by law", the "maximum amount provided by law", or other similar language, or references former G.S. 32-50, this language shall be construed as an intention that the trustee or other fiduciary shall receive reasonable compensation as allowed under this Article. In those instances where the instrument creating the trust or other fiduciary relationship provides that the trustee or other fiduciary shall serve without compensation, this language shall be construed as being a provision relating to compensation, and the trustee or other fiduciary shall not be entitled to receive reasonable compensation as allowed under this Article. (2004-139, s. 2.)

§ 32-61. Counsel fees allowable to attorneys serving as fiduciaries.

The clerk of superior court may exercise discretion to allow counsel fees to an attorney serving as a fiduciary or trustee (in addition to the compensation allowed to the attorney as a fiduciary or trustee) where the attorney, on behalf of the trust or fiduciary relationship, renders professional services as an attorney that are different from the services normally performed by a fiduciary or trustee and of a type which would reasonably justify the retention of legal counsel by a fiduciary or trustee who is not licensed to practice law. (2004-139, s. 2.)

CASE NOTES

***Editor's Note.** — The cases cited below were decided under former G.S. 32-51.*

Foreclosure Proceedings. — When a trustee of a deed of trust who is also a licensed attorney performs such extraordinary services as described in this section in connection with a foreclosure proceeding, counsel is entitled under G.S. 45-21.20 to an award of attorney's fees as an "expense[] incurred with respect to the sale or proposed sale...." In re Newcomb, 112 N.C. App. 67, 434 S.E.2d 648 (1993).

Statute Not Applicable Where Attorney Not Representing Estate. — Where attorney placed settlement proceeds in an account and later withdrew money for services which law firm had rendered, attorney did not violate this section by failing to have the legal fee approved by the clerk of superior court since attorney was not serving as the fiduciary or personal representative for the estate but as the attorney for the personal representative; therefore, this section had no applicability to the facts of the case. Williams v. Randolph, 94 N.C. App. 413, 380 S.E.2d 553, cert. denied, 325 N.C. 437, 384 S.E.2d 547 (1989).

Actions of Trustee Not Shown by Increase in Money. — The mere fact that trust made money is not sufficient to prove that defendant trustee acted openly, fairly and honestly. Estate of Smith ex rel. Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 (1997), cert. denied, 347 N.C. 398, 494 S.E.2d 410 (1997).

§ 32-62. Applicability.

Regardless of when the trust or fiduciary relationship is created, the provisions of this Article shall apply to all payments made to a fiduciary after January 1, 2005, including payments for compensation earned prior to January 1, 2005. (2004-139, s. 2.)

§§ 32-63 through 32-69: Reserved for future codification purposes.

ARTICLE 7.

Investment and Deposit of Trust Funds.

§ 32-70. Definition.

(a) For the purpose of this Article, the word "fiduciary" shall be construed to include a guardian, personal representative, collector, trustee, or any other person charged with the duty of acting for the benefit of another party as to matters coming within the scope of the relationship between them.

(b) As used in subsection (a) above, the word "person" shall be construed to include an individual, a corporation, or any legal or commercial entity authorized to hold property or do business in the State of North Carolina. (1977, c. 502, s. 2; 2005-192, s. 1.)

Editor's Note. — This section was formerly codified as G.S. 36A-1. It was recodified as G.S. 32-70 by the Revisor of Statutes as the result of Session Laws 2005-192, s. 1, effective January 1, 2006.

Where appropriate, the historical citations to sections in repealed Chapter 36, covering the same subject matter as this chapter, have been added to corresponding sections in this Chapter 36A.

Many of the cases cited under this chapter were decided under similar former provisions.

Legal Periodicals. — For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

§ 32-71. Investment; prudent person rule.

(a) In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property for the benefit of another, a fiduciary shall observe the standard of judgment and care under the circumstances then prevailing, which an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary; and if the fiduciary has special skills or is named a fiduciary on the basis of representations of special skills or expertise, he is under a duty to use those skills. This subsection and subsection (b) of this section do not apply to trusts governed by Article 9 of Chapter 36C of the General Statutes.

(b) Within the limitations of the foregoing standard, a fiduciary is authorized to acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing, bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.

(c), (d) Repealed by Session Laws 2007-106, s. 43, effective October 1, 2007. (1870-1, c. 197; Code, s. 1594; 1885, c. 389; 1889, c. 470; Rev., ss. 1792, 1793; 1917, c. 6, s. 9; c. 67, s. 1; c. 152, s. 7; c. 191, s. 1; c. 269, s. 5; C.S., ss. 4018, 4018(a), 4019; Ex. Sess. 1921, c. 63; 1931, c. 257; 1933, c. 549, s. 1; 1935, c. 449; 1937, c. 14; 1943, c. 96; c. 473, ss. 1-3; 1945, c. 713; 1953, c. 620; 1959, c. 364, s. 2; c. 1015, s. 2; 1969, c. 861; 1971, c. 528, s. 34; c. 864, s. 17; 1973, c. 239, s. 1; 1975, cc. 40, 319; 1977, c. 502, s. 2; 1995, c. 153, s. 1; 1999-215, s. 2; 2005-192, s. 1; 2006-259, s. 13(o); 2007-106, s. 43.)

Cross References. — As to deposit of trust funds, see G.S. 32-8 to 32-11.

Editor's Note. — This section was formerly codified as G.S. 36A-2. It was recodified as G.S. 32-71 by the Revisor of Statutes as the result of Session Laws 2005-192, s. 1, effective January 1, 2006.

Session Laws 2006-259, s. 13(s), provides:

"This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(o), effective October 1, 2006, substituted "Article 9 of Chapter 36C of the General Statutes" for "Article 15 of this Chapter" in subsections (a) and (c). See Editor's note for applicability.

Session Laws 2007-106, s. 43, effective October 1, 2007, deleted subsections (c) and (d) regarding duties of a trustee under a contract of life insurance and notice provisions therefore. See Editor's note for applicability.

Legal Periodicals. — For survey of 1977 law on wills, trusts and estates, see 56 N.C.L. Rev. 1152 (1978).

For article, "Legal Aspects of Changing University Investment Strategies," see 58 N.C.L. Rev. 189 (1980).

For article, "A Proposal for a Simple and Socially Effective Rule Against Perpetuities," see 66 N.C.L. Rev. 545 (1988).

CASE NOTES

Editor's Note. — *The cases below were decided under former law.*

Liability of Executor. — An executor, in performing those duties related to managing the estate's assets, acts as a trustee to beneficiaries of the estate. As such, the executor is liable for the depreciation of assets which an ordinarily prudent fiduciary would not have allowed to occur. Fortune v. First Union Nat'l Bank, 87 N.C. App. 1, 359 S.E.2d 801 (1987), rev'd on other grounds, 323 N.C. 146, 371 S.E.2d 483 (1988).

Standard Not Superseded by Grant of Discretion. — The prudent man fiduciary standard is not superseded by a grant of discretion in the trust document. Pittman v. Barker, 117 N.C. App. 580, 452 S.E.2d 326, cert. denied, 340 N.C. 261, 456 S.E.2d 833 (1995).

Violation of Standard Shown. — Trustee violated the prudent man standard by failing to balance the investment of the trust's assets between income and growth investments and by favoring the interests of the life beneficiaries over those of the remaindermen. Pittman v. Barker, 117 N.C. App. 580, 452 S.E.2d 326, cert. denied, 340 N.C. 261, 456 S.E.2d 833 (1995).

§ 32-72. Terms of creating instrument.

(a) Nothing contained in this Article shall be construed as authorizing any departure from the express terms or limitations set forth in any will, agreement, court order, or other instrument creating or defining the fiduciary's powers and duties.

(b) A fiduciary holding funds for investment who is specifically directed or authorized by an instrument creating the fiduciary relationship to retain the stock of a bank or trust company that is a member of a bank holding company currently fully registered under an act of Congress entitled Bank Holding Company Act of 1956, as the same may be amended from time to time, shall be considered as being directed or authorized to retain the stock of such bank holding company.

(c) Whenever a fiduciary holding funds for investment is directed, required, authorized, or permitted by an instrument creating the fiduciary relationship to invest in United States government obligations, the fiduciary may, in the absence of an express prohibition in the instrument, invest in and hold such obligations either directly or in the form of interests in a money market mutual fund registered under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1, et seq., as from time to time amended, the portfolio of which is limited to United States government obligations and repurchase agreements fully collateralized thereby.

(d) Whenever an instrument reserves to the settlor or vests in any person, including an advisory or investment committee or one or more co-fiduciaries, the authority to direct the making or retention of any investment to the exclusion of the fiduciary or to the exclusion of one or more of several co-fiduciaries, the excluded fiduciary or co-fiduciary who has no discretion in selecting the person authorized to make or retain investments is not liable to the beneficiaries or to the trust for the decisions or actions of the settlor or other person authorized to direct the making or retention of investments. As used in this subsection, the term "person" includes an individual, a corporation, or any legal or commercial entity authorized to hold property or do business in the State. (1973, c. 1277; 1977, c. 502, s. 2; 1985, c. 538, s. 1; 2001-413, s. 4; 2005-192, s. 1.)

Editor's Note. — This section was formerly codified as G.S. 36A-3. It was recodified as G.S. 32-72 by the Revisor of Statutes as the result of Session Laws 2005-192, s. 1, effective January 1, 2006.

§ 32-73. Power of court not restricted.

Nothing contained in this Article shall be construed as restricting the power of a court of proper jurisdiction to permit a fiduciary to deviate from the terms of any will, agreement, or other instrument relating to the acquisition, investment, reinvestment, exchange, retention, sale, or management of fiduciary property. (1977, c. 502, s. 2; 2005-192, s. 1.)

Editor's Note. — This section was formerly codified as G.S. 36A-4. It was recodified as G.S. 32-73 by the Revisor of Statutes as the result of Session Laws 2005-192, s. 1, effective January 1, 2006.

§ 32-74. Applicability of provisions.

This Article shall govern fiduciaries acting under wills, agreements, court orders, and other instruments now existing or hereafter made. (1977, c. 502, s. 2; 2005-192, s. 1.)

Editor's Note. — This section was formerly codified as G.S. 36A-5. It was recodified as G.S. 32-74 by the Revisor of Statutes as the result of Session Laws 2005-192, s. 1, effective January 1, 2006.

§ 32-75. Employee trusts.

Pension, profit sharing, stock bonus, annuity, or other employee trusts established for the purpose of distributing the income and principal thereof to some or all of their employees, or the beneficiaries of such employees, shall not be invalid as violating any laws or rules against perpetuities, restraints on the power of alienation of title to property, or the accumulation of income; but such trusts may continue for such period of time as may be required by the provisions thereof to accomplish the purpose for which they were established. (1954, c. 8; 1977, c. 502, s. 2; 2005-192, s. 1.)

Editor's Note. — This section was formerly codified as G.S. 36A-6. It was recodified as G.S. 32-75 by the Revisor of Statutes as the result of Session Laws 2005-192, s. 1, effective January 1, 2006.

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For article, "A Proposal for a Simple and Socially Effective Rule Against Perpetuities," see 66 N.C.L. Rev. 545 (1988).

§ 32-76. Applicability.

The provisions of this Article shall apply to fiduciary relationships in existence on January 1, 1978, or thereafter established. (1977, c. 502, s. 2; 2005-192, s. 1.)

Editor's Note. — This section was formerly codified as G.S. 36A-7. It was recodified as G.S. 32-76 by the Revisor of Statutes as the result of Session Laws 2005-192, s. 1, effective January 1, 2006.

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Powers of Attorney.

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ARTICLE 1.
Statutory Short Form Power of Attorney.

§ 32A-1. Statutory Short Form of General Power of Attorney.

The use of the following form in the creation of a power of attorney is lawful, and, when used, it shall be construed in accordance with the provisions of this Chapter.

"NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE DEFINED IN CHAPTER 32A OF THE NORTH CAROLINA GENERAL STATUTES WHICH EXPRESSLY PERMITS THE USE OF ANY OTHER OR DIFFERENT FORM OF POWER OF ATTORNEY DESIRED BY THE PARTIES CONCERNED.

State of ____________.

County of ____________.

I, ________________, appoint ________________ to be my attorney-in-fact, to act in my name in any way which I could act for myself, with respect to the following matters as each of them is defined in Chapter 32A of the North Carolina General Statutes. (DIRECTIONS: Initial the line opposite any one or more of the subdivisions as to which the principal desires to give the attorney-in-fact authority.)

(1) Real property transactions .... ________
(2) Personal property transactions .... ________
(3) Bond, share, stock, securities and commodity transactions .... ________
(4) Banking transactions .... ________
(5) Safe deposits .... ________
(6) Business operating transactions .... ________
(7) Insurance transactions .... ________
(8) Estate transactions .... ________
(9) Personal relationships and affairs .... ________
(10) Social security and unemployment .... ________
(11) Benefits from military service .... ________
(12) Tax matters .... ________
(13) Employment of agents .... ________
(14) Gifts to charities, and to individuals other than the attorney-in-fact .... ________
(15) Gifts to the named attorney-in-fact .... ________

(If power of substitution and revocation is to be given, add: 'I also give to such person full power to appoint another to act as my attorney-in-fact and full power to revoke such appointment.')

(If period of power of attorney is to be limited, add: 'This power terminates ________, ______.')

(If power of attorney is to be a durable power of attorney under the provision of Article 2 of Chapter 32A and is to continue in effect after the incapacity or mental incompetence of the principal, add: 'This power of attorney shall not be affected by my subsequent incapacity or mental incompetence.')

(If power of attorney is to take effect only after the incapacity or mental incompetence of the principal, add: 'This power of attorney shall become effective after I become incapacitated or mentally incompetent.')

(If power of attorney is to be effective to terminate or direct the administration of a custodial trust created under the Uniform Custodial Trust Act, add: 'In the event of my subsequent incapacity or mental incompetence, the attorney-in-fact of this power of attorney shall have the power to terminate or to direct the administration of any custodial trust of which I am the beneficiary.')

(If power of attorney is to be effective to determine whether a beneficiary under the Uniform Custodial Trust Act is incapacitated or ceases to be incapacitated, add: 'The attorney-in-fact of this power of attorney shall have the power to determine whether I am incapacitated or whether my incapacity has ceased for the purposes of any custodial trust of which I am the beneficiary.')

Dated ____________, ________.

____________________________________ (Seal)
Signature

STATE OF ____________ COUNTY OF ____________.

On this ______ day of ____________, ________, personally appeared before me, the said named ____________ to me known and known to me to be the person described in and who executed the foregoing instrument and he (or she) acknowledged that he (or she) executed the same and being duly sworn by me, made oath that the statements in the foregoing instrument are true.

My Commission Expires ________________.

____
(Signature of Notary Public)
Notary Public (Official Seal)"

(1983, c. 626, s. 1; 1985, c. 162, s. 1; c. 618, s. 1; 1995, c. 331, s. 1; c. 486, s. 2.)

Editor's Note. — Session Laws 1985, c. 162, effective May 7, 1985, which added "(Seal)" following the signature line in the form, as amended by Session Laws 1989, c. 390, s. 11, provided, in s. 2: "No power of attorney executed pursuant to Chapter 32A of the General Statutes prior to April 1, 1989, shall be invalid for the reason that the power of attorney was not signed by the principal under seal."

Session Laws 1995, c. 331, which amended this section, in s. 6 provides that this act is not intended to alter or otherwise affect the law of this State regarding presumptions of fraud or fiduciary responsibilities.

Legal Periodicals. — For article on continuing power of attorney, see 5 Campbell L. Rev. 305 (1983).

CASE NOTES

Power to Make Gifts of Property Generally. — Since the power to make a gift of the principal's property is potentially hazardous or adverse to the principal's interests, such power will not be lightly inferred from broad grants of power contained in a general power of attorney. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

Power of attorney set forth in this section and the powers granted attorneys-in-fact by G.S. 32A-2(1), standing alone, do not authorize an attorney-in-fact to make gifts of the principal's real property. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

The basic premise behind the majority rule that a general power of attorney does not include authority to make gifts of property, is that an attorney-in-fact is presumed to act in the best interests of the principal. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

Power to Make Gift of Real Property Conferred. — Where power of attorney executed by decedent went beyond the short form and expressly provided that attorney-in-fact's powers were to include the power to transfer real estate, the document did expressly confer upon the attorney-in-fact the power to make a gift of real property. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

Use of Nonstatutory Form. — Wife properly executed a power of attorney incorporating by reference the statutory definition of real property transactions found in G.S. 32A-2(1) because, although the parties did not use the statutory short form provided in G.S. 32A-1, they could use a different form and incorporate by reference G.S. 32A-2 pursuant to G.S. 32A-3. In re Doerfer, — Bankr. —, 2006 Bankr. LEXIS 3085 (Bankr. M.D.N.C. Nov. 1, 2006).

Nonstatutory power of attorney that incorporated by reference the statutory definition of real property transactions found in G.S. 32A-2(1) was valid even though it did not contain the warning language required by G.S.32A-1 because, by incorporating the statutory definition, the parties did not automatically bind themselves to use the statutory power of attorney. In re Doerfer, — Bankr. —, 2006 Bankr. LEXIS 3085 (Bankr. M.D.N.C. Nov. 1, 2006).

OPINIONS OF ATTORNEY GENERAL

Codification of Chapter. — Session Laws 1983, c. 626, ratified on June 27, 1983, and effective October 1, 1983, as introduced and as enacted, amended the General Statutes by adding a new Chapter 32B. However, at the time there was no Chapter 32A in the General Statutes, and therefore under the authority of G.S. 164-10, and in conformity with the usual rules of codification, the Division of Legislative Drafting and Codification of the Department of Justice authorized the codification of the new provisions as Chapter 32A. See opinion of the Attorney General to Mr. A.E. Blackburn, Clerk of Superior Court, Forsyth County, 53 N.C.A.G. 76 (1984).

Reference to Chapter 32B. — A power of attorney that makes reference to Chapter 32B is legally effective as a durable power of attorney. See opinion of the Attorney General to Mr. A.E. Blackburn, Clerk of Superior Court, Forsyth County, 53 N.C.A.G. 76 (1984).

Reference to Chapter 32A. — A power of attorney that makes reference to Chapter 32A is legally effective as a durable power of attorney. See opinion of the Attorney General to Mr. A.E. Blackburn, Clerk of Superior Court, Forsyth County, 53 N.C.A.G. 76 (1984).

A reference to either Chapter 32A or 32B may be used; however, it is suggested that a reference to Chapter 32A will be less confusing. See opinion of the Attorney General to Mr. A.E. Blackburn, Clerk of Superior Court, Forsyth County, 53 N.C.A.G. 76 (1984).

§ 32A-2. Powers conferred by the Statutory Short Form Power of Attorney set out in G.S. 32A-1.

The Statutory Short Form Power of Attorney set out in G.S. 32A-1 confers the following powers on the attorney-in-fact named therein:

(1) Real Property Transactions. — To lease, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, purchase, exchange, and acquisition of, and to accept, take, receive, and possess any interest in real property whatsoever, on such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper; and to maintain, repair, improve, manage, insure, rent, lease, sell, convey, subject to liens, mortgage, subject to deeds of trust, and in any way or manner deal with all or any part of any interest in real property whatsoever, that the principal owns at the time of execution or may thereafter acquire, for under such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper.

(2) Personal Property Transactions. — To lease, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, purchase, exchange, and acquisition of, and to accept, take, receive, and possess any personal property whatsoever, tangible or intangible, or interest thereto, on such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper; and to maintain, repair, improve, manage, insure, rent, lease, sell, convey, subject to liens and mortgages, and hypothecate, and in any way or manner deal with all or any part of any personal property whatsoever, tangible or intangible, or any interest therein, that the principal owns at the time of execution or may thereafter acquire, under such terms and conditions, and under such covenants, as said attorney-in-fact shall deem proper.

(3) Bond, Share, Stock, Securities and Commodity Transactions. — To request, ask, demand, sue for, recover, collect, receive, and hold and possess any bond, share, instrument of similar character, commodity interest or any instrument with respect thereto together with the interest, dividends, proceeds, or other distributions connected therewith, as now are, or shall hereafter become, owned by, or due, owing payable, or belonging to, the principal at the time of execution or in which the principal may thereafter acquire interest, to have, use, and take all lawful means and equitable and legal remedies, procedures, and writs in the name of the principal for the collection and recovery

thereof, and to adjust, sell, compromise, and agree for the same, and to make, execute, and deliver for the principal, all endorsements, acquittances, releases, receipts, or other sufficient discharges for the same.

(4) Banking Transaction. — To make, receive, sign, endorse, execute, acknowledge, deliver, and possess checks, drafts, bills of exchange, letters of credit, notes, stock certificates, withdrawal receipts and deposit instruments relating to accounts or deposits in, or certificates of deposit of, banks, savings and loan or other institutions or associations for the principal.

(5) Safe Deposits. — To have free access at any time or times to any safe deposit box or vault to which the principal might have access as lessee or owner.

(6) Business Operating Transactions. — To conduct, engage in, and transact any and all lawful business of whatever nature or kind for the principal.

(7) Insurance Transactions. — To exercise or perform any act, power, duty, right or obligation whatsoever in regard to any contract of life, accident, health, disability or liability insurance or any combination of such insurance procured by or on behalf of the principal prior to execution; and to procure new, different or additional contracts of insurance for the principal and to designate the beneficiary of any such contract of insurance, provided, however, that the agent himself cannot be such beneficiary unless the agent is spouse, child, grandchild, parent, brother or sister of the principal.

(8) Estate Transactions. — To request, ask, demand, sue for, recover, collect, receive, and hold and possess all legacies, bequests, devises, as are, owned by, or due, owing, payable, or belonging to, the principal at the time of execution or in which the principal may thereafter acquire interest, to have, use, and take all lawful means and equitable and legal remedies, procedures, and writs in the name of the principal for the collection and recovery thereof, and to adjust, sell, compromise, and agree for the same, and to make, execute, and deliver for the principal, all endorsements, acquittances, releases, receipts, or other sufficient discharges for the same.

(9) Personal Relationships and Affairs. — To do all acts necessary for maintaining the customary standard of living of the principal, the spouse and children, and other dependents of the principal; to provide medical, dental and surgical care, hospitalization and custodial care for the principal, the spouse, and children, and other dependents of the principal; to continue whatever provision has been made by the principal, for the principal, the spouse, and children, and other dependents of the principal, with respect to automobiles, or other means of transportation; to continue whatever charge accounts have been operated by the principal, for the convenience of the principal, the spouse, and children, and other dependents of the principal, to open such new accounts as the attorney-in-fact shall think to be desirable for the accomplishment of any of the purposes enumerated in this section, and to pay the items charged on such accounts by any person authorized or permitted by the principal or the attorney-in-fact to make such charges; to continue the discharge of any services or duties assumed by the principal, to any parent, relative or friend of the principal; to continue payments incidental to the membership or affiliation of the principal in any church, club, society, order or other organization, or to continue contributions thereto.

In the event the attorney-in-fact named pursuant to G.S. 32A-1 makes a decision regarding the health care of the principal that is contradictory to a decision made by a health care agent appointed pursuant to Article 3 of this Chapter, the decision of the health care agent shall overrule the decision of the attorney-in-fact.

(10) Social Security and Unemployment. — To prepare, execute and file all social security, unemployment insurance and information returns required by the laws of the United States, or of any state or subdivision thereof, or of any foreign government.

(11) Benefits from Military Service. — To execute vouchers in the name of the principal for any and all allowances and reimbursements payable by the United States, or subdivision thereof, to the principal, arising from or based upon military service and to receive, to endorse and to collect the proceeds of any check payable to the order of the principal drawn on the treasurer or other fiscal officer or depository of the United States or subdivision thereof; to take possession and to order the removal and shipment, of any property of the principal from any post, warehouse, depot, dock or other place of storage or safekeeping, either governmental or private, to execute and to deliver any release, voucher, receipt, bill of lading, shipping ticket, certificate or other instrument which the agent shall think to be desirable or necessary for such purpose; to prepare, to file and to prosecute the claim of the principal to any benefit or assistance, financial or otherwise, to which the principal is, or claims to be, entitled, under the provisions of any statute or regulation existing at the creation of the agency or thereafter enacted by the United States or by any state or by any subdivision thereof, or by any foreign government, which benefit or assistance arises from or is based upon military service performed prior to or after execution.

(12) Tax matters. — To prepare, execute, verify and file in the name of the principal and on behalf of the principal any and all types of tax returns, amended returns, declaration of estimated tax, report, protest, application for correction of assessed valuation of real or other property, appeal, brief, claim for refund, or petition, including petition to the Tax Court of the United States, in connection with any tax imposed or proposed to be imposed by any government, or claimed, levied or assessed by any government, and to pay any such tax and to obtain any extension of time for any of the foregoing; to execute waivers or consents agreeing to a later determination and assessment of taxes than is provided by any statute of limitations; to execute waivers of restriction on the assessment and collection of deficiency in any tax; to execute closing agreements and all other documents, instruments and papers relating to any tax liability of any sort; to institute and carry on through counsel any proceeding in connection with determining or contesting any such tax or to recover any tax paid or to resist any claim for additional tax on any proposed assessment or levy thereof; and to enter into any agreements or stipulations for compromise or other adjustments or disposition of any tax.

(13) Employment of Agents. — To employ agents such as legal counsel, accountants or other professional representation as may be appropriate and to grant such agents such powers of attorney or other appropriate authorization as may be required in connection with such representation or by the Internal Revenue Service or other governmental authority.

(14) Gifts to Charities, and to Individuals Other Than the Attorney-In-Fact. —

a. Except as provided in G.S. 32A-2(14)b., to make gifts of any of the principal's property to any individual other than the attorney-in-fact or to any organization described in sections 170(c) and 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts. As used in this subdivision "Internal Revenue Code" means the "Code" as defined in G.S. 105-228.90.

b. Except as provided in G.S. 32A-2(14)c., or unless gifts are expressly authorized by the power of attorney under G.S. 32A-2(15), a power described in G.S. 32A-2(14)a. may not be exercised by the attorney-in-fact in favor of the attorney-in-fact or the estate, creditors, or creditors of the estate of the attorney-in-fact.

c. If the power described in G.S. 32A-2(14)a. is conferred upon two or more attorneys-in-fact, it may be exercised by the attorney-in-fact or attorneys-in-fact who are not disqualified by G.S. 32A-2(14)b. from exercising the power of appointment as if they were the only attorney-in-fact or attorneys-in-fact.

d. An attorney-in-fact expressly authorized by this section to make gifts of the principal's property may elect to request the clerk of the superior court to issue an order to make a gift of the property of the principal.

(15) Gifts to the Named Attorney-In-Fact. — To make gifts to the attorney-in-fact named in the power of attorney or the estate, creditors, or creditors of the estate of the attorney-in-fact, in accordance with the principal's personal history of making or joining in the making of lifetime gifts. (1983, c. 626, s. 1; 1985, c. 618, s. 2; 1987, c. 77, s. 1; 1991, c. 639, s. 2; 1995, c. 331, ss. 2-4; 1999-385, ss. 1, 2; 2001-413, s. 5.1.)

Editor's Note. — Session Laws 1995, c. 331, which amended this section, in s. 6 provides that this act is not intended to alter or otherwise affect the law of this State regarding presumptions of fraud or fiduciary responsibilities.

Legal Periodicals. — For legislative survey of trusts and estates, see 22 Campbell L. Rev. 253 (2000).

CASE NOTES

Gifts of Real Property Generally. — The legislature did not intend to include the power to give a gift of real property under this statute. Whitford v. Gaskill, 119 N.C. App. 790, 460 S.E.2d 346 (1995), modified, 345 N.C. 762, 489 S.E.2d 177 (1997).

The power to give a gift of real property must be expressly conferred; general language of the power to transfer, along with the statutory form, will not suffice. Whitford v. Gaskill, 119 N.C. App. 790, 460 S.E.2d 346 (1995), modified, 345 N.C. 762, 489 S.E.2d 177 (1997).

Since the power to make a gift of the principal's property is potentially hazardous or adverse to the principal's interests, such power will not be lightly inferred from broad grants of power contained in a general power of attorney. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

Power of attorney set forth in G.S. 32A-1 and the powers granted attorneys-in-fact by subsection (1), standing alone, do not authorize an attorney-in-fact to make gifts of the principal's real property. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

The basic premise behind the majority rule that a general power of attorney does not include authority to make gifts of property, is that an attorney-in-fact is presumed to act in the best interests of the principal. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

Power to Make Gift of Real Property Conferred. — Where power of attorney executed by decedent went beyond the short form and expressly provided that attorney-in-fact's powers were to include the power to transfer real estate, the document did expressly confer upon the attorney-in-fact the power to make a gift of real property. Whitford v. Gaskill, 345 N.C. 475, 480 S.E.2d 690 (1997).

Real Property Transactions. — Chapter 7 debtor was authorized to enter into a real estate line of credit on behalf of he and his wife, and the lender was a secured creditor with regard to the transaction, because the wife executed a power of attorney incorporating by reference the statutory definition of real property transactions found in G.S. 32A-2(1), which gave the debtor expansive authority to engage in real property transactions on behalf of his wife. In re Doerfer, — Bankr. —, 2006 Bankr. LEXIS 3085 (Bankr. M.D.N.C. Nov. 1, 2006).

Chapter 7 debtor was not authorized to enter into a real estate line of credit on behalf of he and his wife for property located in Carteret County, and the lender was not a secured creditor with regard to the transaction, because the power of attorney executed by the wife only authorized the debtor to act as his wife's attorney-in-fact with respect to property within Orange County. In re Doerfer, — Bankr. —, 2006 Bankr. LEXIS 3085 (Bankr. M.D.N.C. Nov. 1, 2006).

§ 32A-3. Provisions not exclusive; reference to Chapter 32B; limitations on authority.

(a) The provisions of this Article are not exclusive and shall not bar the use of any other or different form of power of attorney desired by the parties concerned.

(b) A power of attorney under the provisions of this Article may refer to Chapter 32B as the same is set out in Chapter 626 of the 1983 Session Laws.

(c) Notwithstanding any other provision of this Chapter, no attorney-in-fact may exercise powers described in G.S. 36C-6-602.1(a) to alter the designation of beneficiaries to receive property on the settlor's death under the settlor's existing estate plan. This subsection shall not impair the authority of an attorney-in-fact to make gifts of the principal's property, as provided in Articles 2A and 2B of this Chapter. (1983, c. 626, s. 1; 1985, c. 609, s. 4; 2007-106, s. 1.1.)

Cross References. — See the Opinions of the Attorney General under G.S. 32A-1.

Editor's Note. — Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 1.1, effective October 1, 2007, added "limitations on authority" to the section heading and added subsection (c). See Editor's note for applicability.

CASE NOTES

Use of Nonstatutory Form. — Wife properly executed a power of attorney incorporating by reference the statutory definition of real property transactions found in G.S. 32A-2(1)because, although the parties did not use the statutory short form provided in G.S. 32A-1, they could use a different form and incorporate by reference G.S. 32A-2 pursuant to G.S. 32A-3.

Nonstatutory power of attorney that incorporated by reference the statutory definition of real property transactions found in G.S. 32A-2(1) was valid even though it did not contain the warning language required by G.S.32A-1 because, by incorporating the statutory definition, the parties did not automatically bind themselves to use the statutory power of attorney. In re Doerfer, — Bankr. —, 2006 Bankr. LEXIS 3085 (Bankr. M.D.N.C. Nov. 1, 2006).

§§ 32A-4 through 32A-7: Reserved for future codification purposes.

ARTICLE 2.

Durable Power of Attorney.

§ 32A-8. Definition.

A durable power of attorney is a power of attorney by which a principal designates another his attorney-in-fact in writing and the writing contains a statement that it is executed pursuant to the provisions of this Article or the words "This power of attorney shall not be affected by my subsequent incapacity or mental incompetence," or "This power of attorney shall become effective after I become incapacitated or mentally incompetent," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity or mental incompetence. Unless the durable power of attorney provides otherwise, where the grant of power or authority conferred by a durable power of attorney is effective only upon the principal's subsequent incapacity or mental incompetence, any person to whom such writing is presented, in the absence of actual knowledge to the contrary, shall be entitled to rely on an affidavit, executed by the attorney-in-fact and setting forth that such condition exists, as conclusive proof of such incapacity or mental incompetence, subject to the provisions of G.S. 32A-13. (1983, c. 626, s. 1; 1991, c. 173, s. 1.)

Legal Periodicals. — For article on continuing power of attorney, see 5 Campbell L. Rev. 305 (1983).

CASE NOTES

Cited in Estate of Graham v. Morrison, 168 N.C. App. 63, 607 S.E.2d 295, 2005 N.C. App. LEXIS 151 (2005).

§ 32A-9. Registered durable power of attorney not affected by incapacity or mental incompetence.

(a) All acts done by an attorney-in-fact pursuant to a durable power of attorney during any period of incapacity or mental incompetence of the principal have the same effect and inure to the benefit of and bind the principal and his successors in interest as if the principal were not incapacitated or mentally incompetent if the power of attorney has been registered under the provisions of subsection (b).

(b) No power of attorney executed pursuant to the provisions of this Article shall be valid subsequent to the principal's incapacity or mental incompetence unless it is registered in the office of the register of deeds of that county in this State designated in the power of attorney, or if no place of registration is designated, in the office of the register of deeds of the county in which the principal has his legal residence at the time of such registration or, if the principal has no legal residence in this State at the time of registration or the attorney-in-fact is uncertain as to the principal's residence in this State, in some county in the State in which the principal owns property or the county in which one or more of the attorneys-in-fact reside. A power of attorney executed pursuant to the provision of this Article shall be valid even though the time of such registration is subsequent to the incapacity or mental incompetence of the principal.

(c) Any person dealing in good faith with an attorney-in-fact acting under a power of attorney executed under this Article shall be protected to the full extent of the powers conferred upon such attorney-in-fact, and no person so dealing with such attorney-in-fact shall be responsible for the misapplication of any money or other property paid or transferred to such attorney-in-fact. (1983, c. 626, s. 1; 1987, c. 77, s. 2.)

§ 32A-10. Relation of attorney-in-fact to court-appointed fiduciary.

(a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator, guardian of the principal's person or estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions, the attorney-in-fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he were not incapacitated or mentally incompetent.

(b) A principal may nominate, by a durable power of attorney, the conservator, guardian of his estate, or guardian of his person for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in a durable power of attorney except for good cause or disqualification. (1983, c. 626, s. 1.)

§ 32A-11. File with clerk, records, inventories, accounts, fees, and commissions.

(a) Within 30 days after registration of the power of attorney as provided in G.S. 32A-9(b), the attorney-in-fact shall file with the clerk of superior court in the county of such registration a copy of the power of attorney. Every attorney-in-fact acting under a power of attorney under this Article subsequent to the principal's incapacity or mental incompetence shall keep full and accurate records of all transactions in which he acts as agent of the principal and of all property of the principal in his hands and the disposition thereof.

(b) Any provision in the power of attorney waiving or requiring the rendering of inventories and accounts shall govern, and a power of attorney that waives the requirement to file inventories and accounts need not be filed with the clerk of superior court. Otherwise, subsequent to the principal's incapacity or mental incompetence, the attorney-in-fact shall file in the office of the clerk of the superior court of the county in which the power of attorney is filed, inventories of the property of the principal in his hands and annual and final accounts of the receipt and disposition of property of the principal and of other transactions in behalf of the principal. The power of the clerk to enforce the filing and his duties in respect to audit and recording of such accounts shall be the same as those in respect to the accounts of administrators, but the fees and charges of the clerk shall be computed or fixed only with relation to property of the principal required to be shown in the accounts and inventories. The fees and charges of the clerk shall be paid by the attorney-in-fact out of the principal's money or other property and allowed in his accounts. If the powers of an attorney-in-fact shall terminate for any reason whatever, he, or his executors or administrators, shall have the right to have a judicial settlement of a final account by any procedure available to executors, administrators or guardians.

(c) In the event that any power of attorney executed pursuant to the provisions of this Article does not contain the amount of compensation that the attorney-in-fact is entitled to receive or the way such compensation is to be determined, and the principal should thereafter become incapacitated or mentally incompetent, then, subsequent to the principal's incapacity or mental incompetence, the attorney-in-fact shall be entitled to receive reasonable compensation as determined by the clerk of superior court after considering the factors set forth in G.S. 32-54(b). (1983, c. 626, s. 1; 2004-139, s. 3.)

CASE NOTES

Cited in Wilson v. Watson, 136 N.C. App. 500, 524 S.E.2d 812, 2000 N.C. App. LEXIS 51 (2000).

§ 32A-12. Appointment, resignation, removal, and substitutions.

(a) A power of attorney executed under this Article may contain any provisions, not unlawful, relating to the appointment, resignation, removal and substitution of an attorney-in-fact, and to the rights, powers, duties and responsibilities of the attorney-in-fact.

(b) If all attorneys-in-fact named in the instrument or substituted shall die, or cease to exist, or shall become incapable of acting, and all methods for substitution provided in the instrument have been exhausted, such power of attorney shall cease to be effective. Any substitution by a person authorized to make it shall be in writing signed and acknowledged by such person. Notice of every other substitution shall be in writing and acknowledged by the person substituted. No substitution or notice subsequent to the principal's subsequent incapacity or mental incompetence shall be effective until it has been recorded in the office of the register of deeds of the county in which the power of attorney has been recorded. (1983, c. 626, s. 1.)

§ 32A-13. Revocation.

(a) Every power of attorney executed pursuant to the provisions of this Article and registered in an office of the register of deeds in this State as provided in G.S. 32A-9(b) shall be revoked by:

(1) The death of the principal; or

(2) Registration in the office of the register of deeds where the power of attorney has been registered of an instrument of revocation executed and acknowledged by the principal while he is not incapacitated or mentally incompetent, or by the registration in such office of an instrument of revocation executed by any person or corporation who is given such power of revocation in the power of attorney, or by this Article, with proof of service thereof in either case on the attorney-in-fact in the manner prescribed for service of summons in civil actions.

(b) Every power of attorney executed pursuant to the provisions of this Article which has not been registered in an office of the register of deeds in this State shall be revoked by:

(1) The death of the principal;

(2) Any method provided in the power of attorney;

(3) Being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by the principal himself or by another person in his presence and by his direction, while the principal is not incapacitated or mentally incompetent; or

(4) A subsequent written revocatory document executed and acknowledged in the manner provided herein for the execution of durable powers of attorney by the principal while not incapacitated or mentally incompetent and delivered to the attorney-in-fact in person or to his last known address by certified or registered mail, return receipt requested.

(c) As to acts undertaken in good faith reliance upon an affidavit executed by the attorney-in-fact stating that he did not have, at the time of exercise of the power, actual knowledge of the termination of the power by revocation pursuant to the provisions of G.S. 32A-13(b) or by the principal's death, such affidavit is conclusive proof of the nonrevocation or nontermination of the power at that time. This section does not affect any provision in a power of attorney for its termination by the expiration of time or occurrence of an event other than an express revocation. (1983, c. 626, s. 1; 1991, c. 173, s. 2.)

§ 32A-14. Powers of attorney executed under the provisions of G.S. 47-115.1; reference to Chapter 32B; limitations on authority.

(a) A power of attorney executed prior to October 1, 1988, pursuant to G.S. 47-115.1 as it existed prior to October 1, 1983, shall be deemed to be a durable power of attorney as defined in G.S. 32A-8.

(b) A power of attorney under the provisions of this Article may refer to Chapter 32B as the same is set out in Chapter 626 of the 1983 Session Laws.

(c) Notwithstanding any other provision of this Chapter, no attorney-in-fact may exercise powers described in G.S. 36C-6-602.1(a) to alter the designation of beneficiaries to receive property on the settlor's death under the settlor's existing estate plan. This subsection shall not impair the authority of an attorney-in-fact to make gifts of the principal's property, as provided in Articles 2A and 2B of this Chapter. (1983, c. 626, s. 1; 1985, c. 609, s. 5; 1989 (Reg. Sess., 1990), c. 992, s. 1; 2007-106, s. 1.2; 2007-484, s. 39.)

Editor's Note. — Section 47-115.1, referred to in this section, was repealed by Session Laws 1983, c. 626, s. 2.

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 1.2, as amended by Session Laws 2007-484, s. 39, effective October 1, 2007, added "limitations on authority" to the section heading and added subsection (c). See Editor's note for applicability.

ARTICLE 2A.

Authority of Attorney-In-Fact to Make Gifts.

§ 32A-14.1. Gifts under power of attorney.

(a) Except as provided in subsection (b) of this section, if any power of attorney authorizes an attorney-in-fact to do, execute, or perform any act that the principal might or could do or evidences the principal's intent to give the attorney-in-fact full power to handle the principal's affairs or deal with the principal's property, the attorney-in-fact shall have the power and authority to make gifts in any amount of any of the principal's property to any individual or to any organization described in sections 170(c) and 2522(a) of the Internal Revenue Code or corresponding future provisions of federal tax law, or both, in accordance with the principal's personal history of making or joining in the making of lifetime gifts. As used in this subsection, "Internal Revenue Code" means the "Code" as defined in G.S. 105-228.90.

(b) Except as provided in subsection (c) of this section, or unless gifts are expressly authorized by the power of attorney, a power described in subsection (a) of this section may not be exercised by the attorney-in-fact in favor of the attorney-in-fact or the estate, creditors, or the creditors of the estate of the attorney-in-fact.

(c) If the power of attorney described in subsection (a) of this section is conferred upon two or more attorneys-in-fact, it may be exercised by the attorney-in-fact or attorneys-in-fact who are not disqualified by subsection (b) of this section from exercising the power of appointment as if they were the only attorney-in-fact or attorneys-in-fact. If the power of attorney described in subsection (a) of this section is conferred upon one attorney-in-fact, the power of attorney may be exercised by the attorney-in-fact in favor of the attorney-in-fact or the estate, creditors, or the creditors of the estate of the attorney-in-fact pursuant to an order issued by the clerk in accordance with the procedures and provisions of Article 2B of this Chapter.

(d) Subsection (a) of this section shall not in any way impair the right, power, or ability of any principal, by express terms in the power of attorney, to authorize or limit the authority of any attorney-in-fact to make gifts of the principal's property.

(e) An attorney-in-fact expressly authorized by this section to make gifts of the principal's property may elect to request that the clerk of the superior court issue an order approving a gift or gifts of the property of the principal.

(f) This section shall apply to all powers of attorney executed prior to, on, or after October 1, 1995. (1995, c. 331, s. 5; 1999-456, s. 2; 2001-413, s. 5.2.)

Editor's Note. — Session Laws 1995, c. 331, which enacted this article, in s. 6 provides that this act is not intended to alter or otherwise affect the law of this State with regard to presumptions of fraud or fiduciary responsibilities.

Session Laws 1995, c. 331, which enacted this article, in s. 7, as amended by Session Laws 1995, c. 509, s. 135.2(n), provides that this article is intended as a codification of the existing North Carolina common law.

CASE NOTES

Illustrative Cases. — Plaintiff/niece was entitled to summary judgment as a matter of law where the defendant/step-daughter, purporting to act under the power of attorney, deeded the decedent's real property to herself and acted beyond the scope of her authority as his attorney in fact. Hutchins v. Dowell, 138 N.C. App. 673, 531 S.E.2d 900, 2000 N.C. App. LEXIS 781 (2000).

Trial court erred in granting partial summary judgment to plaintiffs pursuant to G.S. 1A-1, N.C. R. Civ. P. 56(c), and in voiding defendants' deeds to land; while it was true that a power of attorney granted to one of the defendants, a decedent's niece, did not expressly grant her the right to make gifts of real property on behalf of the decedent, and the deeds would be void pursuant to G.S. 32A-14.1(b) if the conveyances were determined to be gifts, genuine issues of material fact existed on whether the conveyances were gifts or were transferred for consideration in the form of services to the decedent as recited in the deeds, as the trial court failed to consider those issues during the summary judgment hearing. Estate of Graham v. Morrison, 156 N.C. App. 154, 576 S.E.2d 355, 2003 N.C. App. LEXIS 81 (2003).

Cited in Honeycutt v. F & M Bank, 126 N.C. App. 816, 487 S.E.2d 166 (1997).

§§ 32A-14.2 through 32A-14.9: Reserved for future codification purposes.

ARTICLE 2B.

Gifts Authorized by Court Order.

§ 32A-14.10. Gifts authorized by court order.

An attorney-in-fact, acting under a power of attorney that does not contain the grant of power set out in G.S. 32A-14.1 and does not expressly authorize gifts of the principal's property, may initiate a special proceeding before the clerk of superior court in accordance with the procedures of Article 33 of Chapter 1 of the General Statutes for authority to make gifts of the principal's property to the extent not inconsistent with the express terms of the power of attorney. The principal and any guardian ad litem appointed for the principal are the defendants in a proceeding pursuant to this Article. The clerk may issue an order setting forth the amounts, frequency, recipients, and proportions of any gifts of the principal's property after considering all relevant factors, including, but not limited to: (i) the size of the principal's estate; (ii) the principal's foreseeable obligations; (iii) the principal's foreseeable maintenance needs; (iv) the principal's personal history of making or joining in the making of lifetime gifts; (v) the principal's estate plan; and (vi) the tax effects of the gifts. If there is no appeal from the decision and order of the clerk within the time prescribed by law, the clerk's order shall be submitted to the judge of the superior court and approved by the court before the order becomes effective. (1995, c. 331, s. 5.)

Editor's Note. — Session Laws 1995, c. 331, which enacted this article, in s. 6 provides that this act is not intended to alter or otherwise affect the law of this State regarding presumptions of fraud or fiduciary responsibilities.

CASE NOTES

Stated in Estate of Graham v. Morrison, 168 N.C. App. 63, 607 S.E.2d 295, 2005 N.C. App. LEXIS 151 (2005).

§ 32A-14.11. Appeal; stay effected by appeal.

Any party in interest may appeal from the decision of the clerk to the judge of the superior court. The procedure for appeal is governed by Article 27A of Chapter 1 of the General Statutes. An appeal taken from the decision of the clerk stays the decision and order of the clerk until the cause is heard and determined by the judge upon the appeal taken. (1995, c. 331, s. 5; 1999-216, s. 7.)

Editor's Note. — Session Laws 1995, c. 331, which enacted this article, in s. 6 provides that this act is not intended to alter or otherwise affect the law of this State with regard to presumptions of fraud of fiduciary responsibilities.

§ 32A-14.12. Costs and fees.

All costs and fees arising in connection with a proceeding under this Article shall be assessed the same as costs and fees are assessed in special proceedings governed by Article 33 of Chapter 1 of the General Statutes. (1995, c. 331, s. 5.)

Editor's Note. — Session Laws 1995, c. 331, which enacted this article, in s. 6 provides that this act is not intended to alter or otherwise affect the law of this State with regard to presumptions of fraud or fiduciary responsibilities.

ARTICLE 3.

Health Care Powers of Attorney.

§ 32A-15. General purpose of this Article.

(a) The General Assembly recognizes as a matter of public policy the fundamental right of an individual to control the decisions relating to his or her medical care, and that this right may be exercised on behalf of the individual by an agent chosen by the individual.

(b) The purpose of this Article is to establish an additional, nonexclusive method for an individual to exercise his or her right to give, withhold, or withdraw consent to medical treatment, including mental health treatment, when the individual lacks sufficient understanding or capacity to make or communicate health care decisions.

(c) This Article is intended and shall be construed to be consistent with the provisions of Article 23 of Chapter 90 of the General Statutes provided that in the event of a conflict between the provisions of this Article and Article 23 of Chapter 90, the provisions of Article 23 of Chapter 90 control. No conflict between these Chapters exists when either a health care power of attorney or a declaration provides that the declaration is subject to decisions of a health care agent. If no declaration has been executed by the principal as provided in G.S. 90-321 that expressly covers the principal's present condition and if the health care agent has been given the specific authority in a health care power of attorney to authorize the withholding or discontinuing of life-prolonging measures when the principal is in such condition, the measures may be withheld or discontinued as provided in the health care power of attorney upon the direction and under the supervision of the attending physician, as G.S. 90-322 shall not apply in such case. Nothing in this Article shall be construed to authorize any affirmative or deliberate act or omission to end life other than to permit the natural process of dying.

(d) This Article is intended and shall be construed to be consistent with the provisions of Part 3 of Article 16 of Chapter 130A of the General Statutes. In the event of a conflict between the provisions of this Article and Part 3 of Article 16 of Chapter 130A, the provisions of Part 3 of Article 16 of Chapter 130A control. (1991, c. 639, s. 1; 1993, c. 523, s. 1; 1998-198, s. 1; 1998-217, s. 53; 2007-502, s. 1.)

Editor's Note. — Session Laws 1993, c. 523, which amended this section, in s. 4 provides that powers of attorney made before October 1, 1993, remain in full force and effect.

Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Effect of Amendments. — Session Laws 2007-502, s. 1, effective October 1, 2007, rewrote subsection (c).

Legal Periodicals. — For survey on living wills, see 70 N.C.L. Rev. 2108 (1992).

For comment on the standard of mental capacity in North Carolina for legal transactions of the elderly, see 32 Wake Forest L. Rev. 563 (1997).

Limiting a Surrogate's Authority to Terminate Life-Support for An Incompetent Adult, see 79 N.C.L. Rev. 1815 (2001).

For comment, "Compensating Post-Conception Prenatal Medical Malpractice While Respecting Life: A Recommendation to North Carolina Legislators," see 29 Campbell L. Rev. 761 (2007).

§ 32A-16. Definitions.

The following definitions apply in this Article:

(1) Disposition of remains. — The decision to bury or cremate human remains, as human remains are defined in G.S. 90-210.121, and, subject to G.S. 32A-19(b), arrangements relating to burial or cremation.

(1a) Health care. — Any care, treatment, service, or procedure to maintain, diagnose, treat, or provide for the principal's physical or mental health or personal care and comfort including life-prolonging measures. "Health care" includes mental health treatment as defined in subdivision (8) of this section.

(2) Health care agent. — The person appointed as a health care attorney-in-fact.

(3) Health care power of attorney. — A written instrument that substantially meets the requirements of this Article, that is signed in the presence of two qualified witnesses, and acknowledged before a notary public, pursuant to which an attorney-in-fact or agent is appointed to act for the principal in matters relating to the health care of the principal. The notary who takes the acknowledgement may but is not required to be a paid employee of the attending physician or mental health treatment provider, a paid employee of a health facility in which the principal is a patient, or a paid employee of a nursing home or any adult care home in which the principal resides.

(4) Life-prolonging measures. — Medical procedures or interventions which in the judgment of the attending physician would serve only to postpone artificially the moment of death by sustaining, restoring, or supplanting a vital function, including mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and similar forms of treatment. Life-prolonging measures do not include care necessary to provide comfort or to alleviate pain.

(5) Principal. — The person making the health care power of attorney.

(6) Qualified witness. — A witness in whose presence the principal has executed the health care power of attorney, who believes the principal to be of sound mind, and who states that he or she (i) is not related within the third degree to the principal nor to the principal's spouse, (ii) does not know nor have a reasonable expectation that he or she would be entitled to any portion of the estate of the principal upon the principal's death under any existing will or codicil of the principal or under the Intestate Succession Act as it then provides, (iii) is not the attending physician or mental health treatment provider of the principal, nor a licensed health care provider who is a paid employee of the attending physician or mental health treatment provider, nor a paid employee of a health facility in which the principal is a patient, nor a paid employee of a nursing home or any adult care home in which the principal resides, and (iv) does not have a claim against any portion of the estate of the principal at the time of the principal's execution of the health care power of attorney.

(7) Advance instruction for mental health treatment or advance instruction. — As defined in G.S. 122C-72(1).

(8) Mental health treatment. — The process of providing for the physical, emotional, psychological, and social needs of the principal for the

principal's mental illness. "Mental health treatment" includes electroconvulsive treatment, treatment of mental illness with psychotropic medication, and admission to and retention in a facility for care or treatment of mental illness. (1991, c. 639, s. 1; 1998-198, s. 1; 1998-217, s. 53; 2005-351, s. 1; 2006-226, s. 32; 2007-502, s. 2.)

Editor's Note. — Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Effect of Amendments. — Session Laws 2005-351, s. 1, as amended by Session Laws 2006-226, s. 32, effective October 1, 2005, and applicable to powers of attorney created on, before, or after that date, added present subdivision (1) and redesignated former subdivision (1) as subdivision (1a).

Session Laws 2007-502, s. 2, effective October 1, 2007, rewrote the section.

§ 32A-17. Who may make a health care power of attorney.

Any person having understanding and capacity to make and communicate health care decisions, who is 18 years of age or older, may make a health care power of attorney. (1991, c. 639, s. 1.)

Legal Periodicals. — For comment on the standard of mental capacity in North Carolina for legal transactions of the elderly, see 32 Wake Forest L. Rev. 563 (1997).

§ 32A-18. Who may act as a health care attorney-in-fact.

Any competent person who is not engaged in providing health care to the principal for remuneration, and who is 18 years of age or older, may act as a health care agent. (1991, c. 639, s. 1.)

§ 32A-19. Extent of authority; limitations of authority.

(a) A principal, pursuant to a health care power of attorney, may grant to the health care agent full power and authority to make health care decisions to the same extent that the principal could make those decisions for himself or herself if he or she had capacity to make and communicate health care decisions, including without limitation, the power to authorize withholding or discontinuing life-prolonging measures and the power to authorize the giving or withholding of mental health treatment. A health care power of attorney may also contain or incorporate by reference any lawful guidelines or directions relating to the health care of the principal as the principal deems appropriate.

(a1) A health care power of attorney may incorporate or be combined with an advance instruction for mental health treatment prepared pursuant to Part 2 of Article 3 of Chapter 122C of the General Statutes. A health care agent's decisions about mental health treatment shall be consistent with any statements the principal has expressed in an advance instruction for mental health treatment if one so exists, and if none exists, shall be consistent with what the agent believes in good faith to be the manner in which the principal would act if the principal did not lack capacity to make or communicate health care decisions. A health care agent is not subject to criminal prosecution, civil liability, or professional disciplinary action for any action taken in good faith pursuant to an advance instruction for mental health treatment.

(b) A health care power of attorney may authorize the health care agent to exercise any and all rights the principal may have with respect to anatomical gifts, the authorization of any autopsy, and the disposition of remains; provided this authority is limited to incurring reasonable costs related to exercising these powers, and a health care power of attorney does not give the health care agent general authority over a principal's property or financial affairs.

(c) A health care power of attorney may contain, and the authority of the health care agent shall be subject to, the specific limitations or restrictions as the principal deems appropriate.

(d) The powers and authority granted to the health care agent pursuant to a health care power of attorney shall be limited to the matters addressed in it, and, except as necessary to exercise such powers and authority relating to health care, shall not confer any power or authority with respect to the property or financial affairs of the principal.

(e) This Article shall not be construed to invalidate a power of attorney that authorizes an agent to make health care decisions for the principal, which was executed prior to October 1, 1991.

(f) A health care power of attorney does not limit any authority in Article 5 of Chapter 122C of the General Statutes either to take a person into custody or to admit, retain, or treat a person in a facility. (1991, c. 639, s. 1; 1998-198, s. 1; 1998-217, s. 53; 2007-502, s. 3.)

Editor's Note. — This section was amended by Session Laws 1998-198, s. 1, in the coded bill drafting format provided by G.S. 120-20.1. The subsection designations have been set out above at the direction of the Revisor of Statutes.

Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Effect of Amendments. — Session Laws 2007-502, s. 3, effective October 1, 2007, in subsection (a), deleted "understanding and" following "if he or she had" and substituted "life-prolonging measures" for "life-sustaining procedures"; deleted "sufficient understanding or" following "did not lack" in subsection (a1); inserted "provided this authority is limited to incurring reasonable costs related to exercising these powers, and a health care power of attorney does not give the health care agent general authority over a principal's property or financial affairs" at the end of subsection (b).

§ 32A-20. Effectiveness and duration; revocation.

(a) A health care power of attorney shall become effective when and if the physician or physicians or, in the case of mental health treatment, physician or eligible psychologist as defined in G.S. 122C-3(13d), designated by the principal determine in writing that the principal lacks sufficient understanding or capacity to make or communicate decisions relating to the health care of the principal, and shall continue in effect during the incapacity of the principal. The determination shall be made by the principal's attending physician or eligible psychologist if the physician or physicians or eligible psychologist designated by the principal is unavailable or is otherwise unable or unwilling to make this determination or if the principal failed to designate a physician or physicians or eligible psychologist to make this determination. A health care power of attorney may include a provision that, if the principal does not designate a physician for reasons based on his religious or moral beliefs as specified in the health care power of attorney, a person designated by the principal in the health care power of attorney may certify in writing, acknowledged before a notary public, that the principal lacks sufficient understanding or capacity to make or communicate decisions relating to his health care. The person so designated must be a competent person 18 years of age or older, not engaged in providing health care to the principal for remuneration, and must be a person other than the health care agent.

(b) Except for purposes of exercising authority granted by a health care power of attorney with respect to anatomical gifts, autopsy, or disposition of remains as provided in G.S. 32A-19(b), a health care power of attorney is revoked by the death of the principal. A health care power of attorney may be revoked by the principal at any time, so long as the principal is capable of making and communicating health care decisions. The principal may exercise this right of revocation by executing and acknowledging an instrument of revocation, by executing and acknowledging a subsequent health care power of attorney, or in any other manner by which the principal is able to communicate an intent to revoke. This revocation becomes effective only upon communication by the principal to each health care agent named in the revoked health care power of attorney and to the principal's attending physician or eligible psychologist.

(c) The authority of a health care agent who is the spouse of the principal shall be revoked upon the entry by a court of a decree of divorce or separation between the principal and the health care agent; provided that if the health care power of attorney designates a successor health care agent, the successor shall serve as the health care agent, and the health care power of attorney shall not be revoked. (1991, c. 639, s. 1; 1993, c. 523, s. 2; 1998-198, s. 1; 1998-217, s. 53; 2005-351, s. 2; 2006-226, s. 32.)

Editor's Note. — Session Laws 1993, c. 523, which amended this section, in s. 4 provides that powers of attorney made before October 1, 1993 remain in full force and effect.

Effect of Amendments. — Session Laws 2005-351, s. 2, as amended by Session Laws 2006-226, s. 32, effective October 1, 2005, and applicable to powers of attorney created on, before, or after that date, added the exception at the beginning of subsection (b).

Legal Periodicals. — For comment on the standard of mental capacity in North Carolina for legal transactions of the elderly, see 32 Wake Forest L. Rev. 563 (1997).

§ 32A-21. Appointment, resignation, removal, and substitution.

(a) A health care power of attorney may contain provisions relating to the appointment, resignation, removal and substitution of the health care agent.

(b) If all health care agents named in the instrument or substituted, die or for any reason fail or refuse to act, and all methods of substitution have been exhausted, the health care power of attorney shall cease to be effective. (1991, c. 639, s. 1.)

§ 32A-22. Relation of the health care agent to a court-appointed fiduciary and to a general attorney-in-fact.

(a) If, following the execution of a health care power of attorney, a court of competent jurisdiction appoints a guardian of the person of the principal, or a general guardian with powers over the person of the principal, the guardian may petition the court, after giving notice to the health care agent, to suspend the authority of the health care agent during the guardianship. The court may suspend the authority of the health care agent for good cause shown, provided that the court's order must direct whether the guardian shall act consistently with the health care power of attorney or whether and in what respect the guardian may deviate from it. Any order suspending the authority of the health care agent must set forth the court's findings of fact and conclusions of law. The guardian shall act consistently with G.S. 35A-1201(a)(5). A health care provider shall be fully protected from liability in relying on a health care power of attorney until given actual notice of the court's order suspending the authority of the health care agent.

(b) A principal may nominate, by a health care power of attorney, the guardian of the person of the principal if a guardianship proceeding is thereafter commenced. The court shall make its appointment in accordance with the principal's most recent nomination in an unrevoked health care power of attorney, except for good cause shown.

(c) The execution of a health care power of attorney shall not revoke, restrict or otherwise affect any nonhealth care powers granted by the principal to an attorney-in-fact pursuant to a general power of attorney; provided that the powers granted to the health care agent with respect to health care matters shall be superior to any similar powers granted by the principal to an attorney-in-fact under a general power of attorney.

(d) A health care power of attorney may be combined with or incorporated into a general power of attorney which is executed in accordance with the requirements of this Article. (1991, c. 639, s. 1; 1998-198, s. 1; 1998-217, s. 53; 2007-502, s. 4.)

Editor's Note. — Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Effect of Amendments. — Session Laws 2007-502, s. 4, effective October 1, 2007, rewrote subsection (a).

§ 32A-23. Article 2, Chapter 32A, not applicable.

The provisions of Article 2 of this Chapter shall not be applicable to a health care power of attorney executed pursuant to this Article. (1991, c. 639, s. 1.)

§ 32A-24. Reliance on health care power of attorney; defense.

(a) Any physician or other health care provider involved in the medical care of the principal may rely upon the authority of the health care agent contained in a signed and acknowledged health care power of attorney in the absence of actual knowledge of revocation of the health care power of attorney. The physician or health care provider may rely upon a copy of the health care power of attorney obtained from the Advance Health Care Directive Registry maintained by the Secretary of State pursuant to Article 21 of Chapter 130A of the General Statutes to the same extent that the individual may rely upon the original document.

(b) All health care decisions made by a health care agent pursuant to a health care power of attorney during any period following a determination that the principal lacks understanding or capacity to make or communicate health care decisions shall have the same effect as if the principal were not incapacitated and were present and acting on his or her own behalf. Any health care provider relying in good faith on the authority of a health care agent shall be protected to the full extent of the power conferred upon the health care agent, and no person so relying on the authority of the health care agent shall be liable, by reason of his reliance, for actions taken pursuant to a decision of the health care agent.

(c) The withholding or withdrawal of life-prolonging measures by or under the orders of a physician pursuant to the authorization of a health care agent shall not be considered suicide or the cause of death for any civil or criminal purpose nor shall it be considered unprofessional conduct or a lack of professional competence. Any person, institution or facility, including without limitation the health care agent and the attending physician, against whom criminal or civil liability is asserted because of conduct described in this section, may interpose this section as a defense.

(d) The protections of this section extend to any valid health care power of attorney, including a document valid under G.S. 32A-27; these protections are not limited to health care powers of attorney prepared in accordance with the statutory form provided in G.S. 32A-25.1, or to health care powers of attorney filed with the Advance Health Care Directive Registry maintained by the Secretary of State. A health care provider may rely in good faith on an oral or written statement by legal counsel that a document appears to meet applicable statutory requirements for a health care power of attorney. These protections also extend to a document executed in another jurisdiction that is valid as a health care power of attorney under G.S. 32A-27. A health care provider shall have no liability for acting in accordance with a revoked health care power of attorney unless that provider has actual notice of the revocation. (1991, c. 639, s. 1; 2001-455, s. 3; 2001-513, s. 30(b); 2007-502, ss. 5(a), (b).)

Editor's Note. — Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Effect of Amendments. — Session Laws 2007-502, ss. 5(a) and 5(b), effective October 1, 2007, substituted "life-prolonging measures" for "life-sustaining procedures" in subsection (c); added subsection (d).

§ **32A-25:** Repealed by Session Laws 2007-502, s. 6(a), effective October 1, 2007.

Cross References. — As to current statutory form health care power of attorney, see G.S. 32A-25.1.

Editor's Note. — Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

§ 32A-25.1. Statutory form health care power of attorney.

(a) The use of the following form in the creation of a health care power of attorney is lawful and, when used, it shall meet the requirements of and be construed in accordance with the provisions of this Article:

HEALTH CARE POWER OF ATTORNEY

NOTE: YOU SHOULD USE THIS DOCUMENT TO NAME A PERSON AS YOUR HEALTH CARE AGENT IF YOU ARE COMFORTABLE GIVING THAT PERSON BROAD AND SWEEPING POWERS TO MAKE HEALTH CARE DECISIONS FOR YOU. THERE IS NO LEGAL REQUIREMENT THAT ANYONE EXECUTE A HEALTH CARE POWER OF ATTORNEY.

EXPLANATION: *You have the right to name someone to make health care decisions for you when you cannot make or communicate those decisions. This form may be used to create a health care power of attorney, and meets the requirements of North Carolina law. However, you are not required to use this form, and North Carolina law allows the use of other forms that meet certain requirements. If you prepare your own health care power of attorney, you should be very careful to make sure it is consistent with North Carolina law.*

This document gives the person you designate as your health care agent ***broad powers*** *to make health care decisions for you when you cannot make the decision yourself or cannot communicate your decision to other people. You should discuss your wishes concerning life-prolonging measures, mental health treatment, and other health care decisions with your health care agent. Except to the extent that you express specific limitations or restrictions in this form, your health care agent may make any health care decision you could make yourself.*

This form does not impose a duty on your health care agent to exercise granted powers, but when a power is exercised, your health care agent will be obligated to use due care to act in your best interests and in accordance with this document.

This Health Care Power of Attorney form is intended to be valid in any jurisdiction in which it is presented, but places outside North Carolina may impose requirements that this form does not meet.

If you want to use this form, you must complete it, sign it, and have your signature witnessed by two qualified witnesses and proved by a notary public. Follow the instructions about which choices you can initial very carefully. ***Do not sign this form until*** *two witnesses and a notary public are present to watch you sign it. You then should give a copy to your health care agent and to any alternates you name. You should consider filing it with the Advance Health Care Directive Registry maintained by the North Carolina Secretary of State:* http://www.nclifelinks.org/ahcdr/

1. Designation of Health Care Agent.

I, ______________, being of sound mind, hereby appoint the following person(s) to serve as my health care agent(s) to act for me and in my name (in any way I could act in person) to make health care decisions for me as authorized in this document. My designated health care agent(s) shall serve alone, in the order named.

A. Name: ______________________	Home Telephone: ________________
Home Address: _________________	Work Telephone: ________________
______________________________	Cellular Telephone: _____________
B. Name: ______________________	Home Telephone: ________________
Home Address: _________________	Work Telephone: ________________
______________________________	Cellular Telephone: _____________
C. Name: ______________________	Home Telephone: ________________
Home Address: _________________	Work Telephone: ________________
______________________________	Cellular Telephone: _____________

Any successor health care agent designated shall be vested with the same power and duties as if originally named as my health care agent, and shall serve any time his or her predecessor is not reasonably available or is unwilling or unable to serve in that capacity.

2. Effectiveness of Appointment.
My designation of a health care agent expires only when I revoke it. Absent revocation, the authority granted in this document shall become effective when and if one of the physician(s) listed below determines that I lack capacity to make or communicate decisions relating to my health care, and will continue in effect during that incapacity, or until my death, except if I authorize my health care agent to exercise my rights with respect to anatomical gifts, autopsy, or disposition of my remains, this authority will continue after my death to the extent necessary to exercise that authority.

1. ________________ *(Physician)*
2. ________________ *(Physician)*

If I have not designated a physician, or no physician(s) named above is reasonably available, the determination that I lack capacity to make or communicate decisions relating to my health care shall be made by my attending physician.

3. Revocation.
Any time while I am competent, I may revoke this power of attorney in a writing I sign or by communicating my intent to revoke, in any clear and consistent manner, to my health care agent or my health care provider.

4. General Statement of Authority Granted.
Subject to any restrictions set forth in Section 6 below, I grant to my health care agent full power and authority to make and carry out all health care decisions for me. These decisions include, but are not limited to:

A. Requesting, reviewing, and receiving any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records, and to consent to the disclosure of this information.
B. Employing or discharging my health care providers.
C. Consenting to and authorizing my admission to and discharge from a hospital, nursing or convalescent home, hospice, long-term care facility, or other health care facility.
D. Consenting to and authorizing my admission to and retention in a facility for the care or treatment of mental illness.
E. Consenting to and authorizing the administration of medications for mental health treatment and electroconvulsive treatment (ECT) commonly referred to as "shock treatment."
F. Giving consent for, withdrawing consent for, or withholding consent for, X-ray, anesthesia, medication, surgery, and all other diagnostic and treatment procedures ordered by or under the authorization of a licensed physician, dentist, podiatrist, or other health care provider. This authorization specifically includes the power to consent to measures for relief of pain.
G. Authorizing the withholding or withdrawal of life-prolonging measures.
H. Providing my medical information at the request of any individual acting as my attorney-in-fact under a durable power of attorney or as a Trustee or successor Trustee under any Trust Agreement of which I am a Grantor or Trustee, or at the request of any other individual whom my health care agent believes should have such information. I

desire that such information be provided whenever it would expedite the prompt and proper handling of my affairs or the affairs of any person or entity for which I have some responsibility. In addition, I authorize my health care agent to take any and all legal steps necessary to ensure compliance with my instructions providing access to my protected health information. Such steps shall include resorting to any and all legal procedures in and out of courts as may be necessary to enforce my rights under the law and shall include attempting to recover attorneys' fees against anyone who does not comply with this health care power of attorney.

I. To the extent I have not already made valid and enforceable arrangements during my lifetime that have not been revoked, exercising any right I may have to authorize an autopsy or direct the disposition of my remains.

J. Taking any lawful actions that may be necessary to carry out these decisions, including, but not limited to: (i) signing, executing, delivering, and acknowledging any agreement, release, authorization, or other document that may be necessary, desirable, convenient, or proper in order to exercise and carry out any of these powers; (ii) granting releases of liability to medical providers or others; and (iii) incurring reasonable costs on my behalf related to exercising these powers, provided that this health care power of attorney shall not give my health care agent general authority over my property or financial affairs.

5. Special Provisions and Limitations.

(Notice: The authority granted in this document is intended to be as broad as possible so that your health care agent will have authority to make any decisions you could make to obtain or terminate any type of health care treatment or service. If you wish to limit the scope of your health care agent's powers, you may do so in this section. If none of the following are initialed, there will be no special limitations on your agent's authority.)

A. Limitations about Artificial Nutrition or Hydration: In exercising the authority to make health care decisions on my behalf, my health care agent:

________________ shall NOT have the authority to withhold artificial nutrition (such as through tubes) OR may exercise that authority only in accordance with the following special provisions:

(Initial)

____

____

________________ shall NOT have the authority to withhold artificial hydration (such as through tubes) OR may exercise that authority only in accordance with the following special provisions:

(Initial)

____

____

NOTE: If you initial either block but do not insert any special provisions, your health care agent shall have NO AUTHORITY to withhold artificial nutrition or hydration. ____________________

________________ B. Limitations Concerning Health Care Decisions. In exercising the authority to make health care decisions on my behalf, the authority of my health care agent is subject to the following special provisions: (Here you

(Initial)

may include any specific provisions you deem appropriate such as: your own definition of when life-prolonging measures should be withheld or discontinued, or instructions to refuse any specific types of treatment that are inconsistent with your religious beliefs, or are unacceptable to you for any other reason.)

____

____

NOTE: DO NOT initial unless you insert a limitation.

____
(Initial)

C. Limitations Concerning Mental Health Decisions. In exercising the authority to make mental health decisions on my behalf, the authority of my health care agent is subject to the following special provisions: (Here you may include any specific provisions you deem appropriate such as: limiting the grant of authority to make only mental health treatment decisions, your own instructions regarding the administration or withholding of psychotropic medications and electroconvulsive treatment (ECT), instructions regarding your admission to and retention in a health care facility for mental health treatment, or instructions to refuse any specific types of treatment that are unacceptable to you.)

____

____

NOTE: DO NOT initial unless you insert a limitation.

____
(Initial)

D. Advance Instruction for Mental Health Treatment. (Notice: This health care power of attorney may incorporate or be combined with an advance instruction for mental health treatment, executed in accordance with Part 2 of Article 3 of Chapter 122C of the General Statutes, which you may use to state your instructions regarding mental health treatment in the event you lack capacity to make or communicate mental health treatment decisions. Because your health care agent's decisions must be consistent with any statements you have expressed in an advance instruction, you should indicate here whether you have executed an advance instruction for mental health treatment):

____

____

NOTE: DO NOT initial unless you insert a limitation.

____
(Initial)

E. Autopsy and Disposition of Remains. In exercising the authority to make decisions regarding autopsy and disposition of remains on my behalf, the authority of my health care agent is subject to the following special provisions and limitations. (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority and the scope of authority, or instructions regarding burial or cremation):

____

____

NOTE: DO NOT initial unless you insert a limitation.

Organ Donation.
To the extent I have not already made valid and enforceable arrangements during my lifetime that have not been revoked, my health care agent may exercise any right I may have to:

________________ donate any needed organs or parts; or
(Initial)

________________ donate only the following organs or parts:
(Initial)

____

NOTE: DO NOT INITIAL BOTH BLOCKS ABOVE.

________________ donate my body for anatomical study if needed.
(Initial)

________________ In exercising the authority to make donations, my health care agent is subject to the following special provisions and limitations: (Here you may include any specific limitations you deem appropriate such as: limiting the grant of authority and the scope of authority, or instructions regarding gifts of the body or body parts.)
(Initial)

____
____
____

NOTE: DO NOT initial unless you insert a limitation.

NOTE: NO AUTHORITY FOR ORGAN DONATION IS GRANTED IN THIS INSTRUMENT WITHOUT YOUR INITIALS.

7. Guardianship Provision.
If it becomes necessary for a court to appoint a guardian of my person, I nominate the persons designated in Section 1, in the order named, to be the guardian of my person, to serve without bond or security. The guardian shall act consistently with G.S. 35A-1201(a)(5).

8. Reliance of Third Parties on Health Care Agent.

A. No person who relies in good faith upon the authority of or any representations by my health care agent shall be liable to me, my estate, my heirs, successors, assigns, or personal representatives, for actions or omissions in reliance on that authority or those representations.

B. The powers conferred on my health care agent by this document may be exercised by my health care agent alone, and my health care agent's signature or action taken under the authority granted in this document may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. All acts performed in good faith by my health care agent pursuant to this power of attorney are done with my consent and shall have the same validity and effect as if I were present and exercised the powers myself, and shall inure to the benefit of and bind me, my estate, my heirs, successors, assigns, and personal representatives. The authority of my health care agent pursuant to this power of attorney shall be superior to and binding upon my family, relatives, friends, and others.

9. Miscellaneous Provisions.

A. Revocation of Prior Powers of Attorney. I revoke any prior health care power of attorney. The preceding sentence is not intended to revoke any general powers of attorney, some of the provisions of which may relate to health care; however, this power of attorney shall take precedence over any health care provisions in any valid general power of attorney I have not revoked.

B. Jurisdiction, Severability, and Durability. This Health Care Power of Attorney is intended to be valid in any jurisdiction in which it is presented. The powers delegated under this power of attorney are severable, so that the invalidity of one or more powers shall not affect any others. This power of attorney shall not be affected or revoked by my incapacity or mental incompetence.

C. Health Care Agent Not Liable. My health care agent and my health care agent's estate, heirs, successors, and assigns are hereby released and forever discharged by me, my estate, my heirs, successors, assigns, and personal representatives from all liability and from all claims or demands of all kinds arising out of my health care agent's acts or omissions, except for my health care agent's willful misconduct or gross negligence.

D. No Civil or Criminal Liability. No act or omission of my health care agent, or of any other person, entity, institution, or facility acting in good faith in reliance on the authority of my health care agent pursuant to this Health Care Power of Attorney shall be considered suicide, nor the cause of my death for any civil or criminal purposes, nor shall it be considered unprofessional conduct or as lack of professional competence. Any person, entity, institution, or facility against whom criminal or civil liability is asserted because of conduct authorized by this Health Care Power of Attorney may interpose this document as a defense.

E. Reimbursement. My health care agent shall be entitled to reimbursement for all reasonable expenses incurred as a result of carrying out any provision of this directive.

By signing here, I indicate that I am mentally alert and competent, fully informed as to the contents of this document, and understand the full import of this grant of powers to my health care agent.

This the ______ day of ________________, 20______.

________________________ (SEAL)

I hereby state that the principal, ________________, being of sound mind, signed (or directed another to sign on the principal's behalf) the foregoing health care power of attorney in my presence, and that I am not related to the principal by blood or marriage, and I would not be entitled to any portion of the estate of the principal under any existing will or codicil of the principal or as an heir under the Intestate Succession Act, if the principal died on this date without a will. I also state that I am not the principal's attending physician, nor a licensed health care provider or mental health treatment provider who is (1) an employee of the principal's attending physician or mental health treatment provider, (2) an employee of the health facility in which the principal is a patient, or (3) an employee of a nursing home or any adult care home where the principal resides. I further state that I do not have any claim against the principal or the estate of the principal.

Date: ____________________ Witness: ____________________________

Date: ____________________ Witness: ____________________________

____________________________ COUNTY, ____________________ STATE

Sworn to (or affirmed) and subscribed before me this day by ______________

(type/print name of signer)

____
(type/print name of witness)

____
(type/print name of witness)

Date: ____________________ ______________________________
(Official Seal) *Signature of Notary Public*

__________________, Notary Public
Printed or typed name
My commission expires: ________

(b) Use of the statutory form prescribed in this section is an optional and nonexclusive method for creating a health care power of attorney and does not affect the use of other forms of health care powers of attorney, including previous statutory forms. (1991, c. 639, s. 1; 1993, c. 523, s. 3; 1998-198, s. 1; 1998-217, s. 53; 2005-351, s. 3; 2006-226, s. 32; 2007-502, s. 6(b).)

Editor's Note. — Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Session Laws 2007-502, s. 20, made this section effective October 1, 2007.

§ 32A-26. Health care power of attorney and declaration of desire for natural death.

A health care power of attorney meeting the requirements of this Article may be combined with or incorporated into a Declaration of A Desire For A Natural Death which meets the requirements of Article 23 of Chapter 90 of the General Statutes. (1991, c. 639, s. 1.)

§ 32A-27. Health care powers of attorney executed in other jurisdictions.

Notwithstanding G.S. 32A-16(3), a health care power of attorney or similar document executed in a jurisdiction other than North Carolina shall be valid as a health care power of attorney in this State if it appears to have been executed in accordance with the applicable requirements of that jurisdiction or of this State. (2007-502, s. 7.)

Editor's Note. — Session Laws 2007-502, s. 20, made this section effective October 1, 2007.

Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

ARTICLE 4.

Consent to Health Care for Minor.

§ 32A-28. Purpose.

(a) The General Assembly recognizes as a matter of public policy the fundamental right of a parent to delegate decisions relating to health care for the parent's minor child where the parent is unavailable for a period of time by reason of travel or otherwise.

(b) The purpose of this Article is to establish a nonexclusive method for a parent to authorize in the parent's absence consent to health care for the parent's minor child. This Article is not intended to be in derogation of the common law or of Article 1A of Chapter 90 of the General Statutes. (1993, c. 150, s. 1.)

§ 32A-29. Definitions.

As used in this Article, unless the context clearly requires otherwise, the term:

(1) "Agent" means the person authorized pursuant to this Article to consent to and authorize health care for a minor child.

(2) "Authorization to consent to health care for minor" means a written instrument, signed by the custodial parent and acknowledged before a notary public, pursuant to which the custodial parent authorizes an agent to authorize and consent to health care for the minor child of the custodial parent, and which substantially meets the requirements of this Article.

(3) "Custodial parent" means a parent having sole or joint legal custody of that parent's minor child.

(4) "Health care" means any care, treatment, service or procedure to maintain, diagnose, treat, or provide for a minor child's physical or mental or personal care and comfort, including life sustaining procedures and dental care.

(5) "Life sustaining procedures" are those forms of care or treatment which only serve to artificially prolong life and may include mechan-

ical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and other forms of treatment which sustain, restore, or supplant vital bodily functions, but do not include care necessary to provide comfort or to alleviate pain.

(6) "Minor or minor child" means an individual who has not attained the age of 18 years and who has not been emancipated. (1993, c. 150, s. 1.)

§ 32A-30. Who may make an authorization to consent to health care for minor.

Any custodial parent having understanding and capacity to make and communicate health care decisions who is 18 years of age or older or who is emancipated may make an authorization to consent to health care for the parent's minor child. (1993, c. 150, s. 1.)

§ 32A-31. Extent and limitations of authority.

(a) A custodial parent of a minor child, pursuant to an authorization to consent to health care for minor, may grant an agent full power and authority to consent to and authorize health care for the minor child to the same extent that a custodial parent could give such consent and authorization.

(b) An authorization to consent to health care for minor may contain, and the authority of the agent designated shall be subject to, any specific limitations or restrictions as the custodial parent deems appropriate.

(c) A custodial parent may not, pursuant to an authorization to consent to health care for minor, authorize an agent to consent to the withholding or withdrawal of life sustaining procedures. (1993, c. 150, s. 1.)

§ 32A-32. Duration of authorization; revocation.

(a) An authorization to consent to health care for minor shall be automatically revoked as follows:

(1) If the authorization to consent to health care for minor specifies a date after which it shall not be effective, then the authorization shall be automatically revoked upon such date.

(2) An authorization to consent to health care for minor shall be revoked upon the minor child's attainment of the age of 18 years or upon the minor child's emancipation.

(3) An authorization to consent to health care for minor executed by a custodial parent shall be revoked upon the termination of such custodial parent's rights to custody of the minor child.

(b) An authorization to consent to health care for minor may be revoked at any time by the custodial parent making such authorization. The custodial parent may exercise such right of revocation by executing and acknowledging an instrument of revocation, by executing and acknowledging a subsequent authorization to consent to health care for the minor, or in any other manner in which the custodial parent is able to communicate the parent's intent to revoke. Such revocation shall become effective only upon communication by the custodial parent to the agent named in the revoked authorization.

(c) In the event of a disagreement regarding the health care for a minor child between two or more agents authorized pursuant to this Article to consent to and authorize health care for a minor, or between any such agent and a parent of the minor, whether or not the parent is a custodial parent, then any authorization to consent to health care for minor designating any person as an agent shall be revoked during the period of such disagreement, and the provisions of health care for the minor during such period shall be governed by the common law, the provisions of Article 1A of Chapter 90, and other provisions of law, as if no authorization to consent to health care for minor had been executed.

(d) An authorization to consent to health care for minor shall not be affected by the subsequent incapacity or mental incompetence of the custodial parent making such authorization. (1993, c. 150, s. 1.)

§ 32A-33. Reliance on authorization to consent to health care for minor.

(a) Any physician, dentist, or other health care provider involved in the health care of a minor child may rely upon the authority of the agent named in a signed and acknowledged authorization to consent to health care for minor in the absence of actual knowledge that the authorization has been revoked or is otherwise invalid.

(b) Any consent to health care for a minor child given by an agent pursuant to an authorization to consent to health care for minor shall have the same effect as if the custodial parent making the authorization were present and acting on behalf of the parent's minor child. Any physician, dentist, or other health care provider relying in good faith on the authority of an agent shall be protected to the full extent of the power conferred upon the agent, and no person so relying on the authority of the agent shall be liable, by reason of reliance, for actions taken pursuant to a consent of the agent. (1993, c. 150, s. 1.)

§ 32A-34. Statutory form authorization to consent to health care for minor.

The use of the following form in the creation of any authorization to consent to health care for minor is lawful and, when used, it shall meet the requirements and be construed in accordance with the provisions of this Article.

"Authorization to Consent to
Health Care for Minor."

I, ________, of ________ County, ________, am the custodial parent having legal custody of ________, a minor child, age ______, born ____________, ________. I authorize ________, an adult in whose care the minor child has been entrusted, and who resides at ____________, to do any acts which may be necessary or proper to provide for the health care of the minor child, including, but not limited to, the power (i) to provide for such health care at any hospital or other institution, or the employing of any physician, dentist, nurse, or other person whose services may be needed for such health care, and (ii) to consent to and authorize any health care, including administration of anesthesia, X-ray examination, performance of operations, and other procedures by physicians, dentists, and other medical personnel except the withholding or withdrawal of life sustaining procedures.

[Optional: This consent shall be effective from the date of execution to and including ____________, ________.].

By signing here, I indicate that I have the understanding and capacity to communicate health care decisions and that I am fully informed as to the contents of this document and understand the full import of this grant of powers to the agent named herein.

____________ (SEAL) ________________
Custodial Parent Date
STATE OF NORTH CAROLINA

COUNTY OF ____________

On this ______ day of ____________, ________, personally appeared before me the named ________, to me known and known to me to be the person described in and who executed the foregoing instrument and he (or she) acknowledges that he (or she) executed the same and being duly sworn by me, made oath that the statements in the foregoing instrument are true.

____
Notary Public

My Commission Expires:____________
(OFFICIAL SEAL).
(1993, c. 150, s. 1; 1999, c. 456, s. 59)

§§ 32A-35 through 32A-39: Reserved for future codification purposes.

ARTICLE 5.

Enforcement of Power of Attorney.

§ 32A-40. Reliance on power of attorney.

(a) Unless (i) a person has actual knowledge that a writing is not a valid power of attorney, or (ii) the action taken or to be taken by a person named as attorney-in-fact in a writing that purports to confer a power of attorney is beyond the apparent power or authority of that named attorney-in-fact as granted in that writing, a person who in good faith relies on a writing that on its face is duly signed, acknowledged, and otherwise appears regular, and that purports to confer a power of attorney, durable or otherwise, shall be protected to the full extent of the powers and authority that reasonably appear to be granted to the attorney-in-fact designated in that writing, and no person so dealing in good faith with that named attorney-in-fact shall be held responsible for any breach of fiduciary duty by that attorney-in-fact, including any breach of loyalty, any act of self-dealing, or any misapplication of money or other property paid or transferred as directed by that attorney-in-fact. This subsection applies without regard to whether or not the person dealing with the attorney-in-fact demands or receives an affidavit under subsection (b) of this section. A person who conducts activities through employees or other agents has actual knowledge of a fact involving a power of attorney only from the time the information was received by an employee or agent having the authority to approve the power of attorney presented.

(b) A person may, prior to acceptance of the authority of the attorney-in-fact or at any other time, request an affidavit executed by the attorney-in-fact to the effect that the attorney-in-fact did not have, at the time of the presentation to the person of the writing purporting to confer a power of attorney, actual knowledge of either (i) the revocation of the power of attorney, or (ii) facts that would cause the attorney-in-fact to question the authenticity or validity of the power of attorney. An affidavit meeting the requirements of this subsection shall be sufficient proof to the requesting person, as of the date of the affidavit, of (i) the nonrevocation of the power of attorney, and (ii) the authenticity and validity of the power of attorney. If the exercise of the power of attorney requires execution and delivery of an instrument that is recordable, the affidavit shall be prepared so as to be recordable. An affidavit prepared under this subsection may also be used as an affidavit under G.S. 32A-13(c). An affidavit in the form described in subsection (d) of this section shall be deemed to meet the requirements of this subsection but shall not be the sole means of meeting those requirements.

(c) This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than an express revocation or a change in the principal's capacity.

(d) Example of Affidavit of Attorney-in-Fact.

STATE OF ________________
COUNTY OF ________________
The undersigned does hereby state and affirm the following:

(1) The undersigned is the person named as Attorney-in-Fact in the Power of Attorney executed by ____________ ("Principal") on [date]__________, _______ (the "Power of Attorney").
(2) The Power of Attorney is currently exercisable by the undersigned.
(3) The undersigned has no actual knowledge of any of the following:
  a. The Principal is deceased.
  b. The Power of Attorney has been revoked or terminated, partially or otherwise.
  c. The Principal lacked the understanding and capacity to make and communicate decisions regarding his estate and person at the time the Power of Attorney was executed.
  d. The Power of Attorney was not properly executed and is not a legal, valid power of attorney.
(4) The undersigned agrees not to exercise any powers granted under the Power of Attorney if the undersigned becomes aware that the Principal is deceased or has revoked such powers.

This is the _______ day of _______.

____
[Signature]

[Acknowledgement]

(2005-178, s. 1.)

Editor's Note. — Session Laws 2005-178, s. 2, made this Article effective October 1, 2005, and applicable to powers of attorney created before, on, or after that date.

The numbers G.S. 32A-40 to 32A-43 were assigned by the Revisor of Statutes, the numbers in Session Laws 2005-178, s. 1, having been G.S. 32A-35 to 32A-38.

§ 32A-41. Penalty for unreasonable refusal to recognize power.

(a) A person dealing with an attorney-in-fact who unreasonably refuses to accept a power of attorney shall be subject to all of the following:

(1) Liability for reasonable attorneys' fees and costs incurred in any action or proceeding necessary to confirm the validity of a power of attorney or to implement a power of attorney.
(2) An order of the court requiring acceptance of the valid power of attorney.
(3) Any other remedy available under applicable law.

(b) Acceptance of a power of attorney shall mean (i) acknowledging the validity and authenticity of the document, and (ii) allowing the attorney-in-fact to conduct business in accordance with the powers that reasonably appear to be granted in the document. (2005-178, s. 1.)

§ 32A-42. Protection for third parties.

(a) A person is not required to honor the attorney-in-fact's authority or to conduct business with the attorney-in-fact if the person is not otherwise required to conduct business with the principal in the same circumstances.

(b) Without limiting the generality of subsection (a) of this section, nothing in this Article requires a person to do any of the following:

(1) Engage in any transaction with an attorney-in-fact if the attorney-in-fact has previously breached any agreement with the person, whether in an individual or fiduciary capacity.

(2) Open an account for a principal at the request of an attorney-in-fact if the principal is not currently a customer of the person.

(3) Make a loan to the principal at the request of the attorney-in-fact.

(c) A person who is presented with a power of attorney shall not be deemed to have unreasonably refused to accept the power of attorney solely on the basis of failure to accept the power of attorney within seven business days.

(d) A person who has reasonable cause to question the authenticity or validity of a power of attorney may refuse to accept the authority granted by that document.

(e) A person who promptly requests, and does not within a reasonable time receive, an affidavit as described in G.S. 32A-40(b), is not deemed under G.S. 32A-41 to have unreasonably refused to accept a power of attorney.

(f) The principal, the attorney-in-fact, or a person presented with a power of attorney may initiate a special proceeding in accordance with the procedures of Article 33 of Chapter 1 of the General Statutes to request a determination of the validity of the power of attorney. If the decision in that special proceeding is that reasonable cause to refuse to accept the power of attorney existed, and that the attorney-in-fact willfully misrepresented the authenticity or validity of the power of attorney, the attorney-in-fact, and not the principal, is liable for reasonable attorneys' fees and costs incurred in that action.

(g) Nothing in this Article requires a person who accepts a power of attorney to permit an attorney-in-fact to conduct business not authorized by the terms of the power of attorney, or otherwise not permitted by applicable statute or regulation.

(h) Nothing in this Article amends or modifies the rights of banks and other depository institutions to terminate any deposit account in accordance with applicable law. (2005-178, s. 1; 2006-264, s. 39(a).)

Effect of Amendments. — Session Laws 2006-264, s. 39(a), effective October 1, 2005, and applicable to powers of attorney created before, on, or after date, added "or otherwise not permitted by applicable statute or regulation" at the end of subsection (g).

§ 32A-43. Scope of Article.

This Article shall apply to all or any portion of a document executed under Article 1, Article 2, or Article 2A of this Chapter. (2005-178, s. 1.)

Chapter 33.

Guardian and Ward.

§§ 33-1 through 33-77: Repealed and recodified.

Cross References. — For the North Carolina Uniform Transfers to Minors Act, see now Chapter 33A. As to incompetency and guardianship, see now Chapter 35A.

Editor's Note. — Articles 1 to 4, 5 to 8, and 11 of Chapter 33 were repealed by Session Laws 1987, c. 550, s. 10, effective October 1, 1987. Article 4A was recodified as G.S. 35A-1360 and 35A-1361 by Session Laws 1987, c. 550, s. 9, effective October 1, 1987. Articles 9 and 10 were repealed by Session Laws 1965, c. 815, s. 4. Article 12 was repealed by Session Laws 1987, c. 563, s. 1, effective October 1, 1987.

Session Laws 1987, c. 550, s. 11 changed the title of this Chapter to read "Uniform Gifts to Minors Act." However, in view of the repeal of Article 12 of this Chapter by Session Laws 1987, c. 563, which added a new Chapter 33A, the North Carolina Uniform Transfers to Minors Act, at the direction of the Revisor of Statutes no change has been made in the title of Chapter 33.

Chapter 33A.

North Carolina Uniform Transfers to Minors Act.

Sec.
33A-1. Definitions.
33A-2. Scope and jurisdiction.
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33A-5. Transfer authorized by will or trust.
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33A-11. Validity and effect of transfer.
33A-12. Care of custodial property.
33A-13. Powers of custodian.
33A-14. Use of custodial property.
Sec.
33A-15. Custodian's expenses, compensation, and bond.
33A-16. Exemption of third person from liability.
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§ 33A-1. Definitions.

In this Chapter:

(1) "Adult" means an individual who has attained the age of 21 years.

(2) "Benefit plan" means an employer's plan for the benefit of an employee or partner.

(3) "Broker" means a person lawfully engaged in the business of effecting transactions in securities or commodities for the person's own account or for the account of others.

(4) "Court" means the clerk of the superior court of the several counties of the State.

(5) "Custodial property" means (i) any interest in property transferred to a custodian under this Chapter and (ii) the income from and proceeds of that interest in property.

(6) "Custodian" means a person so designated under Section 33A-9 or a successor or substitute custodian designated under Section 33A-18.

(7) "Financial institution" means a bank, trust company, savings and loan associations or other savings institutions, or credit union, chartered and supervised under State or federal law.

(8) "Guardian" means a person appointed or qualified by a court to act as general, limited, or temporary guardian of a minor's property or a person legally authorized to perform substantially the same functions.

(9) "Legal representative" means an individual's personal representative or guardian.

(10) "Member of the minor's family" means the minor's parent, spouse, grandparent, brother, sister, uncle, or aunt, whether of the whole or half blood or by adoption.

(11) "Minor" means an individual who has not attained the age of 21 years.

(12) "Person" means an individual, corporation, organization, or other legal entity.

(13) "Personal representative" means an executor, administrator, successor personal representative, collector, or special administrator of a

decedent's estate or a person legally authorized to perform substantially the same function.

(14) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(15) "Transfer" means a transaction that creates custodial property under G.S. 33A-9.

(16) "Transferor" means a person who makes a transfer under this Chapter.

(17) "Trust company" means a financial institution, corporation, or other legal entity, authorized to exercise general trust powers. (1987, c. 563, s. 2.)

Legal Periodicals. — For note discussing the Uniform Transfers to Minors Act, see 66 N.C.L. Rev. 1349 (1988).

CASE NOTES

Cited in Schout v. Schout, 140 N.C. App. 722, 538 S.E.2d 213, 2000 N.C. App. LEXIS 1255 (2000); Guerrier v. Guerrier, 155 N.C. App. 154, 574 S.E.2d 69, 2002 N.C. App. LEXIS 1638 (2002).

§ 33A-2. Scope and jurisdiction.

(a) This Chapter applies to a transfer if at the time of the transfer, the transferor, the minor, or the custodian is a resident of this State or the custodial property is located in this State and the transfer instrument refers to this Chapter in the designation under G.S. 33A-9(a) by which the transfer is made. The custodianship so created remains subject to this Chapter despite a subsequent change in residence of a transferor, the minor, or the custodian, or the removal of custodial property from this State.

(b) A person designated as custodian under this Chapter is subject to personal jurisdiction in this State with respect to any matter relating to the custodianship.

(c) A transfer that purports to be made and which is valid under the Uniform Transfers to Minors Act, the Uniform Gifts to Minors Act, or a substantially similar act, of another state is governed by the law of the designated state and may be executed and is enforceable in this State if at the time of the transfer, the transferor, the minor, or the custodian is a resident of the designated state or the custodial property is located in the designated state.

(d) This Chapter shall not be construed to be the exclusive procedures for transferring property interests to minors and any other procedure for such transfers authorized by the law of this State and, not specifically repealed shall continue in effect. (1987, c. 563, s. 2.)

CASE NOTES

Choice of Law. — Where the father, while living in Florida, became a custodian for bank accounts and certificates of deposit opened under the Uniform Transfer to Minors Act belonging to the children, who also lived in Florida, pursuant to Fla. Stat. § 710.103 and G.S. 33A-2, Florida law governed the children's later fraud action that was filed in North Carolina. Beall v. Beall, 156 N.C. App. 542, 577 S.E.2d 356, 2003 N.C. App. LEXIS 188 (2003).

§ 33A-3. Nomination of custodian.

(a) A person having the right to designate the recipient of property transferable upon the occurrence of a future event may revocably nominate a custodian to receive the property for a minor beneficiary upon the occurrence of the event by naming the custodian followed in substance by the words: "as custodian for ____________ (name of minor) under the North Carolina Uniform Transfers to Minors Act." The nomination may name one or more persons as substitute custodians to whom the property must be transferred, in the order named, if the first nominated custodian dies before the transfer or is unable, declines, or is ineligible to serve. The nomination may be made in a will, a trust, a deed, an instrument exercising a power of appointment, or in a writing designating a beneficiary of contractual rights which is registered with or delivered to the payor, issuer, or other obligor of the contractual rights.

(b) A custodian nominated under this section must be a person to whom a transfer of property of that kind may be made under G.S. 33A-9(a).

(c) The nomination of a custodian under this section does not create custodial property until the nominating instrument becomes irrevocable or a transfer to the nominated custodian is completed under G.S. 33A-9. Unless the nomination of a custodian has been revoked, upon the occurrence of the future event the custodianship becomes effective and the custodian shall enforce a transfer of the custodial property pursuant to G.S. 33A-9. (1987, c. 563, s. 2.)

§ 33A-4. Transfer by gift or exercise of power of appointment.

A person may make a transfer by irrevocable gift to, or the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a minor pursuant to G.S. 33A-9. (1987, c. 563, s. 2.)

§ 33A-5. Transfer authorized by will or trust.

(a) A personal representative or trustee may make an irrevocable transfer pursuant to G.S. 33A-9 to a custodian for the benefit of a minor as authorized in the governing will or trust.

(b) If the testator or settlor has nominated a custodian under G.S. 33A-3 to receive the custodial property, the transfer must be made to that person.

(c) If the testator or settlor has not nominated a custodian under G.S. 33A-3, or all persons so nominated as custodian die before the transfer or are unable, decline, or are ineligible to serve the personal representative or the trustee, as the case may be, shall designate the custodian from among those eligible to serve as custodian for property of that kind under G.S. 33A-9(a). (1987, c. 563, s. 2.)

§ 33A-6. Other transfer by fiduciary.

(a) Subject to subsection (c), a personal representative or trustee may make an irrevocable transfer to the transferor or to another adult or trust company as custodian for the benefit of a minor pursuant to G.S. 33A-9, in the absence of a will or under a will or trust that does not contain an authorization to do so.

(b) Subject to subsection (c), a guardian may make an irrevocable transfer to the transferor or to another adult or trust company as custodian for the benefit of the minor pursuant to Section 33A-9.

(c) A transfer under subsection (a) or (b) may be made only if (i) the personal representative, trustee, or guardian considers the transfer to be in the best interest of the minor, and (ii) the transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement, or other governing instrument. If the value of the property transferred under subsections (a) or (b) will total more than ten thousand dollars ($10,000), whether in one or more transfers, that transfer must be authorized by the court. If a transfer under subsections (a) or (b) is to the transferor then the transfer must be authorized by the court. (1987, c. 563, s. 2.)

§ 33A-7. Transfer by obligor.

(a) Subject to subsections (b) and (c), a person not subject to Section 33A-5 or 33A-6 who holds property of or owes a liquidated debt to a minor not having a guardian may make an irrevocable transfer to a custodian for the benefit of the minor pursuant to Section 33A-9.

(b) If a person having the right to do so under Section 33A-3 has nominated a custodian under that section to receive the custodial property, the transfer must be made to that person.

(c) If no custodian has been nominated under Section 33A-3, or all persons so nominated as custodian die before the transfer or are unable, decline, or are ineligible to serve, a transfer under this section may be made to an adult member of the minor's family or to a trust company if the aggregate value of the property does not exceed ten thousand dollars ($10,000) in value. (1987, c. 563, s. 2.)

§ 33A-8. Receipt for custodial property.

A written acknowledgement by a custodian of delivery authorized by this Chapter constitutes a sufficient receipt and discharge for custodial property transferred to the custodian. (1987, c. 563, s. 2.)

§ 33A-9. Manner of creating custodial property and effecting transfer; designation of initial custodian; control.

(a) Custodial property is created and a transfer is made whenever:

(1) An uncertificated security or a certificated security in registered form is either:

a. Registered in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for ____________ (name of minor) under the North Carolina Uniform Transfers to Minors Act"; or

b. Delivered if in certificated form, or any document necessary for the transfer of an uncertificated security is delivered, together with any necessary endorsement to an adult other than the transferor or to a trust company as custodian, accompanied by an instrument in substantially the form set forth in subsection (b);

(2) Money is paid or delivered, or a security held in the name of a broker, financial institution, or its nominee is transferred, to a broker or financial institution for credit to an account in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for ____________ (name of minor) under the North Carolina Uniform Transfers to Minors Act";

(3) The ownership of a life or endowment insurance policy or annuity contract is either:

a. Registered with the issuer in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for ____________ (name of minor) under the North Carolina Uniform Transfers to Minors Act"; or

b. Assigned in a writing delivered to an adult other than the transferor or to a trust company whose name in the assignment is followed in substance by the words: "as custodian for ____________ (name of minor) under the North Carolina Uniform Transfers to Minors Act";

(4) An irrevocable exercise of a power of appointment or an irrevocable present right to future payment under a contract is the subject of a written notification delivered to the payor, issuer, or other obligor that the right is transferred to the transferor, an adult other than the transferor, or a trust company, whose name in the notification is followed in substance by the words: "as custodian for ____________ (name of minor) under the North Carolina Uniform Transfers to Minors Act";

(5) An interest in real property is conveyed or devised to the transferor, an adult other than the transferor, or a trust company, whose name in the conveyance is followed in substance by the words: "as custodian for ____________ (name of minor) under the North Carolina Uniform Transfers to Minors Act";

(6) A certificate of title issued by a department or agency of a state or of the United States which evidences title to tangible personal property is either:

a. Issued in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for ____________ (name of minor) under the North Carolina Uniform Transfers to Minors Act"; or

b. Delivered to an adult other than the transferor or to a trust company, endorsed to that person followed in substance by the words: "as custodian for ____________ (name of minor) under the North Carolina Uniform Transfers to Minors Act"; or

(7) An interest in any property not described in paragraphs (1) through (6) is transferred to an adult other than the transferor or to a trust company by a written instrument in substantially the form set forth in subsection (b).

(b) An instrument in the following form satisfies the requirements of paragraphs (1)b. and (7) of subsection (a):

TRANSFER UNDER THE NORTH CAROLINA UNIFORM TRANSFERS TO MINORS ACT

I, ____________ (name of transferor or name and representative capacity if a fiduciary) hereby transfer to ____________ (name of custodian), as custodian for ____________ (name of minor) under the North Carolina Uniform Transfers to Minors Act, the following: (insert a description of the custodial property sufficient to identify it).

Dated: ______________________________

____

(Signature)

______________________________________ (name of custodian) acknowledges receipt of the property described above as custodian for the minor named above under the North Carolina Uniform Transfers to Minors Act.

Dated: ______________________________

____

(Signature of Custodian)

(c) A transferor shall place the custodian in control of the custodial property as soon as practicable. (1987, c. 563, s. 2; 1997-456, s. 27.)

CASE NOTES

Applied in Jimenez v. Brown, 131 N.C. App. 818, 509 S.E.2d 241 (1998).

§ 33A-10. Single custodianship.

A transfer may be made only for one minor, and only one person may be the custodian. All custodial property held under this Chapter by the same custodian for the benefit of the same minor constitutes a single custodianship. (1987, c. 563, s. 2.)

§ 33A-11. Validity and effect of transfer.

(a) The validity of a transfer made in a manner prescribed in this Chapter is not affected by:

(1) Failure of the transferor to comply with G.S. 33A-9(c) concerning control;

(2) Designation of an ineligible custodian, except designation of the transferor in the case of property for which the transferor is ineligible to serve as custodian under G.S. 33A-9(a);

(3) Death or incapacity of a person nominated under G.S. 33A-3 or designated under G.S. 33A-9 as custodian or the disclaimer of the office by that person; or

(4) The use of an abbreviation in referring to this Chapter or the equivalent act of another state.

(b) A transfer made pursuant to G.S. 33A-9 is irrevocable, and the custodial property is indefeasibly vested in the minor, but the custodian has all the rights, powers, duties, and authority provided in this Chapter, and neither the minor nor the minor's legal representative has any right, power, duty, or authority with respect to the custodial property except as provided in this Chapter.

(c) By making a transfer, the transferor incorporates in the disposition all the provisions of this Chapter and grants to the custodian, and to any third person dealing with a person designated as custodian, the respective powers, rights, and immunities provided in this Chapter. (1987, c. 563, s. 2.)

CASE NOTES

Cited in Jimenez v. Brown, 131 N.C. App. 818, 509 S.E.2d 241 (1998).

§ 33A-12. Care of custodial property.

(a) A custodian shall:

(1) Take control of custodial property;

(2) Register or record title to custodial property if appropriate; and

(3) Collect, hold, manage, invest, and reinvest custodial property.

(b) In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries. If a custodian has a special skill or expertise or is named custodian on the basis of representations of a special skill or expertise, the custodian shall use that skill or expertise. However, a custodian, in the custodian's discretion and without liability to the minor or the minor's estate, may retain any custodial property received from a transferor.

(c) A custodian may invest in or pay premiums on life insurance or endowment policies on (i) the life of the minor only if the minor or the minor's estate or the custodian in the capacity of custodian is the sole beneficiary, or (ii) the life of another person in whom the minor has an insurable interest only to the extent that the minor, the minor's estate, or the custodian in the capacity of custodian, is the irrevocable beneficiary.

(d) A custodian at all times shall keep custodial property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial property of the minor. Custodial property may be held with other owners if owned as tenants in common, provided that the property interest of the owners is fixed. Custodial property subject to recordation is so identified if it is recorded, and custodial property subject to registration is so identified if it is either registered, or held in an account designated, in the name of the custodian, followed in substance by the words: "as a custodian for ____________ (name of minor) under the North Carolina Uniform Transfers to Minors Act."

(e) A custodian shall keep records of all transactions with respect to custodial property, including information necessary for the preparation of the minor's tax returns, and shall make them available for inspection at reasonable intervals by a parent or legal representative of the minor, or by the minor if the minor has attained the age of 14 years. (1987, c. 563, s. 2.)

CASE NOTES

Cited in Jimenez v. Brown, 131 N.C. App. 818, 509 S.E.2d 241 (1998).

§ 33A-13. Powers of custodian.

(a) A custodian, acting in a custodial capacity, has all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property, but a custodian may exercise those rights, powers, and authority in the capacity of a custodian only.

(b) This section does not relieve a custodian from liability for breach of G.S. 33A-12. (1987, c. 563, s. 2.)

§ 33A-14. Use of custodial property.

(a) A custodian may deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (i) the duty or ability of the custodian personally or of any other person to support the minor, or (ii) any other income or property of the minor which may be applicable or available for that purpose.

(b) On petition of an interested person or the minor if the minor has attained the age of 14 years, the court may order the custodian to deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the court considers advisable for the use and benefit of the minor.

(c) A delivery, payment, or expenditure under this section is in addition to, not in substitution for, and does not affect any obligation of a person to support the minor. (1987, c. 563, s. 2.)

§ 33A-15. Custodian's expenses, compensation, and bond.

(a) A custodian is entitled to pay from and to be reimbursed from custodial property for reasonable expenses incurred in the performance of the custodian's duties.

(b) Except for one who is a transferor under G.S. 33A-4, a custodian has a noncumulative election during each calendar year to charge reasonable compensation for services performed during that year.

(c) Except as provided in G.S. 33A-18(f), a custodian need not give a bond. (1987, c. 563, s. 2.)

§ 33A-16. Exemption of third person from liability.

A third person in good faith and without court order may act on the instructions of or otherwise deal with any person purporting to make a transfer or purporting to act in the capacity of a custodian and, in the absence of knowledge, is not responsible for determining:

(1) The validity of the purported custodian's designation;

(2) The propriety of, or the authority under this Chapter for, any act of the purported custodian;

(3) The validity or propriety under this Chapter of any instrument or instructions executed or given either by the person purporting to make a transfer or by the purported custodian; or

(4) The propriety of the application of any property of the minor delivered to the purported custodian. (1987, c. 563, s. 2.)

§ 33A-17. Liability to third persons.

(a) A claim based on (i) a contract entered into by a custodian acting in a custodial capacity, (ii) an obligation arising from the ownership or control of custodial property, or (iii) a tort committed during the custodianship, may be asserted against the custodial property by proceeding against the custodian in the custodial capacity, whether or not the custodian or the minor is personally liable therefor.

(b) A custodian may be held personally liable:

(1) On a contract properly entered into in the custodial capacity if the custodian fails to reveal that capacity and to identify the custodianship in the contract; or

(2) For an obligation arising from control of custodial property or for a tort committed during the custodianship if the custodian is personally at fault.

(c) A minor is not personally liable for an obligation arising from ownership of custodial property or for a tort committed during the custodianship unless the minor is personally at fault. (1987, c. 563, s. 2.)

CASE NOTES

Attachment by Creditors for Debts Incurred in Tort Action. — An irrevocable custodial account set up under this section by a judgment debtor for his son could not be attached by judgment creditors, where the tort on which the creditors' judgment was based occurred before the custodianship was established. Jimenez v. Brown, 131 N.C. App. 818, 509 S.E.2d 241 (1998).

§ 33A-18. Renunciation, resignation, death, or removal of custodian; designation of successor custodian.

(a) A person nominated under G.S. 33A-3 or designated under G.S. 33A-9 as custodian may decline to serve by delivering a written disclaimer to the person who made the nomination or to the transferor or the transferor's legal representative. If the event giving rise to a transfer has not occurred and no substitute custodian able, willing, and eligible to serve was nominated under G.S. 33A-3, the person who made the nomination may nominate a substitute custodian under G.S. 33A-3; otherwise the transferor or the transferor's legal representative shall designate a substitute custodian at the time of the transfer, in either case from among the persons eligible to serve as custodian for that kind of property under G.S. 33A-9(a).

(b) A custodian at any time may designate a trust company or an adult other than the transferor under G.S. 33A-4 as successor custodian by executing and dating an instrument of designation before a subscribing witness other than the successor. If the instrument of designation does not contain or is not accompanied by the resignation of the custodian, the designation of the successor does not take effect until the custodian resigns, dies, becomes incapacitated, or is removed.

(c) A custodian may resign at any time by delivering written notice to the minor if the minor has attained the age of 14 years and to the successor custodian and by delivering the custodial property to the successor custodian.

(d) If a custodian is ineligible, dies, or becomes incapacitated without having effectively designated a successor and the minor has attained the age of 14 years, the minor may designate as successor custodian, in the manner prescribed in subsection (b), an adult member of the minor's family, a guardian of the minor, or a trust company. If the minor has not attained the age of 14 years or fails to act within 60 days after the ineligibility, death, or incapacity, the guardian of the minor becomes successor custodian. If the minor has no guardian or the guardian declines to act, the transferor, the legal representative of the transferor or of the custodian, an adult member of the minor's family, or any other interested person may petition the court to designate a successor custodian.

(e) A custodian who declines to serve under subsection (a) or resigns under subsection (c), or the legal representative of a deceased or incapacitated custodian, as soon as practicable, shall put the custodial property and records in the possession and control of the successor custodian. The successor custodian by action may enforce the obligation to deliver custodial property and records and becomes responsible for each item as received.

(f) A transferor, the legal representative of a transferor, an adult member of the minor's family, a guardian of the person of the minor, the guardian of the minor, or the minor if the minor has attained the age of 14 years may petition the court to remove the custodian for cause and to designate a successor custodian other than a transferor under G.S. 33A-4 or to require the custodian to give appropriate bond. (1987, c. 563, s. 2.)

CASE NOTES

Court Lacked Authority to Remove Custodian. — Trial court lacked jurisdiction and authority to order a father's name to be removed from custodial accounts of his children or to order that he reimburse those accounts for funds that he withdrew; pursuant to G.S. 33A-18(f), which was a part of the Uniform Transfers to Minors Act, G.S. 33A-1 et seq., that authority was initially vested in the Clerk of the Superior Court. Guerrier v. Guerrier, 155 N.C. App. 154, 574 S.E.2d 69, 2002 N.C. App. LEXIS 1638 (2002).

§ 33A-19. Accounting by and determination of liability of custodian.

(a) A minor who has attained the age of 14 years, the minor's guardian of the person or legal representative, an adult member of the minor's family, a transferor, or a transferor's legal representative may petition the court (i) for an accounting by the custodian or the custodian's legal representative; or (ii) for a determination of responsibility, as between the custodial property and the custodian personally, for claims against the custodial property unless the responsibility has been adjudicated in an action under G.S. 33A-17 to which the minor or the minor's legal representative was a party.

(b) A successor custodian may petition the court for an accounting by the predecessor custodian.

(c) The court, in a proceeding under this Chapter or the presiding judge in any other proceeding, may require or permit the custodian or the custodian's legal representative to account.

(d) If a custodian is removed under G.S. 33A-18(f), the court shall require an accounting and order delivery of the custodial property and records to the successor custodian and the execution of all instruments required for transfer of the custodial property. (1987, c. 563, s. 2.)

CASE NOTES

Cited in Guerrier v. Guerrier, 155 N.C. App. 154, 574 S.E.2d 69, 2002 N.C. App. LEXIS 1638 (2002).

§ 33A-20. Termination of custodianship.

The custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor's estate upon the earlier of:

(1) The minor's attainment of 21 years of age with respect to custodial property transferred under G.S. 33A-4 or G.S. 33A-5, except that any transferor may have custodial property transferred to the minor at any time after the age of 18 and before the age of 21 by a designation in the following words or their equivalent: "The custodian shall transfer this property to ____________ (name of minor) when he reaches the age of ____ (age after 18 and before 21).";

(2) The minor's attainment of age 18 with respect to custodial property transferred under G.S. 33A-6 or G.S. 33A-7; or

(3) The minor's death. (1987, c. 563, s. 2.)

CASE NOTES

Cited in Schout v. Schout, 140 N.C. App. 722, 538 S.E.2d 213, 2000 N.C. App. LEXIS 1255 (2000).

§ 33A-21. Applicability.

This Chapter applies to a transfer within the scope of G.S. 33A-2 made after October 1, 1987, if:

(1) The transfer purports to have been made under the Uniform Gifts to Minors Act of North Carolina; or

(2) The instrument by which the transfer purports to have been made uses in substance the designation "as custodian under the Uniform

Gifts to Minors Act" or "as custodian under the Uniform Transfers to Minors Act" of any other state, and the application of this Chapter is necessary to validate the transfer. (1987, c. 563, s. 2.)

§ 33A-22. Effect on existing custodianships.

(a) Any transfer of custodial property as now defined in this Chapter made before October 1, 1987, is validated notwithstanding that there was no specific authority in the Uniform Gifts to Minors Act of North Carolina for the coverage of custodial property of that kind or for a transfer from that source at the time the transfer was made.

(b) This Chapter applies to all transfers made before October 1, 1987, in a manner and form prescribed in the Uniform Gifts to Minors Act of North Carolina, except insofar as the application impairs constitutionally vested rights or extends the duration of custodianships in existence on October 1, 1987.

(c) G.S. 33A-1 and G.S. 33A-20 with respect to the age of a minor for whom custodial property is held under this Chapter shall not apply to custodial property held in a custodianship that terminated because of the minor's attainment of the age of majority and before October 1, 1987. (1987, c. 563, s. 2.)

CASE NOTES

The UTMA age provisions did not apply to a custodianship established for the plaintiff by her grandparents where to do so would impair her constitutionally vested rights and would extend the duration of the custodianship beyond her eighteenth birthday. Schout v. Schout, 140 N.C. App. 722, 538 S.E.2d 213, 2000 N.C. App. LEXIS 1255 (2000).

§ 33A-23. Uniformity of application and construction.

This Chapter shall be applied and construed to effect its general purpose to make uniform the law with respect to the subject of this Chapter among states enacting it. (1987, c. 563, s. 2.)

§ 33A-24. Short title.

This Chapter may be cited as the "North Carolina Uniform Transfers to Minors Act." (1987, c. 563, s. 2.)

Chapter 33B.

North Carolina Uniform Custodial Trust Act.

Sec.
33B-1. Definitions.
33B-2. Custodial trust; general.
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33B-4. Form and effect of receipt and acceptance by custodial trustee; jurisdiction.
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33B-6. Single beneficiaries; separate custodial trusts.
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33B-9. Use of custodial trust property.
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33B-12. Liability to the third person.
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33B-15. Reporting and accounting by custodial trustee; determination of liability of custodial trustee.
33B-16. Limitations of action against custodial trustee.
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33B-22. Limitation on value of custodial trust property.

NORTH CAROLINA COMMENTARY

The North Carolina Uniform Custodial Trust Act (hereinafter "the North Carolina Act") is based upon the Uniform Custodial Trust Act (hereinafter "the Uniform Act"). The most significant differences between the North Carolina Act and the Uniform Act are (i) the deletion of references to multiple beneficiaries, (ii) changes made to be consistent with Chapter 35A of the General Statutes, relating to guardianship, (iii) the addition of witness and acknowledgment requirements for writings or instruments designating someone other than the beneficiary's estate to receive the custodial trust property at the beneficiary's death, and (iv) the addition of a limitation on the aggregate value of transfers or declarations of property to the corpus of a custodial trust. The preference for single beneficiaries reflects a belief that the complexity raised by multiple beneficiaries is not justified by any competing benefit when the ease of creating a separate custodial trust for each individual beneficiary is considered. The drafters believed that although there is no absolute need for the North Carolina Act to be consistent with Chapter 35A, consistency in the various types of guardians, coordination of the use of the terms "incapacitated" and "incompetency," and the incorporation of the procedures and flexibility of Chapter 35A are all desirable goals.

It is believed that the North Carolina Act will be used for two main purposes. The first will be for the creation of a statutory trust with a built-in set of principles and forms that can be used for providing support to an incapacitated person. The second purpose is to allow an individual, while competent, to designate a person to act as the individual's trustee in the event of the individual's incapacity.

The North Carolina Commentary reflects changes to the Uniform Act that were made by the drafters. The Commentary discusses most but not all changes made by the General Assembly.

Editor's Note. — Permission to include the Official Comments was granted by the National Conference of Commissioners on Uniform State Laws and The American Law Institute. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

§ 33B-1. Definitions.

As used in this act:

(1) "Adult" means an individual who is at least 21 years of age.

(2) "Beneficiary" means an individual for whom property has been transferred to or held under a declaration of trust by a custodial trustee for the individual's use and benefit under this act.

(3) "Guardian of the estate" means a guardian appointed for the purpose of managing the property, estate, and business affairs of a ward, or a person legally authorized to perform substantially the same functions. As used in this act the term "guardian of the estate" includes a general guardian or guardian of the estate appointed under the provisions of Chapter 35A of the General Statutes.

(4) "Court" means the clerk of superior court of this State.

(5) "Custodial trust property" means an interest in property transferred to or held under a declaration of trust by a custodial trustee under this act and the income from and proceeds of that interest.

(6) "Custodial trustee" means a person designated as trustee of a custodial trust under this act or a substitute or successor to the person designated.

(7) "Guardian of the person" means a guardian appointed for the purpose of performing duties relating to the care, custody, and control of a ward, but not a person who is only a guardian ad litem. As used in this act the term "guardian of the person" includes a general guardian or guardian of the person appointed under the provisions of Chapter 35A of the General Statutes.

(8) "Incapacitated" means lacking the ability to manage property and business affairs effectively by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, disappearance, being under 21 years of age, or other disabling cause.

(9) "Legal representative" means a personal representative or guardian of the estate.

(10) "Member of the beneficiary's family" means a beneficiary's spouse, descendant, parent, grandparent, brother, sister, uncle or aunt, whether of the whole or half blood or by adoption.

(11) "Person" means an individual, corporation, business trust, estate, trust, partnership, joint venture, association, or any other legal or commercial entity.

(12) "Personal representative" means an executor, administrator, or special administrator of a decedent's estate, a person legally authorized to perform substantially the same function, or a successor to any of them.

(13) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

(14) "Transferor" means a person who creates a custodial trust by transfer or declaration.

(15) "Trust company" means a financial institution, corporation, or other legal entity, authorized to exercise general trust powers in North Carolina.

(16) "General guardian" means a guardian of both the estate and the person. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

(1) "Adult" is a person 18 years of age for the purpose of custodial trusts. The result of this is that a person 18 years of age will be eligible to be a custodial trustee under this Act, although

he or she may not be eligible under UTMA since minor custodianships under UTMA may run to age 21 and the minor could in some cases be older than the custodian. As the Comments under Section 1 of UTMA explain, the age of 21 was retained under that Act because the Internal Revenue Code continues to permit a "minority trust" under Section 2053(c), to continue in effect until age 21 and because it was believed that most transferors creating trusts or custodianships for minors would prefer to retain the property under management for the benefit of the young person as long as possible. The difference has little or no practical consequence and serves the purpose of each Act.

(3) "Conservator" is defined broadly to permit identification of a person functioning as a conservator.

(4) "Court" means _______________ court. Here the likelihood is that most states would utilize the same court, e.g., the probate court, that deals with conservators and estates.

(5 and 6) The terms, "custodial trust property" and "custodial trustee," are used throughout to identify clearly the statutory trust property and trustee under this Act. The statutory trust concept is used throughout the Act.

(7) A definition of guardian has been included and is based on the Uniform Probate Code Section 5-103(6).

(8) A definition of incapacitated has been included, for the purpose of this Act, because incapacity of the beneficiary converts the trust from a revocable trust to a discretionary trust. The definition is taken from the Uniform Probate Code Section 5-401(c) relating to the person who is unable to manage property. Compare Uniform Probate Code Section 5-103(7). Note that Section 10(a)(ii) permits a transferor to direct that the trust shall be administered as one for an incapacitated person. Section 10 deals specifically with the determination of incapacity.

(10) The beneficiary's family is broadly defined to identify persons who may have standing to seek judicial intervention or accounting (Sections 13 and 15).

(11) The definition of a person is taken from the Uniform Probate Code Section 1-201(29).

(12) Personal representative is broadly defined and the definition reflects that in the Uniform Probate Code Section 1-201(30).

NORTH CAROLINA COMMENTARY

The definition of "adult" is modified to mean an individual who is at least 21 rather than 18 years of age. The term "conservator" and its definition are replaced with the term "guardian of the estate" and its definition from the guardianship statutes, Chapter 35A of the General Statutes. The term "guardian" and its definition are replaced with the term "guardian of the person" and its definition from the guardianship statutes, Chapter 35A of the General Statutes. The definitions of "guardian of the estate" and "guardian of the person" are modified to include a general guardian or guardian of the estate whose powers are limited in accordance with an order of the court concerning the extent of incompetence under G.S. 35A-1112(d). The term "general guardian" is added and defined to be a guardian of both the estate and the person. The term "court" is defined to mean the clerk of superior court of this State. The definition of "incapacitated" is modified to substitute "being under 21 years of age" for "minority." The definition of "legal representative" is modified to substitute "guardian of the estate" for "conservator." The definition of "member of the beneficiary's family" is modified to delete the references to "stepchild" and "stepparent," paralleling a change in the North Carolina Uniform Transfers to Minors Act and reflecting the drafters' belief that the inclusion of the references in the definition is undesirable. The definition of "trust company" is modified to refer to a legal entity authorized to exercise general trust powers in North Carolina.

§ 33B-2. Custodial trust; general.

(a) A person may create a custodial trust of property by a written transfer of the property to a trust company or an adult other than the transferor executed in any lawful manner, naming as beneficiary an individual, who may be the transferor, in which the transferee is designated, in substance, as custodial trustee under the North Carolina Uniform Custodial Trust Act. A transfer is executed in a lawful manner if the formalities, if any, of the transfer of the particular property necessary under general principles of law are satisfied.

(b) An adult may create a custodial trust of property by a written declaration which names as beneficiary an individual other than the declarant. The declaration shall be evidenced by registration of the property or by other instrument of declaration executed in any lawful manner, describing the property and designating the declarant, in substance, as custodial trustee under the North Carolina Uniform Custodial Trust Act. A registration or other declaration of trust for the sole benefit of the declarant is not a custodial trust under this act. A registration or declaration is executed in a lawful manner if the formalities, if any, of the transfer of the beneficial interest in the particular property under general principles of law are satisfied.

(c) Title to custodial trust property is in the custodial trustee, and the beneficial interest is in the beneficiary.

(d) Except as provided in subsection (e) of this section, a transferor may not terminate a custodial trust.

(e) The beneficiary, if not incapacitated, or the guardian of the estate of an incapacitated beneficiary, may terminate a custodial trust by delivering to the custodial trustee a writing signed by the beneficiary or guardian of the estate declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary.

(f) Any person may augment existing custodial trust property by the addition of other property pursuant to a written instrument satisfying the requirements of subsections (a) or (b) of this section.

(g) The transferor may designate, or authorize the designation of, a successor custodial trustee in the trust instrument.

(h) This act does not displace or restrict other means of creating trusts. A trust, the terms of which do not conform to this act, may be enforceable according to its terms under the law. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

Section 2 is the principal provision authorizing the creation of a custodial trust and utilizes the concept of incorporation by reference when the transferee or titleholder of property is designated as custodial trustee under the Act. Section 2 sets forth the general effect of such a transfer. Section 18 provides forms which satisfy the requirements of this section and identifies customary methods of transferring assets to create a custodial trust.

Section 2(a) provides that a trust may be created by transfer to another for the benefit of the transferor or another. This is expected to be the most common way in which a custodial trust would be created. However, a custodial trust may also be created by declaration of trust by the owner of property to hold it for the benefit of another as is provided in Section 2(b). A declaration in trust by the owner of property for the sole benefit of the owner is not contemplated by this Act because such an attempt may be considered ineffective as a trust due to the total identity of the trustee and beneficiary. However, the doctrine of merger would not preclude an effective transfer under this Act for the benefit of the transferor and one or more other beneficiaries. See Section 6.

A custodial trust could be created by the exercise of a valid power of attorney or power of appointment given by the owner of property as one of the transfers "consistent with law."

These alternatives permit the major uses of the custodial trust to be accomplished expeditiously. For example, an older person, wishing to be relieved of management of property may transfer property to another for benefit of the transferor or of the transferor's spouse or child. The declaration may be used to establish a trust of which the owner is trustee to continue management of the property for benefit of another, such as a spouse or child. The trust may include a provision for distribution of assets remaining at the beneficiary's death directly to a named distributee.

This Act does not preclude the creation of trusts under other existing law, statutory or nonstatutory, but is designed to facilitate the creation of simple trusts incorporating the provisions of this Act. The written transfer or declaration "consistent with law" requires that the formalities of the transfer of particular property necessary under other law will be observed, e.g., if land is involved, the requirements of a proper deed and recording must be satisfied.

Section 2(c) provides for the retention of the beneficial interest in the custodial trust property in the beneficiary and, of course, not in the custodial trustee. The extensive control and benefit in the beneficiary who is not incapacitated maintains the simplicity of the trust and avoids tax complexity. The custodial trustee is given the title to the property and authority to act with regard to the property only as is authorized by the statute. The custodial trustee's powers are enumerated in Section 8.

Section 2(e) gives the adult beneficiary, who is not incapacitated, the power to terminate the custodial trust at any time during his or her lifetime. This power of termination exists in any beneficiary who is not incapacitated whether the beneficiary was or was not the transferor. A beneficiary may be determined to be incapacitated or the transferor may designate that the trust is to be administered as a trust for an incapacitated beneficiary under Section 10, in which event the beneficiary does not have the power to terminate. However, the designation of incapacity by the transferor can be modified by the trustee or the court by reason of changed circumstances pursuant to Section 10. The Act precludes termination by exercise of a durable power of attorney if the beneficiary is incompetent (Section 7(f)). If the donor prefers not to permit the beneficiary the power to terminate or to designate the beneficiary as incapacitated under Section 10, an individually drafted trust outside the scope of this Act would seem appropriate.

Upon termination of a custodial trust, the custodial trust property must be distributed as provided in Section 17.

A transfer under this Act is irrevocable except to the extent the beneficiary may terminate it. Hence, a transfer to a trustee for benefit of a person other than the transferor is not revocable by the transferor. If a power of revocation were retained by the transferor, that would be a trust outside the scope of this Act and enforceable under general law pursuant to subsection 2(h).

This Act does not provide for protection of the custodial trust assets from the claims of creditors of the beneficiary, whether those are general or governmental creditors. Other laws of the state remain unaffected. In this regard, unusual problems of handicapped persons and the coordination of resources and state or federal services call for special provision and planning outside the scope of this Act.

NORTH CAROLINA COMMENTARY

This section is modified for clarification and to conform to the decision not to authorize multiple beneficiaries. See comments to G.S. 33B-6. The section is also modified to limit those who may be custodial trustees to natural persons and trust companies authorized to act in a fiduciary capacity under North Carolina law.

§ 33B-3. Custodial trust to begin in the future.

(a) A person may create a custodial trust to begin in the future by designating the transferee in substance "as custodial trustee for ________________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act". A designation under this section may be made in:

(1) A will;
(2) A trust;
(3) An insurance policy;
(4) A deed;
(5) A payable-on-death account;
(6) An instrument exercising a power of appointment, provided that the donor of the power has not expressly prohibited the exercise of the power in favor of a custodial trustee, and provided further that the beneficiary of the custodial trust is a permissible object of the power, although the custodial trustee need not be a permissible object of the power; or
(7) A writing designating a beneficiary of contractual rights, including but not limited to rights under a pension or profit sharing plan, which is registered with or delivered to the fiduciary, payor, issuer, or obligor of the contractual right.

(b) Persons may be designated as substitute or successor custodial trustees to whom the property must be paid or transferred in the order named if the preceding designated custodial trustee is unable or unwilling to serve. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This section permits a future custodial trustee to be designated to receive property for the beneficiary of a custodial trust to be effective upon the occurrence of a future event or transfer. To accommodate changes in circumstances during the passage of time, one or more successors or substitute custodial trustees can also be designated. The designation of the future custodial trustee and the beneficiary can be made in an instrument which is revocable or irrevocable depending upon the nature of the transaction or transfer. Any person designated as a future custodial trustee may decline to serve before the transfer occurs or may resign under Section 13 after the transfer.

The source of this section is Section 3 of UTMA.

The enacting state's rule against perpetuities may limit or affect the creation of a custodial trust upon the occurrence of a future event, but because the use of a custodial trust usually contemplates dispositions for the benefit of living persons, perpetuity problems should rarely arise.

NORTH CAROLINA COMMENTARY

The designation of a future custodial trustee under this section is revocable or irrevocable depending upon the nature of the transaction or transfer. For example, the designation of a future custodial trustee in a will ordinarily would be revocable until the death of the testator, because wills are freely revocable. On the other hand, the designation of a future custodial trustee in a deed ordinarily would become irrevocable upon delivery of the deed, because deeds usually are irrevocable.

In order to avoid confusion between revocable and irrevocable transfers, this section is rewritten to list separately the types of transactions or transfers to which it applies. New subsection (a) deletes some ambiguous language about "property payable or transferable upon a future event ..." in favor of a simpler concept of "a custodial trust to begin in the future." To aid in this restructuring, former subsection (c) is incorporated into new subsection (a).

The list of transactions deletes the term "multiple party account" in favor of the term "payable-on-death account." The term "multiple party account" is a Uniform Probate Code term that has no statutory use in North Carolina. Further, certain types of multiple party accounts are not properly within the scope of this section; for example, a depositor's establishing a joint account between the depositor and a custodian would be a present transfer governed by G.S. 33B-2.

The list of transactions adds the term "pension or profit sharing plan" as a specific example of payments pursuant to contract. This term appears also in G.S. 36A-6 (which exempts employee trusts from the Rule Against Perpetuities). The requirement of registration or delivery of the writing under subdivision (a)(7) is mentioned in this subdivision but not in others because the law applicable to the other kinds of transactions is well settled. This organization avoids an ambiguity in the Uniform Act as to whether the registration or delivery requirement applies to all kinds of transactions.

The catchline of this section is changed from "Custodial trustee for future payment or delivery" to "Custodial trust to begin in the future" to clarify the concept of the section.

§ 33B-4. Form and effect of receipt and acceptance by custodial trustee; jurisdiction.

(a) Obligations of a custodial trustee, including the obligation to follow directions of the beneficiary, arise under this act upon the custodial trustee's acceptance, express or implied, of the custodial trust property.

(b) The custodial trustee's acceptance may be evidenced by a writing stating in substance:

"CUSTODIAL TRUSTEE'S RECEIPT AND ACCEPTANCE

I, ________________, (name of custodial trustee) acknowledge receipt of the custodial trust property described below or in the attached instrument and accept the custodial trust as custodial trustee for ________________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act. I undertake to administer and distribute the custodial trust property pursuant to the North Carolina Uniform Custodial Trust Act. My obligations as custodial trustee are subject to the directions of the beneficiary unless the beneficiary is designated as, is, or becomes incapacitated. The custodial trust property consists of ________________________________.

Dated: ____________________

____
(Signature of Custodial Trustee)".

(c) Upon accepting custodial trust property, a person designated as custodial trustee under this act is subject to personal jurisdiction in this State with respect to any matter relating to the custodial trust. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

Although a custodial trust is created by a transfer that satisfies Section 2 of the Act, the responsibility and obligations upon the trustee do not arise until the trustee has accepted the transfer. This detailed section is included to call the attention of the parties to the effective receipt and acceptance by the custodial trustee. Once a custodial trustee accepts the transfer of the custodial trust property, the custodial trustee assumes the obligation of a custodial trustee under this Act. The acceptance can be expressed or implied, but it is recommended that the written acceptance provided for in Section 4(b) be utilized. By the acceptance the custodial trustee submits to the personal jurisdiction of the courts of the enacting state for the purpose of the custodial trust, despite subsequent relocation of the parties or of the custodial trust property. The principal sources of these provisions are Sections 8 and 9 of UTMA and the analogous provisions under the Uniform Probate Code, Sections 3-602, 5-208, 5-307, 7-103.

NORTH CAROLINA COMMENTARY

This section is modified for clarification. The phrase "in this State" is substituted for the phrase "of the court" to reflect the intended use of the term "court" in the Uniform Act, i.e., to provide for the exercise of personal jurisdiction over custodial trustees by the courts of this State.

§ 33B-5. Transfer to custodial trustee by fiduciary or obligor; facility of payment.

(a) A person, including a fiduciary other than a custodial trustee, who holds property of or owes a debt to an incapacitated individual not having a guardian of the estate may make a transfer to an adult member of the beneficiary's family or to a trust company as custodial trustee for the use and benefit of the incapacitated individual. If the value of the property or the debt exceeds twenty thousand dollars ($20,000), the transfer is not effective unless authorized by the court.

(b) A written acknowledgment of delivery, signed by a custodial trustee, is a sufficient receipt and discharge for property transferred to the custodial trustee pursuant to this section.

(c) This section shall not apply when the disposition of the property has been directed by an instrument designating a custodial trustee pursuant to G.S. 33B-3. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This section is in the nature of a facility-of-payment provision that permits persons owing money to an incapacitated individual to discharge a fixed obligation by a payment to a custodial trustee under this Act. The section does not authorize the custodial trustee to settle claims for disputed amounts but only to acknowledge an effective receipt of property paid or delivered. It is based primarily on Sections 6 and 7 of UTMA and includes the protections of Section 8 of UTMA as well. It permits a custodial trust to be established as a substitute for a conservatorship to receive payments due an incapacitated individual. Also, see Section 11, which protects transferors and other third parties dealing with the custodial trustee.

NORTH CAROLINA COMMENTARY

A designation under this section may be made in a will, a trust, a deed, a payable-on-death account, an insurance policy or an instrument exercising a power of appointment. A designation may also be made by a writing designating a beneficiary of contractual rights that is registered with or delivered to the fiduciary, payor, issuer, or obligor of the contractual right. Subsection (c) is added to clarify that the section cannot be used to defeat a custodial trust created under G.S. 33B-3.

§ 33B-6. Single beneficiaries; separate custodial trusts.

(a) Beneficial interests in a custodial trust may not be created for multiple beneficiaries.

(b) All custodial trust property held under this act by the same custodial trustee for the use and benefit of a single beneficiary may be administered as a single custodial trust. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This Act, unlike UTMA, does not preclude a custodial trust for more than one beneficiary. Adult persons creating custodial trusts are likely to set up custodial trusts in various forms, e.g., parents may wish to set up a custodial trust for their children or for themselves, then for a spouse, etc. However, the interests of each beneficiary are separate and the custodial trustee is obligated under subsection (c) to account separately to each beneficiary for administration of the beneficiary's interest in the custodial trust.

Subsection (b) allows a custodial trustee who is administering multiple custodial trusts for the same beneficiary to administer the custodial trusts as a single custodial trust. For example, if multiple trusts are created for an incapacitated beneficiary, the custodial trustee can administer them as a single custodial trust.

NORTH CAROLINA COMMENTARY

This section is modified to eliminate references to multiple beneficiaries of a custodial trust. While there are benefits to allowing multiple beneficiaries, the complexities arising from joint beneficiaries raise questions that are unnecessary in light of the ease of creating more than one custodial trust. The drafters believed that allowing multiple beneficiaries and a right of survivorship in the custodial trust property would raise a host of questions that are inconsistent with the overall goal of a mechanically simple statutory trust, the main incidents of which are designed to be practicable.

Under the provisions of G.S. 33B-17(a)(3)a. and b., a successor to the property following a termination of the custodial trust can be designated by either the creating instrument or a competent beneficiary. The drafters believed that no additional survivorship provisions are warranted.

Subsection (b) is modified for clarification.

§ 33B-7. General duties of custodial trustee.

(a) If appropriate, a custodial trustee shall register or record the instrument vesting title to custodial trust property.

(b) If the beneficiary is not incapacitated, a custodial trustee shall follow the directions of the beneficiary in the management, control, investment, or retention of the custodial trust property.

If the beneficiary is incapacitated or the beneficiary has capacity but has not given direction, the custodial trustee shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other law restricting investments by fiduciaries. However, a custodial trustee, in the custodial trustee's discretion, may retain any custodial trust property received from the transferor.

If a custodial trustee has a special skill or expertise or is named custodial trustee on the basis of representation of a special skill or expertise, the custodial trustee shall observe the standard of care expected of one with that skill or expertise.

(c) Subject to subsection (b) of this section, a custodial trustee shall take control of and collect, hold, manage, invest, and reinvest custodial trust property.

(d) A custodial trustee at all times shall keep custodial trust property of which the custodial trustee has control, separate from all other property in a manner sufficient to identify it clearly as custodial trust property of the beneficiary. Custodial trust property, the title to which is subject to recordation, is adequately identified as such if an appropriate instrument so identifying the property is recorded in the name of the custodial trustee, designated in substance "as custodial trustee for ______________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act". Custodial trust property subject to registration is so identified if it is registered, or held in an account in the name of the custodial trustee, designated in substance "as custodial trustee for ______________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act".

(e) A custodial trustee shall keep records of all transactions with respect to custodial trust property, including information necessary for the preparation of tax returns, and shall make the records and information available at reasonable times to the beneficiary or legal representative of the beneficiary.

(f) Unless the durable power of attorney specifically provides otherwise, the exercise of the durable power of attorney for an incapacitated beneficiary is not effective to terminate or direct the administration or distribution of a custodial trust. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

Subsection (b) restates and confirms the control by the beneficiary who is not incapacitated. However, the trustee has a reasonable obligation to act when the beneficiary has not directed him. Under Sections 9 and 10, when a beneficiary becomes incapacitated, the custodial trust becomes a discretionary trust and the trustee is subject to the control of the statute and not the beneficiary's direction. The custodial trustee is subject to the usual trustee's standard as taken from Section 7-302 of the Uniform Probate Code. The statute also imposes a slightly higher standard on professional fiduciaries acting under the statute. Otherwise, much of this section is taken from Section 12 of UTMA. Whenever recordable assets, such as land, are in the custodial trust, the trustee would be expected to record title to the asset. The section is entitled "general duties" because there are additional specific duties identified in other sections such as Section 9.

NORTH CAROLINA COMMENTARY

Subsections (b) and (d) are modified for clarification. Subsection (f) is modified to add the introductory phrase "[u]nless the durable power of attorney specifically provides otherwise."

§ 33B-8. General powers of custodial trustee.

(a) A custodial trustee, acting in a fiduciary capacity, has all the rights and powers over custodial trust property which an unmarried adult owner has over individually owned property, but a custodial trustee may exercise those rights and powers in a fiduciary capacity only.

(b) This section does not relieve a custodial trustee from liability for a violation of G.S. 33B-7. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This section is taken from Section 13 of UTMA. It grants the trustee very broad powers over the property, subject, however, to the Prudent Person Rule and to the obligations set out in the Act. An alternative approach to subsection (a) that might be taken by an enacting state is to refer to the existing statutes granting powers to a trustee, such as the Uniform Trustee's Powers Act. For example: [(a) A custodial trustee has the powers of a trustee under the Uniform Trustee's Powers Act.]

NORTH CAROLINA COMMENTARY

This section is identical to the comparable section of the Uniform Act.

§ 33B-9. Use of custodial trust property.

(a) A custodial trustee shall pay to the beneficiary or expend for the beneficiary's use and benefit so much or all of the custodial trust property as the beneficiary while not incapacitated may direct from time to time.

(b) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the use and benefit of the beneficiary and the spouse and children, and other dependents of the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order and without regard to other support, income, or property of the beneficiary.

(c) A custodial trustee may establish checking, savings, or other similar accounts of reasonable amounts from which either the custodial trustee or the beneficiary may withdraw funds or against which either may draw checks. Funds withdrawn from, or checks written against, the account of the beneficiary are distributions of custodial trust property by the custodial trustee to the beneficiary. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This section provides that the custodial trustee is obligated to follow the directions of the beneficiary who is not incapacitated in paying over or expending custodial trust property. If the beneficiary is incapacitated, this section imposes duties on the custodial trustee to apply funds for the beneficiary similar to those imposed on custodians for minors under Section 14 of UTMA. In addition, however, subsection (b) authorizes a custodial trustee to pay over or expend custodial trust property for the use and benefit of the incapacitated beneficiary's dependents who were supported by the beneficiary at the time the beneficiary became incapacitated or for whom there is a legal obligation to support.

The use-and-benefits standard for the expenditure of custodial property is intended to avoid any implication that the custodial trust property can be used only for the required support of the incapacitated beneficiary.

Subsection (c) allows a custodial trustee to maintain a bank account, of an amount reasonable under the circumstances, with the beneficiary whereby both the beneficiary and the custodial trustee may write checks on the account. This may be used as one method of making money available for the beneficiary's personal needs. Many incapacitated persons, unable to manage business affairs, are still competent to pay personal expenses. This type of arrangement would be important to them. A custodial trustee should maintain, of course, a separate bank account for use in managing the custodial trust property and investments.

An alternative approach might be taken to this section that refers to the distributive powers of a conservator under the laws of the enacting state, in the event that state should prefer that incorporation by reference. For example: [The custodial trustee has the distributive powers of a conservator under the Uniform Probate Code.]

NORTH CAROLINA COMMENTARY

The drafters were concerned with the broad discretion provided by this section to the custodial trustee when the beneficiary is incompetent. The concern focused on the provisions of subsection (b) stating that the custodial trustee may expend so much of the custodial trust property as the custodial trustee "considers advisable" and may do so "in the manner, when, and to the extent that the custodial trustee determines suitable and proper." There was also concern with the indefiniteness of the phrase "individuals who were supported by the beneficiary," which appears in the Uniform Act. The words "the spouse and children, and other dependents of the beneficiary" are substituted for the words "individuals who were supported by the beneficiary when the beneficiary became incapacitated, or who are legally entitled to support by the beneficiary." The drafters thought it would rarely be desirable to have the custodial trust property used for a person who did not fall within the substituted language (which has been taken from G.S. 32A-2(a) relating to durable powers of attorney). Also, by limiting the custodial trustee's discretion regarding which individuals may receive the custodial trust property, the concerns over the broad discretion granted to the custodial trustee in the administration of the custodial trust are lessened.

Subsection (c) is modified for clarification.

§ 33B-10. Determination of incapacity; effect.

(a) The custodial trustee shall administer the custodial trust as for an incapacitated beneficiary if (i) the custodial trust was created under G.S. 33B-5, (ii) the transferor has so directed in the instrument creating the custodial trust, (iii) a determination that a beneficiary is an incompetent adult has been made under the provisions of Chapter 35A, including a determination of limited incompetence under the provisions of G.S. 35A-1112(d), unless the court provided otherwise, or (iv) the custodial trustee has determined that the beneficiary is incapacitated under subsection (b) of this section.

(b) A custodial trustee may determine that the beneficiary is incapacitated in reliance upon (i) previous direction or authority given by the beneficiary while not incapacitated, including direction or authority pursuant to a durable power of attorney, (ii) the certificate of the beneficiary's physician, (iii) authority given to the custodial trustee in the instrument creating the trust to determine the incapacity of the beneficiary after the creation of the custodial trust, or (iv) other reasonable evidence.

(c) If a custodial trustee for an incapacitated beneficiary determines that the beneficiary's incapacity has ceased, or that circumstances concerning the beneficiary's ability to manage property and business affairs have changed since the creation of a custodial trust directing administration as for an incapacitated beneficiary, the custodial trustee may administer the trust as for a beneficiary who is not incapacitated.

(d) Regardless of whether any determination of incapacity under subsection (b) of this section has or has not been made, the beneficiary, the custodial trustee, or other person interested in the custodial trust property or the welfare of the beneficiary, may petition under the procedures of Chapter 35A for a determination by the court whether the beneficiary is or continues to be incapacitated as defined in G.S. 33B-1(8). A determination of incapacity does not require appointment of a guardian of the estate unless in the discretion of the court such appointment is otherwise warranted.

(e) Incapacity of a beneficiary does not terminate (i) the custodial trust, (ii) any designation of a successor custodial trustee, (iii) rights or powers of the custodial trustee, or (iv) any immunities of third persons acting on instructions of the custodial trustee.

(f) A custodial trustee shall not be liable for any determinations authorized by this section regarding the capacity or incapacity of the beneficiary made in good faith. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This is one of the more important sections of the Act under which the custodial trustee may determine that the beneficiary is incapacitated so the trust will change from one subject to the control of the beneficiary to a discretionary trust for the beneficiary. Subsection (b) allows the custodial trustee to determine that the beneficiary is incapacitated provided the determination is based upon the certificate of the beneficiary's physician, the prior direction or authority of the beneficiary, or other reasonable evidence. That authority could be evidenced, for example, by a durable power of attorney executed by the beneficiary prior to becoming incapacitated even though that power of attorney is not otherwise effective to control management or termination of the custodial trust. Such a durable power of attorney could be given to a child, spouse, friend, or other trusted individual. In addition, specific authority is provided in subsection (d) for the beneficiary, the custodial trustee, or other interested person to seek a declaration from the court as to the capacity of the beneficiary for the purposes of this Act. This is important to the custodial trustee, as his duties and responsibilities change on the event of the beneficiary's incapacity.

This section is not a proceeding for the appointment of a conservator, and it is not contemplated that such a declaration would lead to court appointment of a conservator or guardian unless other factors would warrant such appointment. The existence of a comprehensive and well-managed custodial trust would be one factor that would tend to avoid the necessity for the appointment of a conservator or guardian of the estate.

This section also does not provide a proceeding to attack the legal competence of a transferor in setting up a trust under Section 2. Rather, Section 10 relates to a management matter in a validly established custodial trust.

Subsection (f) provides that the incapacity of the beneficiary does not terminate the custodial trust. If the beneficiary becomes incapacitated, the authority of the custodial trustee continues and the custodial trustee must follow the statutory provisions of the Act relating to managing custodial trusts for incapacitated individuals.

NORTH CAROLINA COMMENTARY

Subdivision (a)(iii) is added to permit a custodial trustee to administer the custodial trust as for an incapacitated beneficiary if a determination of incompetency has been made under Chapter 35A of the General Statutes, including a determination of limited incompetence under the provisions of G.S. 35A-1112(d). For clarification, a reference to subsection (b) is inserted in subdivision (a)(iv), thereby eliminating any interpretation that subdivision (a)(iv) provides additional independent authority for a custodial trustee to make a determination of incapacity. Subdivision (b)(iii) is added to permit a custodial trustee to determine that the beneficiary is incapacitated in reliance upon authority given to the custodial trustee in the instrument creating the custodial trust. In subdivision (b)(iv), "reasonable" is substituted for "persuasive" because "reasonable" has more object connotation. Subsection (c) is modified by substituting "determines" for "reasonably concludes" to conform the language of the subsection to the language of the new subsection (f). Subsection (d) is modified to clarify that when the petition for a determination of incapacity is filed under the provisions of subsection (d), the procedures of Chapter 35A regarding the determination of incompetency are to be used, but that the substantive criteria set out in the definition of "incapacitated" contain in G.S. 33B-1(8) are the criteria to be used in the proceedings. Subsection (e) of the Uniform Act is deleted because the drafters believed that the subsection would be interpreted as expanding the authority of the custodial trustee under subsection (b) to determine that the beneficiary is incapacitated in reliance upon other reasonable evidence. The drafters believed that subsection (e) would expose the custodial trustee to liability to a greater degree than subsection (a) or (b) and that subsection (e) would in effect defeat what the drafters tried to accomplish in modifying subsections (a) and (b). Subsection (f) has no counterpart in the Uniform Act and states what is believed to be implicit in the Uniform Act.

§ 33B-11. Third-party transactions.

A third person in good faith and without a court order may act on instructions of, or otherwise deal with, a person purporting to make a transfer as, or to act in the capacity of, a custodial trustee. In the absence of actual knowledge to the contrary, the third person is not responsible for determining:

(1) The validity of the purported custodial trustee's designation;

(2) The propriety of, or the authority under this act for, any action of the purported custodial trustee;
(3) The validity or propriety of an instrument executed or instruction given pursuant to this act either by the person purporting to make a transfer or declaration or by the purported custodial trustee; or
(4) The propriety of the application of property vested in the purported custodial trustee. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This section is based upon Section 16 of the UTMA and protects third persons who deal in good faith with the custodial trustee.

NORTH CAROLINA COMMENTARY

The catchline to this section is modified for clarification. The first sentence of this section is modified for grammatical reasons, with no intent to change the meaning of the section. The word "actual" is inserted before the word "knowledge" in the introductory language of the second sentence of this section for clarification.

§ 33B-12. Liability to the third person.

(a) A claim based on (i) a contract entered into by a custodial trustee acting in a fiduciary capacity, (ii) an obligation arising from the ownership or control of custodial trust property, (iii) a tort committed in the course of administering the custodial trust, may be asserted by a third person against the custodial trust property by proceeding against the custodial trustee in a fiduciary capacity, whether or not the custodial trustee or the beneficiary is personally liable.

(b) A custodial trustee may be held personally liable to a third person:
(1) On a contract entered into in a fiduciary capacity if the custodial trustee fails to reveal that capacity or to identify the custodial trust in the contract; or
(2) For an obligation arising from control of custodial trust property or for a tort committed in the course of the administration of the custodial trust if the custodial trustee is personally at fault.

(c) A beneficiary is not personally liable to a third person for an obligation arising from beneficial ownership of custodial trust property or for a tort committed in the course of administration of the custodial trust unless the beneficiary is personally in possession of the custodial trust property giving rise to the liability or is personally at fault.

(d) Subsections (b) and (c) of this section do not preclude actions or proceedings to establish liability of the custodial trustee or beneficiary as owner or possessor of the custodial trust property to the extent that person is protected as the insured by liability insurance. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This section is patterned after Section 17 of the UTMA and that section in turn was based upon Sections 5-428 and 7-306 of the Uniform Probate Code limiting the liability of conservators and trustees. See also Restatement of Trusts, 2d Sections 265 and 277. The effect of this section is to limit the claims of third parties to recourse against custodial trust property as both the custodial trustee and the beneficiary are protected from personal liability absent personal fault on their part. This section does not alter the obligations between the custodial trustee and the beneficiary arising out of the administration of the estate and the accounting for that administration.

There may be cases in which a custodial

trustee or beneficiary may have a right to possession of custodial trust property and may insure against liability arising out of possession or control of the property as a named insured, e.g., under homeowner's or automobile liability insurance. In such a case, the beneficiary should be permitted as a party defendant under subsection (d) but only to the extent of the protection of the liability insurance.

NORTH CAROLINA COMMENTARY

Subsection (a) is subdivided for ease of reading. Subsection (b) is modified to state the liability of the custodial trustee in positive rather than negative terms. Subsection (d) is modified for clarification.

§ 33B-13. Declination, resignation, incapacity, death, or removal of custodial trustee; designation of successor custodial trustee.

(a) Before accepting the custodial trust property, a person designated as custodial trustee may decline to serve by notifying the person who made the designation, the transferor, or the transferor's legal representative. In such case, the transferor or the transferor's legal representative may designate a substitute custodial trustee. If the custodial trust is being created under G.S. 33B-3, the substitute custodial trustee designated under G.S. 33B-3 becomes the custodial trustee, or, if a substitute custodial trustee has not been designated, the person who made the designation may designate a substitute custodial trustee pursuant to G.S. 33B-3.

(b) A custodial trustee who has accepted the custodial trust property may resign by (i) delivering written notice to a successor custodial trustee, if any, the beneficiary, and, if the beneficiary is incapacitated, to the beneficiary's guardian of the estate, if any, and (ii) transferring and, where appropriate, registering or recording an instrument relating to the custodial trust property in the name of the successor custodial trustee identified under subsection (c) of this section.

(c) If a custodial trustee or successor custodial trustee is ineligible, resigns, dies, or becomes incapacitated, the successor designated under G.S. 33B-2 or G.S. 33B-3 becomes custodial trustee. If there is no effective provision for a successor, the beneficiary, if not incapacitated, may designate a successor custodial trustee; if the beneficiary fails to act within 90 days, the resigning custodial trustee may designate a successor custodial trustee. If there is no effective provision for a successor custodial trustee and if the beneficiary is incapacitated, the beneficiary's guardian of the estate becomes successor custodial trustee. If the beneficiary does not have a guardian of the estate or the guardian of the estate fails to act as custodial trustee, the resigning custodial trustee may designate a successor custodial trustee.

(d) If a successor custodial trustee is not designated pursuant to subsection (c) of this section, the following persons may in the order listed petition the court to designate a successor custodial trustee: the transferor, the legal representative of the transferor, the legal representative of the custodial trustee, the general guardian of the beneficiary, the guardian of the estate of the beneficiary, an adult member of the beneficiary's family, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary.

(e) A custodial trustee who declines to serve or resigns, or the legal representative of a deceased or incapacitated custodial trustee shall put the custodial trust property and records in the possession and control of the successor custodial trustee as soon as practical. The successor custodial trustee shall enforce the obligation to deliver custodial trust property and records.

(f) A beneficiary, the beneficiary's guardian of the estate, an adult member of the beneficiary's family, a guardian of the person of the beneficiary, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary, may petition the court (i) to remove the custodial trustee for cause and to designate a successor custodial trustee, (ii) to require the custodial trustee to furnish a bond or other security for the faithful performance of fiduciary duties, or (iii) for other appropriate relief. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This section follows many of the provisions of Section 18 of UTMA with some substantive changes. It is designed to accommodate in a single section the circumstances in which a custodial trustee would be replaced by another custodial trustee. Under subsection (b), if the beneficiary is incapacitated, a custodial trustee who resigns must give written notice to both the beneficiary and the beneficiary's conservator if one exists. Under subsection (c), a beneficiary who is not incapacitated may designate, without limitation, a successor custodial trustee. If, however, the beneficiary fails to act or is incapacitated, the procedure to be followed is very similar to that found in UTMA except that the nonincapacitated beneficiary has 90 days to act and if the beneficiary has no conservator or if the conservator declines to act, the custodial trustee may eventually designate a successor custodial trustee.

Under subsection (f), the beneficiary, whether or not incapacitated, can petition the court to remove the custodial trustee for cause and to designate a successor trustee, or the court may require the custodial trustee to give bond or other appropriate relief.

This section, unlike Section 18 of UTMA, does not give the custodial trustee the general power to designate a successor custodial trustee but rather limits that power to the situation in which the procedure for designating successor custodial trustees by others has been exhausted.

NORTH CAROLINA COMMENTARY

This section is modified for clarification and to establish the priority of those involved in the selection of successor custodial trustees.

The second sentence of subsection (e) is modified by substituting "shall" for "may" to conform to existing trust practice, which dictates that a successor trustee obtain a full and complete accounting from his predecessor.

§ 33B-14. Expenses, compensation, and bond of custodial trustee.

Except as otherwise provided in the instrument creating the custodial trust, in an agreement with the beneficiary, or by court order, a custodial trustee:

(1) Is entitled to reimbursement from custodial trust property for reasonable expenses incurred in the performance of fiduciary services;

(2) May charge, no later than six months after the end of each calendar year, a reasonable compensation for fiduciary services performed during that year; and

(3) Need not furnish a bond or other security for the faithful performance of fiduciary duties. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This section follows the pattern of Section 15 of the UTMA except it does subject the arrangements for payment of expenses, compensation, and bond to provisions in the custodial trust instrument or agreement of the beneficiary or court order.

As in UTMA, the provisions with regard to compensation are designed to avoid imputed compensation to the custodian who waives compensation and also to avoid the accumulation of claims for compensation until the termination of the custodial trust. Although the ability to control these matters by the trust instrument or agreement of the beneficiary seems to be implied, as was assumed in UTMA, it is here expressly stated because of the possibility of informal arrangements with persons as trustees.

NORTH CAROLINA COMMENTARY

Subdivision (2) is modified for simplification.

§ 33B-15. Reporting and accounting by custodial trustee; determination of liability of custodial trustee.

(a) Upon the acceptance of custodial trust property, the custodial trustee shall provide a written statement that the custodial trust property is held pursuant to this act and describing the custodial trust property. The custodial trustee shall thereafter provide a written statement of the administration of the custodial trust property (i) once each year, (ii) upon request at reasonable times by the beneficiary or the beneficiary's legal representative, (iii) upon resignation or removal of the custodial trustee, and (iv) upon termination of the custodial trust. The statements must be provided to the beneficiary or to the beneficiary's legal representative. Upon termination of the beneficiary's interest, the custodial trustee shall furnish a statement to the person to whom the custodial trust property is to be delivered.

(b) A beneficiary, the beneficiary's legal representative, an adult member of the beneficiary's family, a person interested in the custodial trust property, or a person interested in the welfare of the beneficiary may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative.

(c) A successor custodial trustee may petition the court for an accounting by a predecessor custodial trustee or the legal representative of a predecessor custodial trustee.

(d) In an action or proceeding under this act or in any other proceeding, the court may require or permit the custodial trustee or the custodial trustee's legal representative to account. The custodial trustee or the custodial trustee's legal representative may petition the court for approval of annual or final accounts.

(e) If a custodial trustee is removed, the court shall require an accounting and order delivery of the custodial trust property and records to the successor custodial trustee and the execution of all instruments required for transfer of the custodial trust property.

(f) On petition of the custodial trustee or any person who could petition for an accounting, the court, after notice to interested persons, may issue instructions to the custodial trustee or review the propriety of the acts of a custodial trustee or the reasonableness of compensation determined by the custodial trustee or others. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This section requires that the custodial trustee inform the beneficiary of the initiation of the trust and provide reasonably current reports of the administration of the custodial trust to the beneficiary or the beneficiary's legal representative. Even though some custodial trustees may act informally, it seems appropriate that both the trustee and the beneficiary be expected to exchange complete information concerning the administration of the trust at least once each year. In some cases, more frequent exchanges of information between the custodial trustee and beneficiary would be expected, e.g., when they use a bank account to which both have access. This is particularly true with regard to necessary information for tax reporting by the parties involved. This section assumes the usual minimum components of an account, i.e., assets and values at the beginning of the accounting period, receipts, and disbursements during the accounting period and assets and their values on hand or available for distribution at the close of the accounting period.

Subsection (a) identifies the necessary reports and accountings for the parties, and subsection (b) identifies a broad group of persons who may petition the court for an accounting by the custodial trustee or the custodial trustee's legal representative. Much of the section is drawn from Section 19 of the UTMA modified to fit the custodial trust. Subsection (f) recognizes the inherent power of the court to instruct trustees and review their actions. This paragraph is patterned after Uniform Probate Code Section 7-205.

NORTH CAROLINA COMMENTARY

The language "that the custodial trust property is held pursuant to this act and" is inserted in the first sentence of subsection (a) for the purpose of insuring that the transfer is a present interest for gift tax purposes. The language ", if any" is deleted from the third sentence of subsection (a) and "current" is deleted from the fourth sentence of subsection (a) as being unnecessary. The language "annual or" is inserted in the second sentence of subsection (d) to allow the custodial trustee or the custodial trustee's legal representative to petition the court for approval of annual accounts as well as final accounts. Apparently the language "for the services of the custodial trustee" was inadvertently deleted from subsection (f).

§ 33B-16. Limitations of action against custodial trustee.

(a) Except as provided in subsections (b) and (c) of this section, a claim for relief against a custodial trustee for accounting or breach of duty is barred as to a beneficiary, a person to whom custodial trust property is to be paid or delivered, or the legal representative of an incapacitated or deceased beneficiary or payee:

(1) Who has received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within two years after receipt of the final account or statement; or

(2) Who has not received a final account or statement fully disclosing the matter unless an action or proceeding to assert the claim is commenced within three years after the termination of the custodial trust.

(b) Except as provided in subsection (c) of this section, a claim for relief to recover from a custodial trustee for fraud, misrepresentation, or concealment is barred unless an action or proceeding to assert the claim is commenced within five years after the termination of the custodial trust.

(c) A claim for relief is not barred by this section if the claimant:

(1) Is a minor, until the earlier of two years after the claimant becomes an adult or dies;

(2) Is an incapacitated adult, until the earliest of two years after (i) the appointment of a guardian of the estate, (ii) the removal of the incapacity, or (iii) the death of the claimant; or

(3) Was an adult, now deceased, who was not incapacitated, until two years after the claimant's death if the claim was not barred by adjudication, consent, or limitation prior to the claimant's death. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

In an effort to provide as comprehensive a statute as possible to inform the parties of substantially all of their obligations and rights, statutes of limitation are provided in this section. The limitations provided in this section are derived from the Uniform Probate Code, Sections 1-106 and 7-307, and from the Missouri Custodial Act.

The nature of the limitations imposed by the section are illustrated by the situation in which a custodial trustee is removed, resigns, or dies. If the former custodial trustee accounts as required under Section 13 on removal or resignation, or the deceased custodial trustee's personal representative accounts, the two-year limitation of subsection (a)(1) applies. Should the former custodial trustee or the personal representative fail to account, then, subsection (a)(2) would apply to limit the time in which a proceeding to assert the claim could be commenced. This time would begin to run on the date the trust terminated. Of course, if the claim is one for fraud or concealment, the longer time limitation of subsection (b) would apply. In any event, should the beneficiary become incapacitated or die before the applicable time limitation had expired, the tolling provision of subsection (c) could postpone the time bar until two years after removal of the disability or death.

NORTH CAROLINA COMMENTARY

The following modifications are made for clarification: the reference to subsection (b) is added to subsection (a); the Uniform Act's language "unless previously barred by adjudication, consent, or limitation," is deleted from subsection (a); and the Uniform Act's language "related to the final settlement of the custodial trust or concealment of the existence of the custodial trust," is deleted from subsection (b). The language "if the claim was not barred by adjudication, consent, or limitation prior to the claimant's death" is inserted in subdivision (c)(3) to eliminate the possibility that the subdivision might be interpreted to revive a claim barred prior to the death of the claimant.

§ 33B-17. Distribution on termination.

(a) Upon termination of a custodial trust, the custodial trustee shall transfer the unexpended custodial trust property:

(1) To the beneficiary, if not incapacitated or deceased;

(2) To the guardian of the estate or other recipient designated by the court for an incapacitated beneficiary; or

(3) Upon the beneficiary's death, in the following order:

a. As last directed in a writing signed by the deceased beneficiary while not incapacitated and received by the custodial trustee during the life of the deceased beneficiary;

b. As designated in the instrument creating the custodial trust; or

c. To the estate of the deceased beneficiary.

(b) If, when the custodial trust would otherwise terminate, the distributee is incapacitated, the custodial trust continues for the use and benefit of the distributee as beneficiary until the incapacity is removed or the custodial trust is otherwise terminated.

(c) Death of a beneficiary does not terminate the power of the custodial trustee to discharge obligations of the custodial trustee or beneficiary incurred before the termination of the custodial trust.

(d) The writing described in G.S. 33B-17(a)(3)a. or the instrument described in G.S. 33B-17(a)(3)b. must also be signed by at least two witnesses, neither of whom is the custodial trustee or the distributee of the custodial trust property, and be acknowledged by the beneficiary or transferor before an individual authorized to administer oaths or take acknowledgements. Failure to comply with the witness or acknowledgement requirement shall not affect the validity of the custodial trust during the life of the beneficiary, but shall invalidate only the direction or designation of the distributee on termination of the custodial trust under G.S. 33B-17(a)(3)a. or G.S. 33B-17(a)(3)b., and upon termination of the custodial trust the custodial trustee shall transfer the unexpended custodial trust property according to the remaining provisions of this section. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This section controls distribution of the custodial trust property when the custodial trust is terminated under Section 2(e). It is designed to provide for efficient and certain distribution without judicial proceedings. Subsection (a)(3) is an important provision for avoiding complications on distribution and provides that distribution may be controlled first, by the direction of the deceased beneficiary or second, by the custodial trust instrument (see Sections 2, 6 and 18) and, only if no effective prior designation for the payment or distribution of the property on the death of the beneficiary has been made, shall it pass through the beneficiary's estate.

The direction to the custodial trustee by the beneficiary, who is not incapacitated, for distribution on termination of the custodial trust may be in any written form clearly identifying the distributee. For example, the following direction would be adequate under the statute:

I, ________ (name of beneficiary) hereby direct ________________ (name of trustee) as custodial trustee, to transfer and pay the unexpended balance of the custodial trust property of which I am beneficiary to ________ as distributee on the termination of the trust at my death. In the event of the prior death of ________ above named as distributee, I designate ________ as distributee of the custodial trust property.

Receipt Acknowledged Signed

(signature) ____________________

(signature) ____________________

Custodial Trustee Beneficiary

Date ________ Date ________

NORTH CAROLINA COMMENTARY

Subdivision (a)(3)(ii) of the Uniform Act, relating to the concept of multiple beneficiaries, is deleted.

Subsection (d), which has no counterpart in the Uniform Act, was added by the General Assembly to require a writing or instrument designating someone other than the beneficiary's estate to receive the custodial trust property at the beneficiary's death (i) to be signed by at least two witnesses, neither of whom is the custodial trustee or the distributee of the custodial trust property and (ii) to be acknowledged by the beneficiary or transferor before an individual authorized to administer oaths or take acknowledgments. These requirements apply only where someone other than the beneficiary's estate is designated to receive the custodial trust property at the beneficiary's death.

§ 33B-18. Methods and forms of creating custodial trusts.

(a) If a transaction (including a declaration with respect to or a transfer of specific property) otherwise satisfies applicable law, the criteria of G.S. 33B-2 are satisfied by:

(1) The execution and either delivery to the custodial trustee or recording of an instrument in substantially the following form:

"TRANSFER UNDER THE NORTH CAROLINA
UNIFORM CUSTODIAL TRUST ACT

I, ________________________ (name of transferor or name and representative capacity if a fiduciary), transfer to ________________ (name of trustee other than transferor), as custodial trustee for ________________ (name of beneficiary) as beneficiary and ________________ as distributee on termination of the trust in absence of direction by the beneficiary under the North Carolina Uniform Custodial Trust Act, the following:
(insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).

Dated: ____________________

________________ (Seal) ________________ (Witness)
Signature

________________ (Witness)

STATE OF ____________ COUNTY OF ____________

On this ______ day of ____________, ________, personally appeared before me, the said named ____________ to me known and known to me to be the person described in and who executed the foregoing instrument and he (or she) acknowledged that he (or she) executed the same and being duly sworn by me, made oath that the statements in the foregoing instrument are true.

My Commission Expires ______________

____
(Signature of Notary Public)
Notary Public (Official Seal)";

or

(2) The execution and the recording or giving notice of its execution to the beneficiary of an instrument in substantially the following form:

"DECLARATION OF TRUST UNDER THE NORTH CAROLINA UNIFORM CUSTODIAL TRUST ACT

I, ______________________ (name of owner of property,) declare that henceforth I hold as custodial trustee for ______________ (name of beneficiary other than transferor) as beneficiary and ______________ as distributee on termination of the trust in absence of direction by the beneficiary under the North Carolina Uniform Custodial Trust Act, the following: (Insert a description of the custodial trust property legally sufficient to identify and transfer each item of property).

Dated: __________________

______________ (Seal) ______________ (Witness)
Signature

______________ (Witness)

STATE OF ___________ COUNTY OF ___________

On this ______ day of ___________, ________, personally appeared before me, the said named ___________ to me known and known to me to be the person described in and who executed the foregoing instrument and he (or she) acknowledged that he (or she) executed the same and being duly sworn by me, made oath that the statements in the foregoing instrument are true.

My Commission Expires ______________

____
(Signature of Notary Public)
Notary Public (Official Seal)"

(b) Any customary methods of transferring or evidencing ownership of property may be used to create a custodial trust, including, but not limited to, any of the following:

(1) Registration of a security in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance "as custodial trustee for ______________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act";

(2) Delivery of a certificated security, or a document necessary for the transfer of an uncertificated security, together with any necessary endorsement, to an adult other than the transferor or to a trust company as custodial trustee, accompanied by an instrument in substantially the form prescribed in subsection (a)(1);

(3) Payment of money or transfer of a security held in the name of a broker or a financial institution or its nominee to a broker or financial institution for credit to an account in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance "as custodial trustee for ______________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act";

(4) Registration of ownership of a life or endowment insurance policy or annuity contract with the issuer in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance "as custodial trustee for ________________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act";

(5) Delivery of a written assignment to an adult other than the transferor or to a trust company designated in the assignment in substance by the words "as custodial trustee for ________________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act";

(6) Irrevocable exercise of a power of appointment, pursuant to its terms, in favor of a trust company, an adult other than the donee of the power, or the donee who holds the power if the beneficiary is other than the donee, designated in the appointment in substance "as custodial trustee for ________________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act";

(7) Delivery of a written notification or assignment of a right to future payment under a contract to an obligor which transfers the right under the contract to a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in the notification or assignment in substance "as custodial trustee for ________________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act";

(8) Execution and delivery of a conveyance of an interest in real property in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance "as custodial trustee for ________________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act";

(9) Issuance of a certificate of title by an agency of a state or of the United States which evidences title to tangible personal property:
  a. Issued in the name of a trust company, an adult other than the transferor, or the transferor if the beneficiary is other than the transferor, designated in substance "as custodial trustee for ________________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act"; or
  b. Delivered to a trust company or an adult other than the transferor or endorsed by the transferor to that person, designated in substance "as custodial trustee for ________________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act"; or

(10) Execution and delivery of an instrument of gift to a trust company or an adult other than the transferor, designated in substance "as custodial trustee for ________________ (name of beneficiary) under the North Carolina Uniform Custodial Trust Act". (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This section largely follows Section 9 of UTMA. It provides instructional detail for forms and methods of transferring assets that satisfy the requirements of the statute. Although many of the customary methods of transferring assets are identified, these methods are not intended to be exclusive since any type of property that can be transferred by any legal means is intended to be within the scope of the statute, provided the requirements of Section 2 are met. The method of transfer or conveyance appropriate to the asset should be used, e.g., if land is involved, a deed or conveyance that satisfies the local requirements would be appropriate. In the effort to make the statute as self-contained and as fully explanatory as possible, these provisions for implementation are included in the statute rather than being appended or inserted in the Comments.

NORTH CAROLINA COMMENTARY

The forms in subsection (a) were modified by the General Assembly to conform to the witness and acknowledgment requirements of G.S. 33B-17(d). The witness and acknowledgment provisions in the forms are necessary only where someone other than the beneficiary's estate is designated to receive the custodial trust property at the beneficiary's death. As provided in G.S. 33B-17(d), failure to comply with the witness or acknowledge requirement shall not affect the validity of the custodial trust during the life of the beneficiary.

The phrase ", but not limited to," is inserted in the introductory language to subsection (b) to clarify that the list of methods of transferring property is illustrative and nonexclusive. Clarifying stylistic changes are made to the Uniform Act's language in subdivisions (b)(5), (6) and (7) by changing "whose name in the assignment is designated," "whose name in the appointment is designated," and "whose name in the notification or assignment is designated" to "designated in the assignment," "designated in the appointment," and "designated in the notification or assignment," respectively. Subdivision (b)(8) is modified by deleting the reference to recordation because recordation (as opposed to delivery of the deed) generally is technically unnecessary for the validity of a conveyance or transfer of an interest in real property in North Carolina. G.S. 47-26 however requires deeds of gift, which would include deeds of gift to a custodial trustee, to be recorded within two years; therefore, under most circumstances the custodial trustee has a duty to record the deed. A change similar to the change made in subdivision (b)(8) was made in the North Carolina Uniform Transfers to Minors Act.

§ 33B-19. Applicable law.

(a) This act applies to a transfer or declaration creating a custodial trust that refers to this act if, at the time of the transfer or declaration, the transferor, beneficiary, or custodial trustee is a resident of or has its principal place of business in this State or the custodial trust property is located in this State. The custodial trust remains subject to this act despite a later change in residence or principal place of business of the transferor, beneficiary, or custodial trustee, or removal of the custodial trust property from this State.

(b) A transfer made pursuant to an act of another state substantially similar to this act is governed by the law of that state and may be enforced in this State. (1995, c. 486, s. 1.)

OFFICIAL COMMENT

This section is designed to avoid confusion in the event a party or assets are removed from the state.

NORTH CAROLINA COMMENTARY

This section is identical to the comparable section of the Uniform Act.

§ 33B-20. Uniformity of application and construction.

This act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this act among states enacting it. (1995, c. 486, s. 1.)

NORTH CAROLINA COMMENTARY

This section is identical to the comparable section of the Uniform Act.

§ 33B-21. Short title.

This act may be cited as the "North Carolina Uniform Custodial Trust Act". (1995, c. 486, s. 1.)

NORTH CAROLINA COMMENTARY

This section is identical to the comparable section of the Uniform Act, except that the words "North Carolina" are inserted before the words "Uniform Custodial Trust Act."

§ 33B-22. Limitation on value of custodial trust property.

Transfers or declarations of property to the corpus of a custodial trust under this act shall not exceed in the aggregate one hundred thousand dollars ($100,000) in value, exclusive of the value of the transferor's or declarant's personal residence. This limitation shall not apply to any appreciation in the value of the corpus held in the custodial trust. A good faith violation of this section shall not invalidate a custodial trust. (1995, c. 486, s. 1.)

NORTH CAROLINA COMMENTARY

This section, which was added by the General Assembly, has no counterpart in the Uniform Act.

Chapter 34.

Veterans' Guardianship Act.

Sec.
34-1. Title.
34-2. Definitions.
34-2.1. Guardian's powers as to property; validation of prior acts.
34-3. Appointment of guardian for wards entitled to benefits from United States Veterans' Bureau.
34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, public guardians, or where wards are members of same family.
34-5. Petition for appointment of guardian.
34-6. Certificate of Director prima facie evidence of necessity for appointment of guardian of minor.
34-7. Certificate as evidence in regard to guardianship of mentally incompetent wards.

Sec.
34-8. Notice of filing of petition.
34-9. Qualifications of guardian; surety bond.
34-10. Guardian's accounts to be filed; hearing on accounts.
34-11. Failure to file account cause for removal.
34-12. Compensation at five percent; additional compensation; premiums on bonds.
34-13. Investment of funds.
34-14. Application of ward's estate.
34-14.1. Payment of veterans' benefits to relatives.
34-15. Certified copy of record required by Bureau to be furnished without charge.
34-16. [Repealed.]
34-17. Discharge of guardian.
34-18. Construction of Chapter.

§ 34-1. Title.

This Chapter shall be known as "The Veterans' Guardianship Act." (1929, c. 33, s. 1.)

§ 34-2. Definitions.

In this Chapter:

The term "benefits" shall mean all moneys payable by the United States through the Bureau.

The term "Bureau" means the United States Veterans' Bureau or its successor.

The term "Director" means the Director of the United States Veterans' Bureau or his successor.

"Estate" means income on hand and assets acquired partially or wholly with "income."

The term "guardian" as used herein shall mean any person acting as a fiduciary for a ward.

"Income" means moneys received from the Veterans Administration and revenue or profit from any property wholly or partially acquired therewith.

The term "person" includes a partnership, corporation or an association.

The term "ward" means a beneficiary of the Bureau. (1929, c. 33, s. 2; 1945, c. 723, s. 2; 1961, c. 396, s. 1.)

Editor's Note. — The successor of the United States Veterans' Bureau is the Veterans Administration.

§ 34-2.1. Guardian's powers as to property; validation of prior acts.

Any guardian appointed under the provisions of this Chapter may be guardian of all property, real or personal, belonging to the ward to the same extent as a guardian appointed under the provisions of Chapter 35A of the General Statutes, and the provisions of such Chapter concerning the custody, management and disposal of property shall apply in any case not provided for by this Chapter. All acts heretofore performed by guardians appointed under the provisions of this Chapter with respect to the custody, management and disposal of property of wards are hereby validated where no provision for such acts was provided for by this Chapter, if such acts were performed under and in conformity with the provisions of Chapter 35A of the General Statutes. (1955, c. 1272, s. 1; 1987, c. 550, s. 18.)

§ 34-3. Appointment of guardian for wards entitled to benefits from United States Veterans' Bureau.

Whenever, pursuant to any law of the United States or regulation of the Bureau, the Director requires, prior to payment of benefits, that a guardian be appointed for a ward, such appointment shall be made in the manner hereinafter provided. (1929, c. 33, s. 3.)

Editor's Note. — The successor of the United States Veterans' Bureau is the Veterans Administration.

§ 34-4. Guardian may not be named for more than five wards; exceptions; banks and trust companies, public guardians, or where wards are members of same family.

It shall be unlawful for any person, other than a public guardian qualified under Article 11, Chapter 35A, General Statutes of North Carolina, to accept appointment as guardian of any United States Veterans Administration ward, if such person shall at the time of such appointment be acting as guardian for five wards. For the purpose of this section, all minors of same family unit shall constitute one ward. In all appointments of a public guardian for United States Veterans Administration wards, the guardian shall furnish a separate bond for each appointment as required by G.S. 34-9. If, in any case, an attorney for the United States Veterans Administration presents a petition under this section alleging that an individual guardian other than a public guardian is acting in a fiduciary capacity for more than five wards and requesting discharge of the guardian for that reason, then the court, upon satisfactory evidence that the individual guardian is acting in a fiduciary capacity for more than five wards, must require a final accounting forthwith from such guardian and shall discharge the guardian in such case. Upon the termination of a public guardian's term of office, he may be permitted to retain any appointments made during his term of office.

This section shall not apply to banks and trust companies licensed to do trust business in North Carolina. (1929, c. 33, s. 4; 1967, c. 564, s. 1; 1987, c. 550, s. 19.)

§ 34-5. Petition for appointment of guardian.

A petition for the appointment of a guardian may be filed in any court of competent jurisdiction by or on behalf of any person who under existing law is entitled to priority of appointment. If there be no person so entitled or if the person so entitled shall neglect or refuse to file such a petition within thirty days after mailing of notice by the Bureau to the last known address of such person indicating the necessity for the same, a petition for such appointment may be filed in any court of competent jurisdiction by or on behalf of any responsible person residing in this State.

The petition for appointment shall set forth the name, age, place of residence of the ward, the names and places of residence of the nearest relative, if known, and the fact that such ward is entitled to receive moneys payable by or through the Bureau and shall set forth the amount of moneys then due and the amount of probable future payments.

The petition shall also set forth the name and address of the person or institution, if any, having actual custody of the ward.

In the case of a mentally incompetent ward the petition shall show that such ward has been rated incompetent on examination by the Bureau in accordance with the laws and regulations governing the Bureau. (1929, c. 33, s. 5.)

Editor's Note. — The successor of the United States Veterans' Bureau is the Veterans Administration.

§ 34-6. Certificate of Director prima facie evidence of necessity for appointment of guardian of minor.

Where a petition is filed for the appointment of a guardian of a minor ward a certificate of the Director, or his representative, setting forth the age of such minor as shown by the records of the Bureau and the fact that the appointment of a guardian is a condition precedent to the payment of any moneys due the minor by the Bureau, shall be prima facie evidence of the necessity of such appointment. (1929, c. 33, s. 6.)

Editor's Note. — The successor of the United States Veterans' Bureau is the Veterans Administration.

§ 34-7. Certificate as evidence in regard to guardianship of mentally incompetent wards.

Where a petition is filed for the appointment of a guardian of a mentally incompetent ward a certificate of the Director, or his representative, setting forth the fact that such person has been rated incompetent by the Bureau on examination in accordance with the laws and regulations governing such Bureau; and that the appointment of a guardian is a condition precedent to the payment of any moneys due such person by the Bureau, shall be prima facie evidence of the necessity for such appointment. (1929, c. 33, s. 7.)

Editor's Note. — The successor of the United States Veterans' Bureau is the Veterans Administration.

§ 34-8. Notice of filing of petition.

Upon the filing of a petition for the appointment of a guardian, under the provisions of this Chapter, the court shall cause such notice to be given as provided by law. (1929, c. 33, s. 8.)

§ 34-9. Qualifications of guardian; surety bond.

Before making an appointment under the provisions of this Chapter the court shall be satisfied that the guardian whose appointment is sought is a fit and proper person to be appointed. Upon the appointment being made the guardian shall execute and file a surety bond to be approved by the court in an amount not less than the sum then due and estimated to become payable during the ensuing year. The said bond shall be in the form and be conditioned as required of guardians appointed under the guardianship laws of this State. The court shall have power from time to time to require the guardian to file an additional bond.

No bond shall be required of the banks and trust companies licensed to do trust business in North Carolina. (1929, c. 33, s. 9.)

Cross References. — As to bond required of guardians, see G.S. 35A-1230 et seq.

§ 34-10. Guardian's accounts to be filed; hearing on accounts.

Every guardian, who shall receive on account of his ward any moneys from the Bureau, shall file with the court annually, on the anniversary date of the appointment, in addition to such other accounts as may be required by the court, a full, true, and accurate account under oath of all moneys so received by him, of all disbursements thereof, and showing the balance thereof in his hands at the date of such account and how invested. A certified copy of each of such accounts filed with the court shall be sent by the guardian to the office of the Bureau having jurisdiction over the area in which such court is located.

At the time such account is filed the clerk of the superior court shall require the guardian to exhibit to the court all investments and bank statements showing cash balance and the clerk of the superior court shall certify on the original account and the certified copy which the guardian sends the Bureau that an examination was made of all investments and cash balance and that same are correctly stated in the account; provided that banks, organized under the laws of North Carolina or the Acts of Congress, engaged in doing a trust and fiduciary business in this State, when acting as guardian, or in other fiduciary capacity, shall be exempt from the requirement of exhibiting such investments and bank statements, and the clerk of the superior court shall not be required to so certify as to the accounts of such banks, except that in addition to the officer verifying the accounts, there shall be added a certificate of another officer of the bank certifying that all assets referred to in the account are held by the guardian or by a clearing corporation for the guardian. If objections are raised to such an accounting, the court shall fix a time and place for the the hearing thereon not less than 15 days nor more than 30 days from the date of filing such objections, and notice shall be given by the court to the aforesaid Bureau office and the Department of Military and Veterans Affairs by mail not less than 15 days prior to the date fixed for the hearing. Notice of such hearing shall also be given to the guardian. (1929, c. 33, s. 10; 1933, c. 262, s. 1; 1945, c. 723, s. 2; 1961, c. 396, s. 2; 1967, c. 564, s. 5; 1973, c. 497, s. 6; c. 620, s. 9.)

Editor's Note. — The successor of the United States Veterans' Bureau is the Veterans Administration.

Legal Periodicals. — As to 1933 amendment, see 11 N.C.L. Rev. 232 (1933).

§ 34-11. Failure to file account cause for removal.

If any guardian shall fail to file any account of the moneys received by him from the Bureau on account of his ward within 30 days after such account is required by either the court or the Bureau, or shall fail to furnish the Bureau a copy of his accounts as required by this Chapter, such failure shall be grounds for removal. (1929, c. 33, s. 11.)

Editor's Note. — The successor of the United States Veterans' Bureau is the Veterans Administration.

§ 34-12. Compensation at five percent; additional compensation; premiums on bonds.

Compensation payable to guardians shall not exceed five percent (5%) of the income of the ward during any year, except that the court may approve compensation in the accounting in an amount not to exceed twenty-five dollars ($25.00) from an estate where the income for any one year is less than five hundred dollars ($500.00). In the event of extraordinary services rendered by such guardian the court may, upon petition and after hearing thereon, authorize additional compensation therefor, payable from the estate of the ward. Notice of such petition and hearing shall be given the proper office of the Bureau and the Department of Military and Veterans Affairs in the manner provided in G.S. 34-10. No compensation shall be allowed on the corpus of an estate received from a preceding guardian. The guardian may be allowed from the estate of his ward reasonable premiums paid by him to any corporate surety upon his bond. (1929, c. 33, s. 12; 1945, c. 723, s. 2; 1967, c. 564, ss. 2, 5; 1973, c. 620, s. 9.)

Editor's Note. — The successor of the United States Veterans' Bureau is the Veterans Administration.

CASE NOTES

Appeal from Award of Additional Compensation. — Where the clerk entered an order allowing a guardian additional compensation for extraordinary services and the Veterans Administration failed to perfect its appeal from the clerk's order, and thereafter applied to the judge of the superior court for a writ of certiorari, the petition for certiorari was denied upon the court's finding of laches and demerit. In re Snelgrove, 208 N.C. 670, 182 S.E. 335 (1935).

§ 34-13. Investment of funds.

Every guardian shall invest the funds of the estate in any of the following securities:

(1) United States government bonds.
(2) State of North Carolina bonds issued since the year 1872.
(3) By loaning the same upon real estate securities in which the guardian has no interest, such loans not to exceed fifty percent (50%) of the actual appraised or assessed value, whichever may be lower, and said loans when made to be evidenced by a note, or notes, or bond, or bonds, under the seal of the borrower and secured by first mortgage or first deed of trust. Said guardian before making such investment on real estate mortgages shall secure a certificate of title from some reputable attorney certifying that the same is first lien on real estate and also setting forth the tax valuation thereof for the current year: Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or his dependents upon petition and order of the clerk of superior court, said order to be approved by the resident or presiding judge of the superior court, and provided further that

copy of said petition shall be forwarded to said Bureau before consideration thereof by said court. Any guardian may encumber the home or farm so purchased for the entire purchase price or balance thereof to enable the ward to obtain benefits provided in Title 38, U.S. Code, Chapter 37, upon petition to and order of the clerk of superior court of the county of appointment of said guardian and approved by the resident or presiding judge of the superior court. Notice of hearing on such petition, together with copy of the petition, shall be given to the United States Veterans Administration and the Department of Military and Veterans Affairs by mail not less than 15 days prior to the date fixed for the hearing.

(4) Any form of investment allowed by law to the State Treasurer under G.S. 147-69.1.

(5) Repealed by Session Laws 1979, c. 467, s. 22.

It shall be the duty of guardians who shall have funds invested other than as provided for in this section to liquidate same within one year from the passage of this law: Provided, however, that upon the approval of the judge of the superior court, either residing in or presiding over the courts of the district, the clerk of the superior court may authorize the guardian to extend from time to time, the time for sale or collection of any such investments; that no extension shall be made to cover a period of more than one year from the time the extension is made.

The clerk of the superior court of any county in the State or any guardian who shall violate any of the provisions of this section shall be guilty of a Class 1 misdemeanor. (1929, c. 33, s. 13; 1933, c. 262, s. 2; 1957, c. 199; 1959, c. 1015, s. 1; 1967, c. 564, ss. 3, 4; 1973, c. 620, s. 9; 1979, c. 467, s. 22; 1993, c. 539, s. 401; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

As to purchase of home for use of dependent sister, see Patrick v. Branch Banking & Trust Co., 216 N.C. 525, 5 S.E.2d 724 (1939).

Applied in First-Citizens Bank & Trust Co. v. Parker, 225 N.C. 480, 35 S.E.2d 489 (1945).

§ 34-14. Application of ward's estate.

A guardian may apply any income received from the Veterans Administration for the benefit of the ward in the same manner and to the same extent as other income of the estate without the necessity of securing an order of court. A guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing, notice of which has been given the proper officer of the Bureau and the Department of Military and Veterans Affairs in the manner provided in G.S. 34-10. (1929, c. 33, s. 14; 1945, c. 723, s. 2; 1961, c. 396, s. 3; 1967, c. 564, s. 5; 1973, c. 620, s. 9.)

Cross References. — As to payment of veterans' benefits to relatives, see G.S. 34-14.1.

Editor's Note. — The successor of the United States Veterans' Bureau is the Veterans Administration.

§ 34-14.1. Payment of veterans' benefits to relatives.

(a) It shall be lawful for a guardian or trustee of a mentally disordered or incompetent Veterans Administration beneficiary to pay to or for

(1) The spouse or children or mother or father of the ward, whether or not said spouse or children or mother or father received any part of their

maintenance from the ward prior to the appointment of said guardian or trustee, such an amount for support and maintenance as shall be approved by the clerk of the superior court having jurisdiction over such guardian or trustee;

(2) A brother, sister, nephew, niece, uncle, aunt, or any other relative of the ward, who, prior to the appointment of said guardian or trustee, received some part of his or her maintenance from said ward, such an amount for support and maintenance as shall be approved by the clerk of the superior court having jurisdiction over said guardian or trustee and by a superior court judge.

(b) Such approval may be granted upon a duly verified petition filed before the clerk of the superior court having jurisdiction of such guardian or trustees setting forth

(1) The amount of benefits received by the guardian or trustee on behalf of the ward from the Veterans Administration;
(2) The amount of periodic disbursements, if any, made by such guardian or trustee for the maintenance and support of the ward;
(3) The person for whose maintenance and support payment is to be made and the relationship of such person to the ward;
(4) If the person for whose maintenance and support payment is to be made is one described in subsection (a)(2) above, facts showing that prior to the appointment of said guardian or trustee such person received some part of his or her maintenance from said ward;
(5) The amount to be paid and the period when such payments are to be made.

Notice of hearing upon such petition shall be as provided by G.S. 34-14, and no person or persons, other than the guardian or trustees and petitioner, need to be made parties to any such proceeding. If the guardian or trustee is the petitioner, no other parties shall be necessary. (1945, c. 479, ss. 1, 2; 1953, c. 122, s. 1; 1955, c. 1272, s. 2.)

CASE NOTES

Cited in Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 34-15. Certified copy of record required by Bureau to be furnished without charge.

Whenever a copy of any public record is required by the Bureau or the Department of Military and Veterans Affairs to be used in determining the eligibility of any person to participate in benefits made available by such Bureau, the official charged with the custody of such public record shall without charge provide the applicant for such benefits or any person acting on his behalf or the representative of such Bureau or the Department of Military and Veterans Affairs with a certified copy of such record. (1929, c. 33, s. 15; 1945, c. 723, s. 2; 1967, c. 564, s. 5; 1973, c. 620, s. 9.)

Editor's Note. — The successor of the United States Veterans' Bureau is the Veterans Administration.

§ 34-16: Repealed by Session Laws 1985, c. 589, s. 14.

§ 34-17. Discharge of guardian.

When a minor ward for whom a guardian has been appointed under the provisions of this Chapter or other laws of this State shall have attained his or her majority, and if incompetent shall be declared competent by the Bureau and by an order of the clerk of the superior court of the county in which such guardian was appointed, and when any incompetent ward, not a minor, shall be declared competent by said Bureau and by an order of the clerk of the superior court of the county in which such guardian was appointed, the guardian shall upon making a satisfactory accounting be discharged upon a petition filed for that purpose. The certificate of the Director, or his representative, setting forth the fact that an incompetent ward has been rated competent by the Bureau on examination in accordance with the laws and regulations governing such Bureau shall be prima facie evidence upon which the court may declare such ward competent. (1929, c. 33, s. 17; 1955, c. 1272, s. 3.)

Editor's Note. — The successor of the United States Veterans' Bureau is the Veterans Administration.

§ 34-18. Construction of Chapter.

This Chapter shall be construed liberally to secure the beneficial intents and purposes thereof and shall apply only to beneficiaries of the Bureau. (1929, c. 33, s. 18.)

Editor's Note. — The successor of the United States Veterans' Bureau is the Veterans Administration.

Chapter 35.

Sterilization Procedures.

Article 1.

Definitions.

Sec.
35-1 through 35-1.5. [Repealed.]

Article 1A.

Guardianship of Incompetent Adults.

35-1.6 through 35-1.41. [Repealed.]

Article 2.

Guardianship and Management of Estates of Incompetents.

35-2 through 35-9. [Repealed.]

Article 3.

Sales of Estates.

35-10 through 35-13. [Repealed.]

Article 4.

Mortgage or Sale of Estates Held by the Entireties.

35-14 through 35-18. [Recodified.]

Article 5.

Surplus Income and Advancements.

35-19 through 35-29. [Recodified.]

Article 5A.

Gifts from Income for Certain Purposes.

35-29.1 through 35-29.4. [Recodified.]

Article 5B.

Gifts from Principal for Certain Purposes.

35-29.5 through 35-29.10. [Recodified.]

Article 5C.

Declaring Revocable Trust Irrevocable and Making Gift of Incompetent's Life Interest Therein.

Sec.
35-29.11 through 35-29.16. [Recodified.]

Article 6.

Detention, Treatment, and Cure of Inebriates.

35-30 through 35-35.2. [Repealed.]

Article 7.

Sterilization of Persons Mentally Ill and Mentally Retarded.

35-36 through 35-57. [Repealed.]

Article 8.

Temporary Care and Restraint of Inebriates, Drug Addicts and Persons Insane.

35-58 through 35-60. [Repealed.]

Article 9.

Mental Health Council.

35-61 through 35-63. [Transferred.]

Article 10.

Interstate Compact on Mental Health.

35-64 through 35-69. [Transferred.]

Article 11.

Medical Advisory Council to State Board of Mental Health.

35-70 through 35-72. [Repealed.]

Article 12.

Council on Mental Retardation and Developmental Disabilities.

35-73 through 35-77. [Repealed.]

Cross References. — As to incompetency and guardianship, see now Chapter 35A.

Editor's Note. — Session Laws 1987, c. 550, s. 8, effective October 1, 1987, rewrote the heading of Chapter 35, which formerly read "Persons with Mental Diseases and Incompetents".

ARTICLE 1.

Definitions.

§§ 35-1 through 35-1.5: Repealed by Session Laws 1987, c. 550, s. 7.

ARTICLE 1A.

Guardianship of Incompetent Adults.

§§ **35-1.6 through 35-1.41:** Repealed by Session Laws 1987, c. 550, s. 7.

Editor's Note. — Session Laws 1987, c. 783, s. 2, effective August 12, 1987, inserted "without further proceedings" in subdivision (4) of former G.S. 35-1.7 as it read prior to repeal by Session Laws 1987, c. 550, s. 7. The amendment was incorporated into new Chapter 35A, which was added by Session Laws 1987, c. 550, s. 1.

ARTICLE 2.

Guardianship and Management of Estates of Incompetents.

§§ **35-2 through 35-9:** Repealed by Session Laws 1987, c. 550, s. 7.

ARTICLE 3.

Sales of Estates.

§§ **35-10 through 35-13:** Repealed by Session Laws 1987, c. 550, s. 7.

ARTICLE 4.

Mortgage or Sale of Estates Held by the Entireties.

§§ **35-14 through 35-18:** Recodified as §§ 35A-1310 to 35A-1314 by Session Laws 1987, c. 550, s. 2.

ARTICLE 5.

Surplus Income and Advancements.

§§ **35-19 through 35-29:** Recodified as §§ 35A-1320 to 35A-1330 by Session Laws 1987, c. 550, s. 3.

ARTICLE 5A.

Gifts from Income for Certain Purposes.

§§ **35-29.1 through 35-29.4:** Recodified as §§ 35A-1335 to 35A-1338 by Session Laws 1987, c. 550, s. 4.

ARTICLE 5B.

Gifts from Principal for Certain Purposes.

§§ **35-29.5 through 35-29.10:** Recodified as §§ 35A-1340 to 35A-1345 by Session Laws 1987, c. 550, s. 5.

Article 5C.

Declaring Revocable Trust Irrevocable and Making Gift of Incompetent's Life Interest Therein.

§§ 35-29.11 through 35-29.16: Recodified as §§ 35A-1350 to 35A-1355 by Session Laws 1987, c. 550, s. 6.

Article 6.

Detention, Treatment, and Cure of Inebriates.

§§ 35-30 through 35-35.2: Repealed by Session Laws 1963, c. 1184, s. 35.

Article 7.

Sterilization of Persons Mentally Ill and Mentally Retarded.

§§ 35-36 through 35-50: Repealed by Session Laws 2003, c. 13, s. 1, effective April 17, 2003.

Cross References. — As to present similar provision pertaining to procedure for sterilization of mentally ill or mentally retarded in case of medical necessity, see G.S. 35A-1245.

§§ 35-51 through 35-57: Repealed by Session Laws 1973, c. 1281.

Article 8.

Temporary Care and Restraint of Inebriates, Drug Addicts and Persons Insane.

§§ 35-58 through 35-60: Repealed by Session Laws 1963, c. 1184, s. 36.

Article 9.

Mental Health Council.

§§ 35-61 through 35-63: Transferred to G.S. 122-105 to 122-107 by Session Laws 1963, c. 1184, s. 13.

Editor's Note. — Sections 122-105 to 122-107, referred to above, were repealed by Session Laws 1973, c. 476, s. 176.

Article 10.

Interstate Compact on Mental Health.

§§ **35-64 through 35-69:** Transferred to G.S. 122-99 to 122-104 by Session Laws 1963, c. 1184, s. 12.

Editor's Note. — Chapter 122 was repealed by Session Laws 1985, c. 589, s. 1, effective January 1, 1986, and Chapter 122C was enacted. For the Interstate Compact on Mental Health, see now G.S. 122C-361 et seq.

Article 11.

Medical Advisory Council to State Board of Mental Health.

§§ **35-70 through 35-72:** Repealed by Session Laws 1973, c. 476, s. 133.

Article 12.

Council on Mental Retardation and Developmental Disabilities.

§§ **35-73 through 35-77:** Repealed by Session Laws 1973, c. 476, s. 170.

Chapter 35A.

Incompetency and Guardianship.

SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

Article 1.

Determination of Incompetence.

Sec.
35A-1101. Definitions.
35A-1102. Scope of law; exclusive procedure.
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SUBCHAPTER I. PROCEEDINGS TO DETERMINE INCOMPETENCE.

ARTICLE 1.

Determination of Incompetence.

§ 35A-1101. Definitions.

When used in this Subchapter:

(1) "Autism" means a physical disorder of the brain which causes disturbances in the developmental rate of physical, social, and language skills; abnormal responses to sensations; absence of or delay in speech or language; or abnormal ways of relating to people, objects, and events. Autism occurs sometimes by itself and sometimes in conjunction with other brain-functioning disorders.

(2) "Cerebral palsy" means a muscle dysfunction, characterized by impairment of movement, often combined with speech impairment, and caused by abnormality of or damage to the brain.

(3) "Clerk" means the clerk of superior court.

(4) "Designated agency" means the State or local human services agency designated by the clerk in the clerk's order to prepare, cause to be prepared, or assemble a multidisciplinary evaluation and to perform other functions as the clerk may order. A designated agency includes, without limitation, State, local, regional, or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers.

(5) "Epilepsy" means a group of neurological conditions characterized by abnormal electrical-chemical discharge in the brain. This discharge is manifested in various forms of physical activity called seizures, which range from momentary lapses of consciousness to convulsive movements.

(6) "Guardian ad litem" means a guardian appointed pursuant to G.S. 1A-1, Rule 17, Rules of Civil Procedure.

(7) "Incompetent adult" means an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

(8) "Incompetent child" means a minor who is at least 17 1/2 years of age and who, other than by reason of minority, lacks sufficient capacity to make or communicate important decisions concerning the child's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, disease, injury, or similar cause or condition.

(9) "Indigent" means unable to pay for legal representation and other necessary expenses of a proceeding brought under this Subchapter.

(10) "Inebriety" means the habitual use of alcohol or drugs rendering a person incompetent to transact ordinary business concerning the person's estate, dangerous to person or property, cruel and intolerable to family, or unable to provide for family.

(11) "Interim guardian" means a guardian, appointed prior to adjudication of incompetence and for a temporary period, for a person who

requires immediate intervention to address conditions that constitute imminent or foreseeable risk of harm to the person's physical well-being or to the person's estate.

(12) "Mental illness" means an illness that so lessens the capacity of a person to use self-control, judgment, and discretion in the conduct of the person's affairs and social relations as to make it necessary or advisable for the person to be under treatment, care, supervision, guidance, or control. The term "mental illness" encompasses "mental disease", "mental disorder", "lunacy", "unsoundness of mind", and "insanity".

(13) "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22.

(14) "Multidisciplinary evaluation" means an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may include current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders. The evaluation is current if made not more than one year from the date on which it is presented to or considered by the court. The evaluation shall set forth the nature and extent of the disability and recommend a guardianship plan and program.

(15) "Respondent" means a person who is alleged to be incompetent in a proceeding under this Subchapter.

(16) "Treatment facility" has the same meaning as "facility" in G.S. 122C-3(14), and includes group homes, halfway houses, and other community-based residential facilities.

(17) "Ward" means a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction. (1987, c. 550, s. 1; 1989, c. 473, s. 11; 1997-443, s. 11A.11.)

Cross References. — For the Uniform Custodial Trust Act, see G.S. 33B-1 et seq.

Legislative Study Commission on State Guardianship Laws. — Session Laws 2004-161, ss. 45.1 through 45.6 created the Commission to review State law pertaining to guardianship and its relationship to other laws such as health care power of attorney, right to a natural death, and durable power of attorney. The Commission is to make its final report to the 2006 Regular Session of the 2005 General Assembly, and expires upon delivery of its final report.

Legal Periodicals. — For article, "Holding, Dictum ... Whatever," 25 N.C. Cent. L.J. 139 (2003).

CASE NOTES

Chapter Sets Out Sole Procedure for Determining Incompetency. — Although G.S. 1A-1, Rule 17 may have once allowed the trial court to conduct a competency hearing, that procedure was preempted on October 1, 1987, by the enactment of this Chapter, which sets forth the sole procedure for determining the incompetency of infants and adults. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), rev'd on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990).

G.S. 35A-1102 has been amended to provide that nothing in G.S. 35A-1101 shall interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under G.S. 1A-1, N.C. R. Civ. P. 17(b), and G.S. 35A-1101 et seq. sets forth the procedure for determining incompetency, which a trial judge must comply with when conducting a competency hearing under G.S. 1A-1, N.C. R. Civ. P. 17. In re J.A.A., 175 N.C. App. 66, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

G.S. 7B-1101.1 requires that a guardian ad litem be appointed in accordance with the provisions of G.S. 1A-1, N.C. R. Civ. P. 17 to represent a parent, meaning that where an allegation is made that parental rights should be terminated, a trial court is required to conduct a hearing to determine whether a guardian ad litem should be appointed to represent the parent, and an allegation under G.S. 7B-1111(a)(6) serves as a triggering mechanism, alerting the trial court that it should conduct a hearing to determine whether a guardian ad litem should be appointed; at the hearing, the trial court must determine whether the parents are incompetent within the meaning of G.S. 35A-1101, such that the individual would be unable to aid in their defense at the termination of parental rights proceeding, and the trial court should always keep in mind that the appointment of a guardian ad litem will divest the parent of their fundamental right to conduct his or her litigation according to their own judgment and inclination. In re J.A.A., 175 N.C. App. 66, 623 S.E.2d 45, 2005 N.C. App. LEXIS 2706 (2005).

And Adjudication of Incompetency Must Be Within Perimeters of This Chapter. — The language of G.S. 35A-1102 requires any adjudication of incompetency to take place within the perimeters of this Chapter, even if the person sought to be declared incompetent does not challenge the action. However, G.S. 1A-1, Rule 17 still exists as a means of appointment of a guardian ad litem where incompetency has already been determined. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), rev'd on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990).

Incompetency Resulting from Abuse. — Plaintiff's repression of memories and post-traumatic stress syndrome suffered as a result of her grandmother's alleged sexual, physical, and emotional abuse rendered plaintiff "incompetent", thereby tolling the statutes of limitations so that summary judgment for defendant was improper. Leonard v. England, 115 N.C. App. 103, 445 S.E.2d 50, cert. granted, 337 N.C. 801, 449 S.E.2d 571 (1994), cert. denied, 340 N.C. 113, 455 S.E.2d 663 (1995).

Finding of Competency Did Not Include Finding of Capacity to Provide Care and Supervision to Child. — When the mother was adjudicated competent, it established only that the mother regained the capacity to manage the mother's own affairs, not that the mother, facing a termination of parental rights petition, had the capacity to provide proper care and supervision for the child. In re A.H., — N.C. App. —, 644 S.E.2d 635, 2007 N.C. App. LEXIS 1159 (2007).

This Chapter has had a significant impact on § 1A-1, Rule 25(b), which discusses the continuation of an action when one party becomes incompetent. In a situation where no incompetency adjudication has yet occurred, the action contemplated in the last clause of G.S. 1A-1, Rule 25(b) would be referral of the competency issue to the clerk of superior court for action under this Chapter. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), rev'd on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990).

"Incompetent Adult" not Shown. — "Incompetent adult" not shown within the meaning of subdivision (7) of this section where the adult was able to arrange for places to live, signed leases, cooked, went shopping, held several jobs, attended college, obtained driver's licenses, drove vehicles, owned farmland, traveled and lived in foreign countries, produced a ballet, and created music. Soderlund v. Kuch, 143 N.C. App. 361, 546 S.E.2d 632, 2001 N.C. App. LEXIS 313 (2001), review denied, 353 N.C. 729, 551 S.E.2d 438 (2001).

The appropriate test for establishing an adult incompetent is one of mental competence to manage one's own affairs. While there was competent evidence that a wife of an insurance policyholder was extremely and unfortunately injured by the accident, in and out of hospitals, and on and off of many painkillers, there was also evidence that she was able to name an attorney-in-fact to handle her insurance claims; the wife did not show sufficient competent evidence that her injury made her incapable of managing her own affairs to allow a disability tolling of the fraud statute of limitations under G.S. 1-52(9). State Farm Fire & Cas. Co. v. Darsie, 161 N.C. App. 542, 589 S.E.2d 391, 2003 N.C. App. LEXIS 2257 (2003), cert. denied, 358 N.C. 241, 594 S.E.2d 194 (2004), cert. dismissed, 358 N.C. 241, 594 S.E.2d 193 (2004).

Issue of Incompetence Becomes Moot Upon Death. — Sister's petition to declare her brother incompetent was nugatory after the death of the brother and did not survive the death of the brother; thus, the appeal abated and became moot upon the brother's death and was dismissed. In re Higgins, 160 N.C. App. 704, 587 S.E.2d 77, 2003 N.C. App. LEXIS 1908 (2003).

Appointment of Guardian Ad Litem. — Trial court terminated a mother's parental rights based on: (1) neglect; (2) wilfully leaving the children in foster care for more than 12 months without showing reasonable progress; (3) wilfully failing to provide financial support to the children; and (4) abandonment of the children for at least six months immediately preceding the filing of the petition for termination of parental rights; the mother did not request that a guardian ad litem (GAL) be appointed. Also, the petition for termination of her parental rights did not allege the mother's incapability to parent the children, and no allegations were asserted, and no showing was made that the mother was incompetent; thus, the trial court was not required to appoint a GAL to the mother under either G.S. 7B-1101 and 35A-1101, or G.S. 1A-1-17 . In re D.H., 177

N.C. App. 700, 629 S.E.2d 920, 2006 N.C. App. LEXIS 1195 (2006).

Applied in Soderlund v. North Carolina Sch. of Arts, 125 N.C. App. 386, 481 S.E.2d 336 (1997); State v. Young, 140 N.C. App. 1, 535 S.E.2d 380, 2000 N.C. App. LEXIS 1042 (2000), cert. denied, 353 N.C. 397, 547 S.E.2d 429 (2001), appeal dismissed, 353 N.C. 397, 547 S.E.2d 429 (2001).

Cited in Dunkley v. Shoemate, 121 N.C. App. 360, 465 S.E.2d 319 (1996); Johnson v. Jones Group, Inc., 123 N.C. App. 219, 472 S.E.2d 587 (1996).

§ 35A-1102. Scope of law; exclusive procedure.

This Article establishes the exclusive procedure for adjudicating a person to be an incompetent adult or an incompetent child. However, nothing in this Article shall interfere with the authority of a judge to appoint a guardian ad litem for a party to litigation under Rule 17(b) of the North Carolina Rules of Civil Procedure. (1987, c. 550, s. 1; 2003-236, s. 4.)

Legal Periodicals. — For article, "Holding, Dictum ... Whatever," 25 N.C. Cent. L.J. 139 (2003).

CASE NOTES

Chapter Sets Out Sole Procedure for Determining Incompetency. — Although G.S. 1A-1, Rule 17 may have once allowed the trial court to conduct a competency hearing, that procedure was preempted on October 1, 1987, by the enactment of this Chapter, which sets forth the sole procedure for determining the incompetency of infants and adults. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), rev'd on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990).

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And Adjudication of Incompetency Must Be Within Perimeters of This Chapter. — The language of this section requires any adjudication of incompetency to take place within the perimeters of this Chapter, even if the person sought to be declared incompetent does not challenge the action. However, G.S. 1A-1, Rule 17 still exists as a means of appointment of a guardian ad litem where incompetency has already been determined. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), rev'd on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990).

This Chapter has had a significant impact on § 1A-1, Rule 25(b), which discusses the continuation of an action when one party becomes incompetent. In a situation where no incompetency adjudication has yet occurred, the action contemplated in the last clause of G.S. 1A-1, Rule 25(b) would be referral of the competency issue to the clerk of superior court for action under this Chapter. Culton v. Culton, 96 N.C. App. 620, 386 S.E.2d 592 (1989), rev'd on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990).

Adult Must Be Declared Incompetent. — The terms of a will may not create a guardianship for an adult heir who has not been declared incompetent through the provisions of Chapter 35A. In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994).

Cited in In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993).

§ 35A-1103. Jurisdiction; venue.

(a) The clerk in each county shall have original jurisdiction over proceedings under this Subchapter.

(b) Venue for proceedings under this Subchapter shall be in the county in which the respondent resides or is domiciled or is an inpatient in a treatment facility. If the county of residence or domicile cannot be determined, venue shall be in the county where the respondent is present.

(c) If proceedings involving the same respondent are brought under this Subchapter in more than one county in which venue is proper, venue shall be in the county in which proceedings were commenced first.

(d) If the clerk in the county in which a proceeding under this Subchapter is brought has an interest, direct or indirect, in the proceeding, jurisdiction with respect thereto shall be vested in any superior court judge residing or presiding in the district, and the jurisdiction of the superior court judge shall extend to all things which the clerk might have done. (1987, c. 550, s. 1.)

CASE NOTES

Cited in In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993); In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994).

§ 35A-1104. Change of venue.

The clerk, on motion of a party, or the clerk's own motion, may order a change of venue upon finding that no hardship or prejudice to the respondent will result from a change of venue. (1987, c. 550, s. 1.)

§ 35A-1105. Petition before clerk.

A verified petition for the adjudication of incompetence of an adult, or of a minor who is within six months of reaching majority, may be filed with the clerk by any person, including any State or local human services agency through its authorized representative. (1987, c. 550, s. 1; 1989, c. 473, s. 22; 1997-443, s. 11A.12.)

CASE NOTES

Cited in In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993).

§ 35A-1106. Contents of petition.

The petition shall set forth, to the extent known:

(1) The name, age, address, and county of residence of the respondent;
(2) The name, address, and county of residence of the petitioner, and his interest in the proceeding;
(3) A general statement of the respondent's assets and liabilities with an estimate of the value of any property, including any compensation, insurance, pension, or allowance to which he is entitled;
(4) A statement of the facts tending to show that the respondent is incompetent and the reason or reasons why the adjudication of incompetence is sought;
(5) The name, address, and county of residence of the respondent's next of kin and other persons known to have an interest in the proceeding;
(6) Facts regarding the adjudication of respondent's incompetence by a court of another state, if an adjudication is sought on that basis pursuant to G.S. 35A-1113(1). (1987, c. 550, s. 1.)

§ 35A-1107. Right to counsel or guardian ad litem.

(a) The respondent is entitled to be represented by counsel of his own choice or by an appointed guardian ad litem. Upon filing of the petition, an attorney shall be appointed as guardian ad litem to represent the respondent unless the respondent retains his own counsel, in which event the guardian ad litem may be discharged. Appointment and discharge of an appointed guardian ad litem shall be in accordance with rules adopted by the Office of Indigent Defense Services.

(b) An attorney appointed as a guardian ad litem under this section shall represent the respondent until the petition is dismissed or until a guardian is appointed under Subchapter II of this Chapter. After being appointed, the guardian ad litem shall personally visit the respondent as soon as possible and shall make every reasonable effort to determine the respondent's wishes regarding the incompetency proceeding and any proposed guardianship. The guardian ad litem shall present to the clerk the respondent's express wishes at all relevant stages of the proceedings. The guardian ad litem also may make recommendations to the clerk concerning the respondent's best interests if those interests differ from the respondent's express wishes. In appropriate cases, the guardian ad litem shall consider the possibility of a limited guardianship and shall make recommendations to the clerk concerning the rights, powers, and privileges that the respondent should retain under a limited guardianship. (1987, c. 550, s. 1; 2000-144, s. 33; 2003-236, s. 3.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

CASE NOTES

Cited in In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994).

OPINIONS OF ATTORNEY GENERAL

Appointment of Guardians Ad Litem in Incompetency Proceedings. — Based on this section and G.S. 35A-1130, the Office of Indigent Defense Services has unambiguous authority to provide through its rules for appointments of guardians ad litem in incompetency proceedings. See opinion of Attorney General to Mr. Malcolm Ray Hunter, Director, Office of Indigent Defense Services, 2004 N.C.A.G. 5 (3/11/04).

§ 35A-1108. Issuance of notice.

(a) Within five days after filing of the petition, the clerk shall issue a written notice of the date, time, and place for a hearing on the petition, which shall be held not less than 10 days nor more than 30 days after service of the notice and petition on the respondent, unless the clerk extends the time for good cause, for preparation of a multidisciplinary evaluation as provided in G.S. 35A-1111, or for the completion of a mediation.

(b) If a multidisciplinary evaluation or mediation is ordered after a notice of hearing has been issued, the clerk may extend the time for hearing and issue a notice to the parties that the hearing has been continued, the reason therefor, and the date, time, and place of the new hearing, which shall not be less than 10 days nor more than 30 days after service of such notice on the respondent.

(c) Subsequent notices to the parties shall be served as provided by G.S. 1A-1, Rule 5, Rules of Civil Procedure, unless the clerk orders otherwise. (1987, c. 550, s. 1; 2005-67, s. 2.)

Editor's Note. — Subsections (a) and (b), as amended by Session Laws 2005-67, s. 2, effective May 26, 2005, are applicable to all matters pending before a clerk or superior court on, or filed with the clerk after, the date the Supreme Court adopts rules implementing Session Laws 2005-67.

CASE NOTES

Cited in In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993).

§ 35A-1109. Service of notice and petition.

Copies of the petition and initial notice of hearing shall be personally served on the respondent. Respondent's counsel or guardian ad litem shall be served pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure. A sheriff who serves the notice and petition shall do so without demanding his fees in advance. The petitioner, within five days after filing the petition, shall mail or cause to be mailed, by first-class mail, copies of the notice and petition to the respondent's next of kin alleged in the petition and any other persons the clerk may designate, unless such person has accepted notice. Proof of such mailing or acceptance shall be by affidavit or certificate of acceptance of notice filed with the clerk. The clerk shall mail, by first-class mail, copies of subsequent notices to the next of kin alleged in the petition and to such other persons as the clerk deems appropriate. (1987, c. 550, s. 1; 1989, c. 473, s. 18.)

§ 35A-1110. Right to jury.

The respondent has a right, upon request by him, his counsel, or his guardian ad litem, to trial by jury. Failure to request a trial by jury shall constitute a waiver of the right. The clerk may nevertheless require trial by jury in accordance with G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial by jury on his own motion. The jury shall be composed of 12 persons chosen from the county's jury list in accordance with the provisions of Chapter 9 of the General Statutes. (1987, c. 550, s. 1.)

§ 35A-1111. Multidisciplinary evaluation.

(a) To assist in determining the nature and extent of a respondent's disability, or to assist in developing an appropriate guardianship plan and program, the clerk, on his own motion or the motion of any party, may order that a multidisciplinary evaluation of the respondent be performed. A request for a multidisciplinary evaluation shall be made in writing and filed with the clerk within 10 days after service of the petition on the respondent.

(b) If a multidisciplinary evaluation is ordered, the clerk shall name a designated agency and order it to prepare, cause to be prepared, or assemble a current multidisciplinary evaluation of the respondent. The agency shall file the evaluation with the clerk not later than 30 days after the agency receives the clerk's order. The multidisciplinary evaluation shall be filed in the proceeding for adjudication of incompetence, in the proceeding for appointment of a guardian under Subchapter II of this Chapter, or both. Unless otherwise ordered by the clerk, the agency shall send copies of the evaluation to the petitioner and the counsel or guardian ad litem for the respondent not later than 30 days after the agency receives the clerk's order. The evaluation shall be kept under such conditions as directed by the clerk and its contents revealed only as directed by the clerk. The evaluation shall not be a public record and shall not be released except by order of the clerk.

(c) If a multidisciplinary evaluation does not contain medical, psychological, or social work evaluations ordered by the clerk, the designated agency nevertheless shall file the evaluation with the clerk and send copies as required by subsection (b). In a transmittal letter, the agency shall explain why the evaluation does not contain such medical, psychological, or social work evaluations.

(d) The clerk may order that the respondent attend a multidisciplinary evaluation for the purpose of being evaluated.

(e) The multidisciplinary evaluation may be considered at the hearing for adjudication of incompetence, the hearing for appointment of a guardian under Subchapter II of this Chapter, or both. (1987, c. 550, s. 1.)

§ 35A-1112. Hearing on petition; adjudication order.

(a) The hearing on the petition shall be at the date, time, and place set forth in the final notice of hearing and shall be open to the public unless the respondent or his counsel or guardian ad litem requests otherwise, in which event the clerk shall exclude all persons other than those directly involved in or testifying at the hearing.

(b) The petitioner and the respondent are entitled to present testimony and documentary evidence, to subpoena witnesses and the production of documents, and to examine and cross-examine witnesses.

(c) The clerk shall dismiss the proceeding if the finder of fact, whether the clerk or a jury, does not find the respondent to be incompetent.

(d) If the finder of fact, whether the clerk or the jury, finds by clear, cogent, and convincing evidence that the respondent is incompetent, the clerk shall enter an order adjudicating the respondent incompetent. The clerk may include in the order findings on the nature and extent of the ward's incompetence.

(e) Following an adjudication of incompetence, the clerk shall either appoint a guardian pursuant to Subchapter II of this Chapter or, for good cause shown, transfer the proceeding for the appointment of a guardian to any county identified in G.S. 35A-1103. The transferring clerk shall enter a written order authorizing the transfer. The clerk in the transferring county shall transfer all original papers and documents, including the multidisciplinary evaluation, if any, to the transferee county and close his file with a copy of the adjudication order and transfer order.

(f) If the adjudication occurs in any county other than the county of the respondent's residence, a certified copy of the adjudication order shall be sent to the clerk in the county of the ward's legal residence, to be filed and indexed as in a special proceeding of that county.

(g) Except as provided in G.S. 35A-1114(f), a proceeding filed under this Article may be voluntarily dismissed as provided in G.S. 1A-1, Rule 41, Rules of Civil Procedure. (1987, c. 550, s. 1.)

CASE NOTES

Burden of Proof. — Incompetency must be proven by clear, cogent, and convincing evidence. In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994).

Cited in In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993); Johnson v. Jones Group, Inc., 123 N.C. App. 219, 472 S.E.2d 587 (1996).

§ 35A-1113. Hearing when incompetence determined in another state.

When the petition alleges that the respondent is incompetent on the basis of an adjudication that occurred in another state, the clerk in his discretion may:

(1) Adjudicate incompetence on the basis of the prior adjudication, if the clerk first finds by clear, cogent, and convincing evidence that:
  a. The respondent is represented by an attorney or guardian ad litem; and

b. A certified copy of an order adjudicating the respondent incompetent has been filed in the proceeding; and

c. The prior adjudication was made by a court of competent jurisdiction on grounds comparable to a ground for adjudication of incompetence under this Article; and

d. The respondent, subsequent to the adjudication of incompetence in another state, assumed residence in North Carolina and needs a guardian in this State; or

(2) Decline to adjudicate incompetence on the basis of the other state's adjudication, and proceed with an adjudicatory hearing as in any other case pursuant to this Article. (1987, c. 550, s. 1.)

§ 35A-1114. Appointment of interim guardian.

(a) At the time of or subsequent to the filing of a petition under this Article the petitioner may also file a verified motion with the clerk seeking the appointment of an interim guardian.

(b) The motion shall set forth facts tending to show:

(1) That there is reasonable cause to believe that the respondent is incompetent, and

(2) One or both of the following:

a. That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his physical well-being and that requires immediate intervention

b. That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate that requires immediate intervention in order to protect the respondent's interest and

(3) That the respondent needs an interim guardian to be appointed immediately to intervene on his behalf prior to the adjudication hearing.

(c) Upon filing of the motion for appointment of an interim guardian, the clerk shall immediately set a date, time, and place for a hearing on the motion The motion and a notice setting the date, time, and place for the hearing shall be served promptly on the respondent and on his counsel or guardian ad litem and other persons the clerk may designate. The hearing shall be held as soon as possible but no later than 15 days after the motion has been served on the respondent.

(d) If at the hearing the clerk finds that there is reasonable cause to believe that the respondent is incompetent, and:

(1) That the respondent is in a condition that constitutes or reasonably appears to constitute an imminent or foreseeable risk of harm to his physical well-being, and that there is immediate need for a guardian to provide consent or take other steps to protect the respondent, or

(2) That there is or reasonably appears to be an imminent or foreseeable risk of harm to the respondent's estate, and that immediate intervention is required in order to protect the respondent's interest,

the clerk shall immediately enter an order appointing an interim guardian.

(e) The clerk's order appointing an interim guardian shall include specific findings of fact to support the clerk's conclusions, and shall set forth the interim guardian's powers and duties. Such powers and duties shall be limited and shall extend only so far and so long as necessary to meet the conditions necessitating the appointment of an interim guardian. In any event, the interim guardianship shall terminate on the earliest of the following: the date specified in the clerk's order; 45 days after entry of the clerk's order unless the clerk, for good cause shown, extends that period for up to 45 additional days when any guardians are appointed following an adjudication of incompetence; or when the petition is dismissed by the court. An interim guardian whose authority relates only to the person of the respondent shall not be required to post a bond. If the interim guardian has authority related to the respondent's estate, the interim guardian shall post a bond in an amount determined by the clerk, with any conditions the clerk may impose, and shall render an account as directed by the clerk.

(f) When a motion for appointment of an interim guardian has been made, the petitioner may voluntarily dismiss the petition for adjudication of incompetence only prior to the hearing on the motion for appointment of an interim guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 12.)

§ 35A-1115. Appeal from clerk's order.

Appeal from an order adjudicating incompetence shall be to the superior court for hearing de novo and thence to the Court of Appeals. An appeal does not stay the appointment of a guardian unless so ordered by the superior court or the Court of Appeals. The Court of Appeals may request the Attorney General to represent the petitioner on any appeal by the respondent to the Appellate Division of the General Court of Justice, but the Department of Justice shall not be required to pay any of the costs of the appeal. (1987, c. 550, s. 1.)

CASE NOTES

Cited in In re Ward, 112 N.C. App. 202, 435 S.E.2d 125 (1993); In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994); In re Ward, 337 N.C. 443, 446 S.E.2d 40 (1994).

§ 35A-1116. Costs and fees.

(a) Except as otherwise provided herein, costs shall be assessed as in special proceedings. Costs, including any reasonable fees and expenses of counsel for the petitioner which the clerk, in his discretion, may allow, may be taxed against either party in the discretion of the court unless:

(1) The clerk finds that the petitioner did not have reasonable grounds to bring the proceeding, in which case costs shall be taxed to the petitioner; or

(2) The respondent is indigent, in which case the costs shall be waived by the clerk if not taxed against the petitioner as provided above or otherwise paid as provided in subsection (b) or (c).

(b) The cost of a multidisciplinary evaluation order pursuant to G.S. 35A-1111 shall be assessed as follows:

(1) If the respondent is adjudicated incompetent and is not indigent, the cost shall be assessed against the respondent;

(2) If the respondent is adjudicated incompetent and is indigent, the cost shall be borne by the Department of Health and Human Services;

(3) If the respondent is not adjudicated incompetent, the cost may be taxed against either party, apportioned among the parties, or borne by the Department of Health and Human Services, in the discretion of the court.

(c) Witness fees and the fees of court-appointed counsel or guardian ad litem shall be paid by:

(1) The respondent, if the respondent is adjudicated incompetent and is not indigent;

(2) The petitioner, if the respondent is not adjudicated incompetent and the clerk finds that there were not reasonable grounds to bring the proceeding;

(3) The Administrative Office of the Courts in all other cases.

(c1) Mediator fees and other costs associated with mediation shall be assessed in accordance with G.S. 7A-38.3B.

(d) The provisions of this section shall also apply to all parties to any proceedings under this Chapter, including a guardian who has been removed from office and the sureties on the guardian's bond. (1987, c. 550, s. 1; 1989, c. 473, s. 15; 1995, c. 235, s. 9; 1997-443, s. 11A.118(a); 2005-67, s. 3.)

Editor's Note. — Subsection (c1), added by Session Laws 2005-67, s. 3, effective May 26, 2005, is applicable to all matters pending before a clerk or superior court on, or filed with the clerk after, the date the Supreme Court adopts rules implementing Session Laws 2005-67.

§§ 35A-1117 through 35A-1119: Reserved for future codification purposes.

Article 2.

Appointment of Guardian.

§ 35A-1120. Appointment of guardian.

If the respondent is adjudicated incompetent, a guardian or guardians shall be appointed in the manner provided for in Subchapter II of this Chapter. (1987, c. 550, s. 1.)

CASE NOTES

Death of Respondent Abated Appeal. — Sister's petition to declare her brother incompetent was nugatory after the death of the brother and did not survive the death of the brother; thus, the appeal abated and became moot upon the brother's death and was dismissed. In re Higgins, 160 N.C. App. 704, 587 S.E.2d 77, 2003 N.C. App. LEXIS 1908 (2003).

Cited in In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994).

§§ 35A-1121 through 35A-1129: Reserved for future codification purposes.

Article 3.

Restoration to Competency.

§ 35A-1130. Proceedings before clerk.

(a) The guardian, ward, or any other interested person may petition for restoration of the ward to competency by filing a motion in the cause of the incompetency proceeding with the clerk who is exercising jurisdiction therein. The motion shall be verified and shall set forth facts tending to show that the ward is competent.

(b) Upon receipt of the motion, the clerk shall set a date, time, and place for a hearing, which shall be not less than 10 days or more than 30 days from service of the motion and notice of hearing on the ward and the guardian, or on the one of them who is not the petitioner, unless the clerk for good cause directs otherwise. The petitioner shall cause notice and a copy of the motion to be served on the guardian and ward (but not on one who is the petitioner) and any other parties to the incompetency proceeding. Service shall be in accordance with provisions of G.S. 1A-1, Rule 4, Rules of Civil Procedure.

(c) At the hearing on the motion, the ward shall be entitled to be represented by counsel or guardian ad litem, and a guardian ad litem shall be appointed in accordance with rules adopted by the Office of Indigent Defense Services if the ward is indigent and not represented by counsel. Upon motion of any party or the clerk's own motion, the clerk may order a multidisciplinary evaluation. The ward has a right, upon request by him, his counsel, or his guardian ad litem to trial by jury. Failure to request a trial by jury shall constitute a waiver of the right. The clerk may nevertheless require trial by jury in accordance with G.S. 1A-1, Rule 39(b), Rules of Civil Procedure, by entering an order for trial by jury on his own motion. Provided, if there is a jury in a proceeding for restoration to competency, it shall be a jury of six persons selected in accordance with the provisions of Chapter 9 of the General Statutes.

(d) If the clerk or jury finds by a preponderance of the evidence that the ward is competent, the clerk shall enter an order adjudicating that the ward is restored to competency. Upon such adjudication, the ward is authorized to manage his affairs, make contracts, control and sell his property, both real and personal, and exercise all rights as if he had never been adjudicated incompetent.

(e) The filing and approval of final accounts from the guardian and the discharge of the guardian shall be as provided in Subchapter II of this Chapter.

(f) If the clerk or jury fails to find that the ward should be restored to competency, the clerk shall enter an order denying the petition. The ward may appeal from the clerk's order to the superior court for trial de novo. (1987, c. 550, s. 1; 2000-144, s. 34.)

Cross References. — For the Indigent Defense Services Act, see Chapter 7A, Subchapter IX, Article 39B.

Legal Periodicals. — For note on guardianship and restoration to sanity, see 41 N.C.L. Rev. 279 (1963).

CASE NOTES

Editor's Note. — *Most of the cases cited below were decided under former G.S. 35-4 and prior law.*

Constitutionality of Section. — Former section, requiring that only six freeholders (now six people chosen in accordance with the provisions of Chapter 9) shall be summoned to inquire into the sanity of the person alleged to be insane, is constitutional. Groves v. Ware, 182 N.C. 553, 109 S.E. 568 (1921).

Section May Not Be Invoked by Person Committed to State Mental Institution. — A person committed to a State mental institution under Article 3 of former Chapter 122 could not invoke the provisions of former G.S. 35-4 for restoration of sanity by jury trial. The remedy is by habeas corpus. In re Harris, 241 N.C. 179, 84 S.E.2d 808 (1954).

Ex parte proceedings to remove a guardian of an insane person, without notice to such guardian, are void. Sims v. Sims, 121 N.C. 297, 28 S.E. 407, 40 L.R.A. 737, 61 Am. St. R. 665 (1897).

Clerk's Authority to Reopen Proceeding. — Clerk had original jurisdiction to appoint a guardian and could reopen the incompetency proceeding, where an interested party was not notified of the original proceeding. In re Ward, 337 N.C. 443, 446 S.E.2d 40 (1994).

OPINIONS OF ATTORNEY GENERAL

Appointment of Guardians Ad Litem in Incompetency Proceedings. — Based on G.S. 35A-1107 and this section, the Office of Indigent Defense Services has unambiguous authority to provide through its rules for appointments of guardians ad litem in incompetency proceedings. See opinion of Attorney General to Mr. Malcolm Ray Hunter, Director, Office of Indigent Defense Services, 2004 N.C.A.G. 5 (3/11/04).

§§ 35A-1131 through 35A-1200: Reserved for future codification purposes.

SUBCHAPTER II. GUARDIAN AND WARD.

ARTICLE 4.

Purpose and Scope; Jurisdiction; Venue.

§ 35A-1201. Purpose.

(a) The General Assembly of North Carolina recognizes that:

(1) Some minors and incompetent persons, regardless of where they are living, require the assistance of a guardian in order to help them exercise their rights, including the management of their property and personal affairs.

(2) Incompetent persons who are not able to act effectively on their own behalf have a right to a qualified, responsible guardian.

(3) The essential purpose of guardianship for an incompetent person is to replace the individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions.

(4) Limiting the rights of an incompetent person by appointing a guardian for him should not be undertaken unless it is clear that a guardian will give the individual a fuller capacity for exercising his rights.

(5) Guardianship should seek to preserve for the incompetent person the opportunity to exercise those rights that are within his comprehension and judgment, allowing for the possibility of error to the same degree as is allowed to persons who are not incompetent. To the maximum extent of his capabilities, an incompetent person should be permitted to participate as fully as possible in all decisions that will affect him.

(6) Minors, because they are legally incompetent to transact business or give consent for most purposes, need responsible, accountable adults to handle property or benefits to which they are entitled. Parents are the natural guardians of the person of their minor children, but unemancipated minors, when they do not have natural guardians, need some other responsible, accountable adult to be responsible for their personal welfare and for personal decision-making on their behalf.

(b) The purposes of this Subchapter are:

(1) To establish standards and procedures for the appointment of guardians of the person, guardians of the estate, and general guardians for incompetent persons and for minors who need guardians;

(2) To specify the powers and duties of such guardians;

(3) To provide for the protection of the person and conservation of the estate of the ward through periodic accountings and reports; and

(4) To provide for the termination of guardianships. (1987, c. 550, s. 1.)

Cross References. — For the Uniform Custodial Trust Act, see G.S. 33B-1 et seq.

Legal Periodicals. — For comment, "Compensating Post-Conception Prenatal Medical Malpractice While Respecting Life: A Recommendation to North Carolina Legislators," see 29 Campbell L. Rev. 761 (2007).

CASE NOTES

Death of Respondent Abated Appeal. — Sister's petition to declare her brother incompetent was nugatory after the death of the brother and did not survive the death of the brother; thus, the appeal abated and became moot upon the brother's death and was dismissed. In re Higgins, 160 N.C. App. 704, 587 S.E.2d 77, 2003 N.C. App. LEXIS 1908 (2003).

Cited in Whitman v. Kiger, 139 N.C. App. 44, 533 S.E.2d 807, 2000 N.C. App. LEXIS 816 (2000), aff'd, 353 N.C. 360, 543 S.E.2d 476 (2001); State v. Young, 140 N.C. App. 1, 535 S.E.2d 380, 2000 N.C. App. LEXIS 1042 (2000), cert. denied, 353 N.C. 397, 547 S.E.2d 429 (2001), appeal dismissed, 353 N.C. 397, 547 S.E.2d 429 (2001); Simmons v. Justice, 87 F. Supp. 2d 524, 2000 U.S. Dist. LEXIS 2945 (W.D.N.C. 2000).

§ 35A-1202. Definitions.

When used in this Subchapter, unless a contrary intent is indicated or the context requires otherwise:

(1) "Accounting" means the financial or status reports filed with the clerk, designated agency, respondent, or other person or party with whom such reports are required to be filed.

(2) "Clerk" means the clerk of superior court.

(3) "Designated agency" means the State or local human services agency designated by the clerk in an order to prepare, cause to be prepared, or assemble a multidisciplinary evaluation and to perform other functions as the clerk may order. A designated agency includes, without limitation, State, local, regional or area mental health, mental retardation, vocational rehabilitation, public health, social service, and developmental disabilities agencies, and diagnostic evaluation centers.

(4) "Disinterested public agent" means:

a. The director or assistant directors of a local human services agency, or

b. An adult officer, agent, or employee of a State human services agency.

The fact that a disinterested public agent is employed by a State or local human services agency that provides financial assistance, services, or treatment to a ward does not disqualify that person from being appointed as guardian.

(5) "Estate" means any interest in real property, choses in action, intangible personal property, and tangible personal property, and includes any interest in joint accounts or jointly held property.

(6) "Financial report" means the report filed by the guardian concerning all financial transactions, including receipts and expenditures of the ward's money, sale of the ward's property, or other transactions involving the ward's property.

(7) "General guardian" means a guardian of both the estate and the person.

(8) "Guardian ad litem" means a guardian appointed pursuant to G.S. 1A-1, Rule 17, Rules of Civil Procedure.

(9) "Guardian of the estate" means a guardian appointed solely for the purpose of managing the property, estate, and business affairs of a ward.

(10) "Guardian of the person" means a guardian appointed solely for the purpose of performing duties relating to the care, custody, and control of a ward.

(11) "Incompetent person" means a person who has been adjudicated to be an "incompetent adult" or "incompetent child" as defined in G.S. 35A-1101(7) or (8).

(12) "Minor" means a person who is under the age of 18, is not married, and has not been legally emancipated.

(13) "Multidisciplinary evaluation" means an evaluation that contains current medical, psychological, and social work evaluations as directed by the clerk and that may contain current evaluations by professionals in other disciplines, including without limitation education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, and communications disorders. The evaluation is current if made not more than one year from the date on which it is presented to or considered by the court. The evaluation shall set forth the nature and extent of the disability and recommend a guardianship plan and program.

(14) "Status report" means the report required by G.S. 35A-1242 to be filed by the general guardian or guardian of the person. A status report shall include a report of a recent medical and dental examination of the ward by one or more physicians or dentists, a report on the guardian's performance of the duties set forth in this Chapter and in the clerk's order appointing the guardian, and a report on the ward's condition, needs, and development. The clerk may direct that the report contain other or different information. The report may also contain, without limitation, reports of mental health or mental retardation professionals, psychologists, social workers, persons in loco parentis, a member of a multidisciplinary evaluation team, a designated agency, a disinterested public agent or agency, a guardian ad litem, a guardian of the estate, an interim guardian, a successor guardian, an officer, official, employee or agent of the Department of Health and Human Services, or any other interested persons including, if applicable to the ward's situation, group home parents or supervisors, employers, members of the staff of a treatment facility, or foster parents.

(15) "Ward" means a person who has been adjudicated incompetent or an adult or minor for whom a guardian has been appointed by a court of competent jurisdiction. (1987, c. 550, s. 1; 1997-443, s. 11A.13.)

CASE NOTES

Cited in Valles de Portillo v. D.H. Griffin Wrecking Co., 134 N.C. App. 714, 518 S.E.2d 555, 1999 N.C. App. LEXIS 904 (1999), cert. denied, 351 N.C. 186, 541 S.E.2d 727 (1999).

§ 35A-1203. Jurisdiction; authority of clerk.

(a) Clerks of superior court in their respective counties have original jurisdiction for the appointment of guardians of the person, guardians of the estate, or general guardians for incompetent persons and of related proceedings brought or filed under this Subchapter. Clerks of superior court in their respective counties have original jurisdiction for the appointment of guardians of the estate for minors, for the appointment of guardians of the person or general guardians for minors who have no natural guardian, and of related proceedings brought or filed under this Subchapter.

(b) The clerk shall retain jurisdiction following appointment of a guardian in order to assure compliance with the clerk's orders and those of the superior court. The clerk shall have authority to remove a guardian for cause and shall appoint a successor guardian, following the criteria set forth in G.S. 35A-1213 or G.S. 35A-1224, after removal, death, or resignation of a guardian.

(c) The clerk shall have authority to determine disputes between guardians and to adjust the amount of the guardian's bond.

(d) Any party or any other interested person may petition the clerk to exercise the authority conferred on the clerk by this section.

(e) Where a guardian or trustee has been appointed for a ward under former Chapter 33 or former Chapter 35 of the General Statutes, the clerk, upon his own motion or the motion of that guardian or trustee or any other interested person, may designate that guardian or trustee or appoint another qualified person as guardian of the person, guardian of the estate, or general guardian of the ward under this Chapter; provided, the authority of a guardian or trustee properly appointed under former Chapter 33 or former Chapter 35 of the General Statutes to continue serving in that capacity is not dependent on such motion and designation. (1987, c. 550, s. 1; 2003-13, s. 3.)

Editor's Note. — Chapter 33 and most of Chapter 35, referred to in this section, have been repealed and/or recodified. As to incompetency and guardianship, see now Chapter 35A, G.S. 35A-1101 et seq.

Subsection (e), as amended by Session Laws 2003-13, s. 3, effective April 17, 2003, is applicable to all petitions for sterilization pending and orders authorizing sterilization that have not been executed as of April 17, 2003.

CASE NOTES

Editor's Note. *— Many of the cases cited below were decided under former G.S. 33-1 and prior law.*

Clerk's Authority to Reopen Proceeding. — Clerk had original jurisdiction to appoint a guardian and could reopen the incompetency proceeding, where an interested party was not notified of the original proceeding. In re Ward, 337 N.C. 443, 446 S.E.2d 40 (1994).

The powers which a court of equity formerly exercised in regard to orphans and their estates are now conferred upon the clerk of the superior court by former G.S. 33-1 and 33-6. Duffy v. Williams, 133 N.C. 195, 45 S.E. 548 (1903).

The superior court has no power to appoint a general guardian, in the absence of other matters of which the court has jurisdiction. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

Residence of Infant. — The word "reside" as used in this section, relating to the appointment of guardians, has been construed to mean the domicile of the infant. And a legitimate child, whose father is alive, takes at birth, and continues during minority, the domicile of his father, following it as it changes. Upon the death of the father his domicile at death continues to be the domicile of his minor child until the domicile of such child is legally changed. In re Hall's Guardianship, 235 N.C. 697, 71 S.E.2d 140 (1952).

Where both parents of an infant are dead and he is taken to the home of his paternal grandparents and resides with them, regardless of what theretofore may have been his domicile, the domicile of his grandparents then becomes his domicile. Hence, the clerk of superior court of the county in which the grandparents reside has jurisdiction of him. In re Hall's Guardianship, 235 N.C. 697, 71 S.E.2d 140 (1952).

Appointment by General Assembly. — An act of the General Assembly authorizing a certain person "to act as guardian" of another without giving bond, is constitutional, and is in itself an appointment without intervention of the clerk. Henderson v. Bowed, 116 N.C. 795, 21 S.E. 692 (1895).

The appointment of a guardian is a matter of discretion, the exercise of which cannot be reviewable by the Supreme Court. Battle v. Vick, 15 N.C. 294 (1833).

Not Bound by Choice of the Minor. — In early cases it was held that the court in appointing a guardian was not bound by the choice of the minor, but could appoint the person, who, in its discretion, would best perform the duty. Wynne v. Always, 5 N.C. 38 (1804); Grant v. Whitaker, 5 N.C. 231 (1809).

Person Related to Ward. — Courts are empowered to appoint as guardian such person as they may think proper, without regard to the kinship of the guardian to the ward. Mills v. McAllister, 2 N.C. 303 (1796).

Custody of Child. — The jurisdiction of superior court clerks in the appointment of guardians of infants, etc., does not extend to a case where the petitioner asks for the custody of a child who had been placed by its mother under the control of another. In re Lewis, 88 N.C. 31 (1883).

Removal of Guardian. — A ward may not bring an action in the superior court by her next friend to remove her guardian appointed by the clerk. Moses v. Moses, 204 N.C. 657, 169 S.E. 273 (1933).

Termination of Guardianship When Ward Reaches Majority. — When one is appointed as guardian for a minor, his right to act terminates when the ward reaches his majority.

In re Simmons, 256 N.C. 184, 123 S.E.2d 614 (1962).

OPINIONS OF ATTORNEY GENERAL

A clerk of superior court may appoint a guardian of the person when there is no natural guardian for a minor. See opinion of Attorney General to Ms. Diana Morgan, Assistant Clerk of Superior Court, Brunswick County, 54 N.C.A.G. 31 (1984), rendered under former G.S. 33-1.

Clerk of Court as "Court of Competent Jurisdiction." — If a purchaser or beneficiary of a preneed contract has been adjudicated incompetent, the clerk of the superior court is a "court of competent jurisdiction" and, a hearing should be held in order for the clerk to make findings establishing that it is in the best interest of the ward to revoke the contract. See opinion of Attorney General to Mr. William R. Hoke, Attorney for the North Carolina State Board of Mortuary Science, — N.C.A.G. — (November 3, 1995).

§ 35A-1204. Venue.

(a) Venue for the appointment of a guardian for an incompetent person is in the county in which the person was adjudicated to be incompetent unless the clerk in that county has transferred the matter to a different county, in which case venue is in the county to which the matter has been transferred.

(b) Venue for the appointment of a guardian for a minor is in the county in which the minor resides or is domiciled.

(c) Venue for the appointment of an ancillary guardian for a nonresident of the State of North Carolina who is a minor or who has been adjudicated incompetent in another state, and who has a guardian of the estate or general guardian in the state of his residence, is in any county in which is located real estate in which the nonresident ward has an ownership or other interest, or if the nonresident ward has no such interest in real estate, any county in which the nonresident owns or has an interest in personal property. (1987, c. 550, s. 1.)

CASE NOTES

Editor's Note. — *The case cited below was decided under former G.S. 33-1.*

Residence of Infant. — The word "reside" as used in former G.S. 33-1 relating to the appointment of guardians has been construed to mean the domicile of the infant. And a legitimate child, whose father is alive, takes at birth, and continues during minority, the domicile of his father — following is as it changes. Upon the death of the father his domicile at death continues to be the domicile of his minor child until the domicile of such child is legally changed. In re Hall's Guardianship, 235 N.C. 697, 71 S.E.2d 140 (1952).

Where both parents of an infant are dead and he is taken to the home of his paternal grandparents and resides with them, regardless of what theretofore may have been his domicile, the domicile of his grandparents then becomes his domicile. Hence, the clerk of superior court of the county in which the grandparents reside has jurisdiction of him. In re Hall's Guardianship, 235 N.C. 697, 71 S.E.2d 140 (1952).

§ 35A-1205. Transfer to different county.

At any time before or after appointing a guardian for a minor or incompetent person the clerk may, on a motion filed in the cause or on the court's own motion, for good cause order that the matter be transferred to a different county. The transferring clerk shall enter a written order directing the transfer under such conditions as the clerk specifies. The clerk in the transferring county shall transfer all original papers, documents, and orders from the guardianship and the incompetency proceeding, if any, to the clerk of the transferee county, along with the order directing the transfer. The clerk in the transferee county shall docket and file the papers in the estates division as a basis for jurisdiction in all subsequent proceedings. The clerk in the transferring county shall close his file with a copy of the transfer order and any order adjudicating incompetence or appointing a guardian. (1987, c. 550, s. 1.)

§ 35A-1206. Letters of appointment.

Whenever a guardian has been duly appointed and qualified under this Subchapter, the clerk shall issue to the guardian letters of appointment signed by the clerk and sealed with the clerk's seal of office. In all cases, the clerk shall specify in the order and letters of appointment whether the guardian is a guardian of the estate, a guardian of the person, or a general guardian. (1987, c. 550, s. 1.)

CASE NOTES

Editor's Note. — *The case cited below was decided under former law.*

The appointment of a guardian can be shown only by the records in the office of the clerk of the superior court by whom the appointment was made, or by letters of appointment issued by the clerk as required by this section, and parol evidence tending to show appointment is incompetent. Buncombe County v. Cain, 210 N.C. 766, 188 S.E. 399 (1936).

§ 35A-1207. Motions in the cause.

(a) Any interested person may file a motion in the cause with the clerk in the county where a guardianship is docketed to request modification of the order appointing a guardian or guardians or consideration of any matter pertaining to the guardianship.

(b) The clerk shall treat all such requests, however labeled, as motions in the cause.

(c) A movant under this section shall obtain from the clerk a time, date, and place for a hearing on the motion, and shall serve the motion and notice of hearing on all other parties and such other persons as the clerk directs as provided by G.S. 1A-1, Rule 5 of the Rules of Civil Procedure, unless the clerk orders otherwise.

(d) If the clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate, the clerk may enter an appropriate ex parte order to address the emergency pending the disposition of the matter at the hearing. (1987, c. 550, s. 1.)

CASE NOTES

Chapter 35A contemplates a spousal support obligation. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Any interested person, including a spouse, may seek payment of an obligation from an incompetent's estate by filing a motion in the cause under this section. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

The duty to provide support to a dependent spouse is a continuing obligation, fairly chargeable to the estate of an incompetent; therefore, incompetent's wife's complaint for support stated a legally recognized claim. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Clerk of Superior Court Has Power to Determine Whether Incompetent's Spouse Is Granted Support. — The clerk of superior court—after first ensuring that the estate is ample to meet the expenses of caring for the incompetent has residual equitable power under Chapter 35A to examine the facts and circumstances of the case to determine whether the incompetent's spouse should be granted support from her husband's estate and the right to continue to live in his home; factors the clerk may consider include the size and condition of the estate, the present and future demands against it, and the spouse's needs. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

The district court was not the proper forum in which to seek spousal support from the estate of an incompetent; the superior court is the only proper division to hear matters regarding the administration of incompetents' estates; therefore, the incompetent's spouse should have made her demand for support before the clerk of superior court either as a motion in the cause pursuant to this section, or as a special proceeding for the sale of her husband's property under G.S. 35A-1307. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

The estate of an incompetent may not be so depleted in favor of a spouse as to compromise the quality of care provided to the incompetent, or to force the incompetent to become a public charge; rather, in the limited instance in which an incompetent's estate is ample to provide for his own care and maintenance, an award of spousal support may properly be charged against the estate. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

If the guardian questions the propriety of a particular charge against the estate, he may seek prior court approval before making payment by filing a motion in the cause with the superior court clerk. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Cited in In re Ward, 337 N.C. 443, 446 S.E.2d 40 (1994).

§ 35A-1208. Authority for health care decisions.

(a) A guardian of the person or general guardian of an incompetent adult may petition the Clerk, in accordance with G.S. 32A-22(a), for an order suspending the authority of a health care agent, as that term is defined in G.S. 32A-16(2).

(b) A guardian of the person or general guardian of an incompetent adult may not revoke a Declaration, as that term is defined in G.S. 90-321. (2007-502, s. 8.)

Editor's Note. — Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Session Laws 2007-502, s. 20, made this section effective October 1, 2007.

§ 35A-1209: Reserved for future codification purposes.

ARTICLE 5.

Appointment of Guardian for Incompetent Person.

§ 35A-1210. Application before clerk.

Any individual, corporation, or disinterested public agent may file an application for the appointment of a guardian for an incompetent person by filing the same with the clerk. The application may be joined with or filed subsequent to a petition for the adjudication of incompetence under Subchapter I of this Chapter. The application shall set forth, to the extent known and to the extent such information is not already a matter of record in the case:

(1) The name, age, address, and county of residence of the ward or respondent;
(2) The name, address, and county of residence of the applicant, his relationship if any to the respondent or ward, and his interest in the proceeding;
(3) The name, address, and county of residence of the respondent's next to kin and other persons known to have an interest in the proceeding;
(4) A general statement of the ward's or respondent's assets and liabilities with an estimate of the value of any property, including any income and receivables to which he is entitled; and
(5) Whether the applicant seeks the appointment of a guardian of the person, a guardian of the estate, or a general guardian, and whom the applicant recommends or seeks to have appointed as such guardian or guardians. (1987, c. 550, s. 1.)

Cross References. — As to service of summons upon a person under a disability, see G.S. 1A-1, Rule 4. As to right of surviving spouse to claim an elective share, see G.S. 30-3.1 et seq. As to right of alleged incompetent to examine his will filed with the clerk, see G.S. 31-11. As to appointment, duties, etc., of guardian generally, see G.S. 35A-1101 et seq. As to bond required of guardian, see G.S. 35A-1230 et seq. As to guardian's power to claim benefits under Workers' Compensation Act, see G.S. 97-49. For the Mental Health, Developmental Disabilities and Substance Abuse Act, see Chapter 122C.

Legal Periodicals. — For note on requirement of notice for appointment of guardians ad litem and next friends, see 48 N.C.L. Rev. 92 (1969).

For survey of 1977 law on health care regulation, see 56 N.C.L. Rev. 857 (1978).

CASE NOTES

I. General Consideration.
II. Inability to Manage Own Affairs.
III. Appointment of Guardian.

I. GENERAL CONSIDERATION.

Editor's Note. *— The cases cited below were decided under former G.S. 35-1.6 and 35-2 and prior law.*

Nature of Proceeding. — An inquisition under this section as regards the person whose sanity is in question is a proceeding in personam; as it affects his property is a proceeding in rem. Such an inquisition is certainly not a criminal action as contemplated by G.S. 1-5. It is not a civil action as defined in G.S. 1-2. And by G.S. 1-3 "every other remedy is a special proceeding." Certainly such an inquisition is of a civil nature, though it would seem it is not a special proceeding under G.S. 1-3. In re Dunn, 239 N.C. 378, 79 S.E.2d 921 (1954).

Right to Notice and Opportunity to Be Heard. — When a party's lack of mental capacity is asserted and denied, and he has not previously been adjudicated incompetent to manage his affairs, he is entitled to notice and an opportunity to be heard before either a next friend or a guardian ad litem can be appointed for him. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

It is fundamental that one accused of incompetency is entitled to notice of the proceedings and a reasonable opportunity to rebut the allegations of the petition. In re Robinson, 26 N.C. App. 341, 215 S.E.2d 631 (1975).

Notice to Alleged Incompetent Serves Function of Summons. — The effect of former section is to provide that the proceeding may be commenced by the filing of the petition, and that the inquisition may be held upon the notice therein provided being served upon the alleged incompetent, thereby dispensing with the necessity of issuing a summons. The notice to an incompetent to appear at a time and place named to present evidence and show cause, if any, why he should not be declared incompetent serves every function of a summons. In re Barker, 210 N.C. 617, 188 S.E. 205 (1936).

Presence of Party. — The person alleged to be incompetent has a right to be present at the inquest, and if this right be denied him, it is good cause for setting aside the inquisition. Bethea v. McLennon, 23 N.C. 523 (1841).

Right to Traverse Inquisition. — From the earliest times the common law and the course of the legislation in common-law states has guarded sedulously the right of persons accused of incompetency of any kind to traverse the inquisition or other proceeding in the nature of one de lunatico inquirendo. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Conclusiveness of Adjudication. — An adjudication of insanity is conclusive as to the parties to the proceeding and their privies, but as to others it is evidence of incompetency and raises a mere presumption to that effect which is not conclusive but may be rebutted. Medical College v. Maynard, 236 N.C. 506, 73 S.E.2d 315 (1952).

The executed contract of a mentally incompetent person is ordinarily voidable and not void. If, however, the person has been adjudged incompetent from want of understanding to manage his affairs and the court has appointed a guardian for him, he is conclusively presumed insane insofar as parties and privies to the guardianship proceedings are concerned; as to all others, it is presumptive (but rebuttable) proof of the ward's incapacity. Chesson v. Pilot Life Ins. Co., 268 N.C. 98, 150 S.E.2d 40 (1966).

The test for mental competence to enter into a release is the same as that controlling the running of the statute of limitations, i.e., whether at the time of execution of the release, the party challenging the release had the mental competence to manage his own affairs. Cox v. Jefferson-Pilot Fire & Cas. Co., 80 N.C. App. 122, 341 S.E.2d 608, cert. denied, 317 N.C. 702, 347 S.E.2d 38 (1986).

Guardian of a young incompetent adult, appointed by the State, acted under color of State law and was a State actor for purposes of jurisdiction under 42 U.S.C. § 1983 in a suit brought by ward's next friend seeking appropriate treatment for the ward. Thomas S. v. Morrow, 781 F.2d 367 (4th Cir.), cert. denied, 476 U.S. 1124, 106 S. Ct. 1992, 90 L. Ed. 2d 673, 479 U.S. 869, 107 S. Ct. 235, 93 L. Ed. 2d 161 (1986) upholding federal district court's order directing guardian and Secretary of North Carolina Department of Human Resources to furnish specific treatment for the ward, but directing the district court to delete from its order the direction that the guardian perform his duties under State law.

II. INABILITY TO MANAGE OWN AFFAIRS.

The word "affairs" encompasses a person's entire property and business, not just one transaction or one piece of property to which he may have a unique attachment. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Test of Incompetence to Manage Own Affairs. — Under former G.S. 35-2, if a person's mental condition is such that he is incapable of transacting the ordinary business involved in taking care of his property, if he is incapable of exercising rational judgment and weighing the consequences of his acts upon himself, his family, his property and estate, he is incompetent to manage his affairs. On the other hand, if he understands what is necessarily required for the management of his ordinary business affairs and is able to perform those acts with reasonable continuity, if he comprehends the effect of what he does, and can exercise his own will, he is not lacking in understanding within the meaning of the law, and he cannot be deprived of the control of his litigation or property. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

There is no completely satisfactory definition of the phrase "incompetent from want of understanding to manage his own affairs." Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Incompetency to administer one's property obviously depends upon the general frame and habit of mind, and not upon specific actions, such as may be reflected by eccentricities, prejudices, or the holding of particular beliefs. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

As to the requirement that an adult plaintiff be non compos mentis before the court has jurisdiction to appoint a next friend for him, see Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

More Efficient Management of Property by Another Is Insufficient Ground. — To authorize the appointment of next friend or guardian ad litem, it is not enough to show that another might manage a man's property more wisely or efficiently than he himself. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Mere weakness of mind will not be sufficient to put a person among those who are incompetent to manage their own affairs. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Eccentricity, like profligacy, may coexist with the ability to manage one's property. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

III. APPOINTMENT OF GUARDIAN.

Mental incapacity is only cause for appointment of a guardian under this section. Former section does not make physical incapacity alone, however complete, grounds for such appointment. Goodson v. Lehmon, 224 N.C. 616, 31 S.E.2d 756 (1944).

Ward Presumed to Lack Capacity after Guardian Appointed. — Where a person has been adjudged incompetent for want of understanding to manage his own affairs, under former section, and the court has appointed a guardian, and not a trustee, the ward is conclusively presumed to lack mental capacity to manage his own affairs, insofar as parties and privies to the proceeding are concerned; and, while not conclusive as to others, it is presumptive, and the presumption continues unless rebutted in a proper proceeding. Sutton v. Sutton, 222 N.C. 274, 22 S.E.2d 553 (1942).

An inquisition is not always a condition precedent for the appointment of a next friend or a guardian ad litem. In an emergency, when it is necessary, pendente lite, to safeguard the property of a person non compos mentis whose incompetency has not been adjudicated, the protection of the court may be invoked in his behalf by one acting as next friend. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

No Substantial Difference between Next Friend and Guardian Ad Litem. — Although technically a next friend represents a plaintiff and a guardian ad litem represents a defendant, there is no substantial difference between the two. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

The class of persons for whom next friends and guardians ad litem may be appointed are the same. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

Neither a next friend nor a guardian ad litem has authority to receive money or administer the litigant's property. His powers are coterminous with the beginning and end of the litigation in which he is appointed. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

§ 35A-1211. Service of application, motions, and notices.

(a) Application for appointment of a guardian and related motions and notices shall be served on the respondent, respondent's counsel or guardian ad litem, other parties of record, and such other persons as the clerk shall direct.

(b) When the application for appointment of a guardian is joined with a petition for adjudication of incompetence, the application shall be served with and in the same manner as the petition for adjudication of incompetence. When the application is filed subsequent to the petition for adjudication of incompetence, the applicant shall serve the application as provided by G.S. 1A-1, Rule 5, Rules of Civil Procedure, unless the clerk directs otherwise. (1987, c. 550, s. 1; 1989, c. 473, s. 25.)

§ 35A-1212. Hearing before clerk on appointment of guardian.

(a) The clerk shall make such inquiry and receive such evidence as the clerk deems necessary to determine:

(1) The nature and extent of the needed guardianship;
(2) The assets, liabilities, and needs of the ward; and
(3) Who, in the clerk's discretion, can most suitably serve as the guardian or guardians.

If the clerk determines that the nature and extent of the ward's capacity justifies ordering a limited guardianship, the clerk may do so.

(b) If a current multidisciplinary evaluation is not available and the clerk determines that one is necessary, the clerk, on his own motion or the motion of any party, may order that such an evaluation be performed pursuant to G.S. 35A-1111. The provisions of that section shall apply to such an order for a multidisciplinary evaluation following an adjudication of incompetence.

(c) The clerk may require a report prepared by a designated agency to evaluate the suitability of a prospective guardian, to include a recommendation as to an appropriate party or parties to serve as guardian, or both, based on the nature and extent of the needed guardianship and the ward's assets, liabilities, and needs.

(d) If a designated agency has not been named pursuant to G.S. 35A-1111, the clerk may, at any time he finds that the best interest of the ward would be served thereby, name a designated agency. (1987, c. 550, s. 1; 2003-236, s. 1.)

§ 35A-1212.1. Recommendation of appointment of guardian by will or other writing.

Any parent may by will recommend appointment of a guardian for an unmarried child who has been adjudicated an incompetent person and specify desired limitations on the powers to be given to the guardian. If both parents make such recommendations, the will with the latest date shall, in the absence of other relevant factors, prevail. Such recommendation shall be a strong guide for the clerk in appointing a guardian, but the clerk is not bound by the recommendation if the clerk finds that a different appointment is in the incompetent adult's best interest. If the will specifically so directs, a guardian appointed pursuant to such recommendation may be permitted to qualify and serve without giving bond, unless the clerk finds as a fact that the interest of the incompetent adult would be best served by requiring the guardian to give bond. (2005-333, s. 1.)

§ 35A-1213. Qualifications of guardians.

(a) The clerk may appoint as guardian an adult individual, a corporation, or a disinterested public agent. The applicant may submit to the clerk the name or names of potential guardians, and the clerk may consider the recommendations of the next of kin or other persons.

(b) A nonresident of the State of North Carolina, to be appointed as general guardian, guardian of the person, or guardian of the estate of a North Carolina resident, must indicate in writing his willingness to submit to the jurisdiction of the North Carolina courts in matters relating to the guardianship and must appoint a resident agent to accept service of process for the guardian in all actions or proceedings with respect to the guardianship. Such appointment must be approved by and filed with the clerk, and any agent so appointed must notify the clerk of any change in the agent's address or legal residence. The clerk shall require a nonresident guardian of the estate or a nonresident general guardian to post a bond or other security for the faithful performance of the guardian's duties. The clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties.

(c) A corporation may be appointed as guardian only if it is authorized by its charter to serve as a guardian or in similar fiduciary capacities.

(d) A disinterested public agent who is appointed by the clerk to serve as guardian is authorized and required to do so; provided, if at the time of the appointment or any time subsequent thereto the disinterested public agent believes that his role or the role of his agency in relation to the ward is such that his service as guardian would constitute a conflict of interest, or if he knows of any other reason that his service as guardian may not be in the ward's best interest, he shall bring such matter to the attention of the clerk and seek the appointment of a different guardian. A disinterested public agent who is appointed as guardian shall serve in that capacity by virtue of his office or employment, which shall be identified in the clerk's order and in the letters of appointment. When the disinterested public agent's office or employment terminates, his successor in office or employment, or his immediate supervisor if there is no successor, shall succeed him as guardian without further proceedings unless the clerk orders otherwise.

(e) Notwithstanding any other provision of this section, an employee of a treatment facility, as defined in G.S. 35A-1101(16), may not serve as guardian for a ward who is an inpatient in or resident of the facility in which the employee works; provided, this subsection shall not apply to or affect the validity of any appointment of a guardian that occurred before October 1, 1987. (1987, c. 550, s. 1; 2004-203, s. 31(a).)

CASE NOTES

The court correctly dismissed the plaintiff's challenge to this section due to a lack of standing where he failed to allege that the court would have named him his grandmother's guardian in the absence of the residency requirements of this section. Jones v. Jones, 2000 U.S. App. LEXIS 12271 (4th Cir. June 5, 2000), reported in table case format at 215 F.3d 1319 (4th Cir. 2000).

§ 35A-1214. Priorities for appointment.

The clerk shall consider appointing a guardian according to the following order of priority: an individual recommended under G.S. 35A-1212.1; an individual; a corporation; or a disinterested public agent. No public agent shall be appointed guardian until diligent efforts have been made to find an appropriate individual or corporation to serve as guardian, but in every instance the clerk shall base the appointment of a guardian or guardians on the best interest of the ward. (1987, c. 550, s. 1; 2005-333, s. 2.)

§ 35A-1215. Clerk's order; issuance of letters of appointment.

(a) When appointing a guardian, the clerk shall enter an order setting forth:

(1) The nature of the guardianship or guardianships to be created and the name of the person or entity appointed to fill each guardianship; and

(2) The powers and duties of the guardian or guardians, which shall include, unless the clerk orders otherwise, (i) with respect to a guardian of the person and general guardian, the powers and duties provided under G.S. 35A, Article 8, and (ii) with respect to a guardian of the estate and general guardian, the powers, and duties provided under G.S. 35A, Article 9 and Subchapter III; and

(3) The identity of the designated agency if there is one.

(b) If the clerk orders a limited guardianship as authorized by G.S. 35A-1212(a), the clerk may order that the ward retain certain legal rights and privileges to which the ward was entitled before the ward was adjudged incompetent. Any order of limited guardianship shall include findings as to the nature and extent of the ward's incompetence as it relates to the ward's need for a guardian or guardians.

(c) The clerk shall issue the guardian or guardians letters of appointment as provided in G.S. 35A-1206. (1987, c. 550, s. 1; 2003-236, s. 2.)

§ 35A-1216. Rule-making power of Secretary of Health and Human Services.

The Secretary of the Department of Health and Human Services shall adopt rules concerning the guardianship responsibilities of disinterested public agents. The rules shall provide, among other things, that disinterested public agents shall undertake or have received training concerning the powers and responsibilities of guardians. (1987, c. 550, s. 1; 1997-443, s. 11A.15.)

§§ 35A-1217 through 35A-1219: Reserved for future codification purposes.

Article 6.

Appointment of Guardian for a Minor.

§ 35A-1220. Absence of natural guardian.

When a minor either has no natural guardian or has been abandoned, and the minor requires services from the county department of social services, the social services director in the county in which the minor resides or is domiciled shall be the guardian of the person of the minor until the appointment of a general guardian or guardian of the person for the minor under this Subchapter or the entry of an order by a court of competent jurisdiction awarding custody of the minor or appointing a general guardian or guardian of the person for the minor. (1987, c. 550, s. 1.)

§ 35A-1221. Application before clerk.

Any person or corporation, including any State or local human services agency through its authorized representative, may make application for the appointment of a guardian of the estate for any minor or for the appointment of a guardian of the person or general guardian for any minor who has no natural guardian by filing an application with the clerk. The application shall set forth, to the extent known:

(1) The minor's name, date of birth, address, and county of residence;
(2) The names and address of the minor's parents, if living, and of other persons known to have an interest in the application for appointment of a guardian; the name of and date of death of the minor's deceased parent or parents;
(3) The applicant's name, address, county of residence, relationship if any to the minor, and interest in the proceeding;
(4) If a guardian has been appointed for the minor or custody of the minor has been awarded, a statement of the facts relating thereto and a copy of any guardianship or custody order, if available;
(5) A general statement of the minor's assets and liabilities with an estimate of the value of any property, including any income and receivables to which he is entitled;
(6) A statement of the reason or reasons that the appointment of a guardian is sought; whether the applicant seeks the appointment of a guardian of the person, a guardian of the estate, or a general guardian; and whom the applicant recommends or seeks to have appointed as such guardian or guardians; and
(7) Any other information that will assist the clerk in determining the need for a guardian or in appointing a guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 24; 1997-443, s. 11A.16.)

§ 35A-1222. Service of application and notices.

A copy of the application and written notice of the time, date, and place set for a hearing shall be served on each parent, guardian, and legal custodian of the minor who is not an applicant, and on any other person the clerk may direct, including the minor. Service shall be provided by G.S. 1A-1, Rule 4, Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by the sheriff, the sheriff shall make such service without demanding his fees in advance. Parties may waive their right to notice of the hearing and the clerk may proceed to consider the application upon determining that all necessary parties are before the court and agree to have the application considered. (1987, c. 550, s. 1; 1989, c. 473, s. 19.)

§ 35A-1223. Hearing before clerk on appointment of guardian.

The clerk shall receive evidence necessary to determine whether a guardian of the person, a guardian of the estate, or a general guardian is required. If the court determines that a guardian or guardians are required, the court shall receive evidence necessary to determine the minor's assets, liabilities, and needs, and who the guardian or guardians shall be. The hearing may be informal and the clerk may consider whatever testimony, written reports, affidavits, documents, or other evidence the clerk finds necessary to determine the minor's best interest. (1987, c. 550, s. 1.)

§ 35A-1224. Criteria for appointment of guardians.

(a) The clerk may appoint a guardian of the estate for any minor. The clerk may appoint a guardian of the person or a general guardian only for a minor who has no natural guardian.

(b) The clerk may appoint as guardian of the person or general guardian only an adult individual whether or not that individual is a resident of the State of North Carolina.

(c) The clerk may appoint as guardian of the estate an adult individual whether or not that individual is a resident of the State of North Carolina or a corporation that is authorized by its charter to serve as a guardian or in similar fiduciary capacities.

(d) If the minor's parent or parents have made a testamentary recommendation pursuant to G.S. 35A-1225 for the appointment of a guardian, the clerk shall give substantial weight to such recommendation; provided, such recommendation may not affect the rights of a surviving parent who has not willfully abandoned the minor, and the clerk shall in every instance base the appointment of a guardian or guardians on the minor's best interest.

(e) Notwithstanding any other provision of this section, an employee of a treatment facility, as defined in G.S. 35A-1101(16), may not serve as guardian for a ward who is an inpatient in or resident of the facility in which the employee works; provided, this subsection shall not apply to or affect the validity of any appointment of a guardian that occurred before October 1, 1987. (1987, c. 550, s. 1; 1989 c. 473, s. 1.)

CASE NOTES

Appointment of Person to Receive Minor's Death Benefits. — Clerk of Superior Court may not appoint a "general guardian" for a minor if a natural guardian, such as a biological mother, exists; however, clerk of Superior Court may appoint "some other person" to receive death benefits on behalf of minor. Valles de Portillo v. D.H. Griffin Wrecking Co., 134 N.C. App. 714, 518 S.E.2d 555, 1999 N.C. App. LEXIS 904 (1999), cert. denied, 351 N.C. 186, 541 S.E.2d 727 (1999).

§ 35A-1225. Testamentary recommendation; guardian for incompetent minor.

(a) Parents are presumed to know the best interest of their children. Any parent may by last will and testament recommend a guardian for any of his or her minor children, whether born at the parent's death or en ventre sa mere, for such time as the child remains under 18 years of age, unmarried, and unemancipated, or for any less time. Such will may be made without regard to whether the testator is an adult or a minor. If both parents make such recommendations, the will with the latest date shall, in the absence of other relevant factors, prevail. In the absence of a surviving parent, such recommendation shall be a strong guide for the clerk in appointing a guardian, but the clerk is not bound by the recommendation if the clerk finds that a different appointment is in the minor's best interest. If the will specifically so directs, a guardian appointed pursuant to such recommendation may be permitted to qualify and serve without giving bond, unless the clerk finds as a fact that the interest of the minor would be best served by requiring the guardian to give bond.

(b) Any person authorized by law to recommend a guardian for a minor by his last will and testament or other writing may direct that the guardian appointed for his incompetent child shall petition the clerk during the six months before the child reaches majority for an adjudication of incompetence and appointment of a guardian under the provisions of this Chapter. If so directed, the guardian shall timely file such a petition unless the minor is no longer incompetent. Notwithstanding the absence of such provision in a will or other writing, the guardian of an incompetent child, or any other person, may file such petition during the six months before the minor reaches majority or thereafter. (1987, c. 550, s. 1.)

Cross References. — As to adoption of children, see G.S. 48-1 et seq. As to action or proceeding for custody of minor child, see G.S. 50-13.1 to 50-13.8.

Legal Periodicals. — For survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

CASE NOTES

Editor's Note. — *The cases cited below were decided under former G.S. 33-2 and prior law.*

Section Controls Appointment. — A father cannot appoint a guardian for his children, nor impose on anyone the duties and obligations of that office, except pursuant to former section. Peyton v. Smith, 22 N.C. 325 (1839). See Long v. Rhymes, 6 N.C. 122 (1812).

And Applies Only to Testator's Children. — A testator cannot appoint a testamentary guardian except for his own children. Camp v. Pittman, 90 N.C. 615 (1884).

Appointment by Will. — A last will and testament cannot operate to appoint a guardian for an adult child regardless of the disability. In re Efird, 114 N.C. App. 638, 442 S.E.2d 381 (1994).

Former section does not authorize a grandfather to appoint a guardian for his grandchildren. Williamson v. Jordon, 45 N.C. 46 (1852). See Johnson v. Salsbury, 232 N.C. 432, 61 S.E.2d 327 (1950).

Bequest to Son as Trustee for Grandchildren. — Testatrix bequeathed certain property to her grandchildren with subsequent provisions that it was her will and desire that her son be appointed their guardian and that the guardian should hold and manage the property for the grandchildren with power to sell, convey or exchange the securities. It was held that since testatrix could not appoint a testamentary guardian for her grandchildren the provisions will be interpreted as bequeathing the property to testatrix' son as trustee for testatrix' grandchildren, in order that each provision of the instrument be given effect consistent with testatrix' intention. Johnson v. Salsbury, 232 N.C. 432, 61 S.E.2d 327 (1950).

Interpretation of Will. — Where it can clearly be collected from the will of a father that certain persons are thereby appointed to have the custody of the persons and the estate of his children, until they arrive at age, such an appointment will be held to constitute them guardians, as though the appropriate term had been used. Peyton v. Smith, 22 N.C. 325 (1839).

Rights of Both Parents Are Recognized. — In former sections and other statutes, the legislature has recognized the human as well as the legal relation between parent and child, the paramount and the subordinate, the present and the inchoate, rights of the father and the mother, and has wisely provided that both the parents shall have adequate opportunity to be heard and, except in rare cases, shall give their consent before the legal relation is severed or the domestic circle is broken. Truelove v. Parker, 191 N.C. 430, 132 S.E. 295 (1926).

Father Not Regarded as Wrongdoer When He Acts in Good Faith with Child's Money. — Since under former section the father is natural guardian for his minor children he should not be regarded as a trespasser or a wrongdoer when he acts in good faith with his child's money and makes purchases for its benefit. Lifsey v. Bullock, 11 F. Supp. 728 (M.D.N.C. 1935).

§ 35A-1226. Clerk's order; issuance of letters of appointment.

After considering the evidence, the clerk shall enter an appropriate order. If the clerk determines that a guardian or guardians should be appointed, the order may set forth:

(1) Findings as to the minor's circumstances, assets, and liabilities as they relate to his needs for a guardian or guardians; and

(2) Whether there shall be one or more guardians, his or their identity, and if more than one, who shall be guardian of the person and who shall be guardian of the estate. The clerk shall issue the guardian or guardians letters of appointment as provided in G.S. 35A-1206. (1987, c. 550, s. 1.)

§ 35A-1227. Funds owed to minors.

(a) Certain insurance proceeds or other funds to which a minor is entitled may be paid to and administered by the public guardian or the clerk as provided in G.S. 7A-111.

(b) A devise or legacy of personal property to a minor may be distributed to the minor's parent or guardian with the approval of the clerk as provided in G.S. 28A-22-7.

(c) A personal representative or collector who holds property due a minor without a guardian may deliver the property to the clerk as provided in G.S. 28A-23-2.

(d) Inter vivos or testamentary transfers to minors may be made and administered according to the North Carolina Uniform Transfers to Minors Act, Chapter 33A of the General Statutes. (1987, c. 550, s. 1; 1989, c. 473, s. 23.)

§ 35A-1228. Guardians of children of servicemen; allotments and allowances.

In all cases where a person serving in the armed forces of the United States has made an allotment or allowance to a resident of this State who is his child or other minor dependent as provided by the Wartime Allowance to Service Men's Dependents Act or any other act of Congress, the clerk in the county of the minor's residence may act as temporary guardian, or appoint some suitable person to act as temporary guardian, of the person's minor dependent for purposes of receiving and disbursing allotments and allowance funds for the benefit of the minor dependent, when:

(1) The other parent of the child or other minor dependent, or other person designated in the allowance or allotment to receive and disburse such moneys for the benefit of the minor dependent, dies or becomes mentally incompetent; and

(2) The person serving in the armed forces of the United States is reported as missing in action or as a prisoner of war and is unable to designate

another person to receive and disburse the allotment or allowance to the minor dependent. (1987, c. 550, s. 1.)

§ 35A-1229: Reserved for future codification purposes.

ARTICLE 7.

Guardian's Bond.

§ 35A-1230. Bond required before receiving property.

Except as otherwise provided by G.S. 35A-1212.1 and G.S. 35A-1225 (a), no general guardian or guardian of the estate shall be permitted to receive the ward's property until he has given sufficient surety, approved by the clerk, to account for and apply the same under the direction of the court, provided that if the guardian is a nonresident of this State and the value of the property received exceeds one thousand dollars ($1,000) the surety shall be a bond under G.S. 35A-1231 (a) executed by a duly authorized surety company, or secured by cash in an amount equal to the amount of the bond or by a mortgage executed under Chapter 109 of the General Statutes on real estate located in the county, the value of which, excluding all prior liens and encumbrances, shall be at least one and one-fourth times the amount of the bond; and further provided that the nonresident shall appoint a resident agent to accept service of process in all actions and proceedings with respect to the guardianship. The clerk shall not require a guardian of the person who is a resident of North Carolina to post a bond; the clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties. (1987, c. 550, s. 1; 1989, c. 473, s. 2; 2005-333, s. 3.)

Cross References. — As to giving bond in surety company, see G.S. 58-73-5. As to giving mortgage in lieu of bond, see G.S. 58-74-1 et seq.

Editor's Note. — Chapter 109 of the General Statutes, referred to in the section above, has been recodified as Articles 72 through 77 of Chapter 58 (G.S. 58-72-1 et seq. through G.S. 58-77-1 et seq.) under the authority of Session Laws 1987, c. 752, s. 9 and Session Laws 1987 (Reg. Sess., 1988), c. 975, s. 34.

CASE NOTES

Editor's Note. *— The cases cited below were decided under former law.*

Presumption of Giving of Bond. — When the fact that a guardian was appointed is admitted, a presumption arises that a guardian bond was given, since such a bond is a prerequisite to the appointment. Kello v. Maget, 18 N.C. 414 (1835).

When Denial of Guardianship Not Permissible. — Where there is evidence that one had been appointed and had acted as guardian, neither he nor his administrators can deny that he was guardian on the ground that he had not given bond. Latham v. Wilcox, 99 N.C. 367, 6 S.E. 711 (1888).

The surety on a guardianship bond is estopped to deny the validity of the appointment of a guardian when the bond signed by the surety recites that the guardian has been duly appointed. Phipps v. Royal Indem. Co., 201 N.C. 561, 161 S.E. 69 (1931).

Omission by the clerk to take the bond required on the appointment of a guardian does not destroy the efficacy of the appointment. Howerton v. Sexton, 104 N.C. 75, 10 S.E. 148 (1889).

Liability on Bond. — A guardian and his bondsmen are liable for all moneys due his wards which he has collected or ought to have collected. Loftin v. Cobb, 126 N.C. 58, 35 S.E. 230 (1900).

Where the administrator of a former guardian himself becomes guardian, he and his guardian bondsmen become liable for any balance due from the solvent estate of the former guardian. Loftin v. Cobb, 126 N.C. 58, 35 S.E. 230 (1900).

§ 35A-1231. Terms and conditions of bond; increase on sale of realty or personal property.

(a) Before issuing letters of appointment to a general guardian or guardian of the estate the clerk shall require the guardian to give a bond payable to the State. The clerk shall determine the value of all the ward's personal property and the rents and profits of the ward's real estate by examining, under oath, the applicant for guardianship or any other person or persons. The penalty in the bond shall be set as follows:

(1) Where the bond is executed by personal sureties, the penalty must be at least double the value so determined by the clerk;

(2) Where the bond is executed by a duly authorized surety company, the penalty may be fixed at not less than one and one-fourth times the value so determined by the clerk;

(3) Provided, however, the clerk may accept bond in estates where the value determined by the clerk exceeds the sum of one hundred thousand dollars ($100,000), in a sum equal to one hundred and ten percent (110%) of the determined value.

The bond must be secured with two or more sufficient sureties, jointly and severally bound, and must be acknowledged before and approved by the clerk. The bond must be conditioned on the guardian's faithfully executing the trust reposed in him as such and obeying all lawful orders of the clerk or judge relating to the guardianship of the estate committed to him. The bond must be recorded in the office of the clerk appointing the guardian, except, if the guardianship is transferred to a different county, it must be recorded in the office of the clerk in the county where the guardianship is docketed.

(b) If the court orders a sale of the ward's real property, or if the guardian expects or offers to sell personal property that he knows or has reason to know has a value greater than the value used in determining the amount of the bond posted, the guardian shall, before receiving the proceeds of the sale, furnish bond or increase his existing bond to cover the proceeds if real estate is sold, or to cover the increased value if personal property is sold. The bond, or the increase in the existing bond, shall be twice the amount of the proceeds of any real property sold, or of the increased value of any personal property sold, except where the bond is executed by a duly authorized surety company, in which case the penalty of the bond need not exceed one and one-fourth times the amount of the real property sold or the increased value of the personal property sold. (1987, c. 550, s. 1; 1989, 473, s. 9.)

Cross References. — As to statute of limitations on bond, see G.S. 1-50, 1-52. As to reduction of penalty of bond, see G.S. 35A-1233. As to action on bond, see G.S. 35A-1234. As to renewal of bond, see G.S. 35A-1236. As to liability of clerk for taking insufficient bond, see G.S. 35A-1238.

CASE NOTES

Editor's Note. — *The cases cited below were decided under former G.S. 33-13 and prior law.*

Former section contemplates that the bond shall be signed and acknowledged by the guardian as principal, as well as by the sureties. Cheshire v. Howard, 207 N.C. 566, 178 S.E. 348 (1935).

And Acceptance without Guardian's Signature Is an Irregularity. — The acceptance and approval of the bond by the clerk of the superior court without the signature of the guardian as principal is an irregularity, but such irregularity does not render the bond void either as to the principal or as to his sureties.

Cheshire v. Howard, 207 N.C. 566, 178 S.E. 348 (1935).

A guardian's bond is not strictly a record of the court, although the fact that it was made and accepted may be. An action may therefore be brought on the bond after its loss or destruction, without any previous application to the court to restore it as a record. Harrell v. Hare, 70 N.C. 658 (1874).

Failure to Insert Penalty. — A guardian's bond is not binding on the sureties thereto where it did not state the amount of the penalty at the time it was signed, and they did not afterwards authorize anyone to insert the amount. Rollins v. Ebbs, 137 N.C. 355, 49 S.E. 341 (1904), aff'd on rehearing, 138 N.C. 140, 50 S.E. 577 (1905).

Failure to Collect Money. — Where a guardian ought to receive a certain amount of money and does not, but takes something else, his own bond for instance, in place of the money, he and his sureties are liable. State ex rel. Avent v. Womack, 72 N.C. 397 (1875).

Bank Intermingling Trust Funds. — A bank, as guardian, in not investing the funds of its ward, but intermingling them with other funds of the bank, was faithless to the trust reposed in it; and, under the terms of this action, its bondsman must suffer the loss for such faithlessness. Roebuck v. National Sur. Co., 200 N.C. 196, 156 S.E. 531 (1931).

Responsible for Laches. — A guardian is responsible on his bond for any loss resulting from his laches in failing to sue. Cross v. Craven, 120 N.C. 331, 26 S.E. 940 (1897).

Limit of Liability for Realty. — The guardian's bond is not responsible in any way for the realty beyond the rents and profits. Cross v. Craven, 120 N.C. 331, 26 S.E. 940 (1897).

Liability on Note for Ward's Board. — The sureties on a guardian's bond are not responsible for the nonpayment of a note given by the guardian, and signed by him as guardian, for the board and tuition of his ward. McKinnon v. McKinnon, 81 N.C. 201 (1879).

Surety as a Party in Interest. — When a guardian fails to "faithfully execute the trust reposed in him as such," upon which his bond is conditioned, the surety thereon is subjected to liability, and as a party in interest is entitled to have the wrong remedied. Maryland Cas. Co. v. Lawing, 223 N.C. 8, 25 S.E.2d 183 (1943).

§ 35A-1232. Exclusion of deposited money in computing amount of bond.

(a) When it appears that the ward's estate includes money that has been or will be deposited in a bank in this State or invested in an account in an insured savings and loan association upon condition that the money or securities will not be withdrawn except on authorization of the court, the court may, in its discretion, order that the money be so deposited or invested and exclude such deposited money from the computation of the amount of the bond or reduce the amount of the bond in respect of such money to such an amount as it may deem reasonable.

(b) The applicant for letters of guardianship may deliver to any such bank or association any such money in his possession or may allow such bank or association to retain any such money already deposited or invested with it; in either event, the applicant shall secure and file with the court a written receipt including the agreement of the bank or association, duly acknowledged by an authorized officer of the bank or association, that the money shall not be allowed to be withdrawn except on authorization of the court. In so receiving and retaining such money, the bank or association shall be protected to the same extent as though it had received the same from a person to whom letters of guardianship had been issued.

(c) The term "account in an insured savings and loan association" as used in this section means any account in a savings and loan association that is insured by the Federal Deposit Insurance Corporation, by the Federal Savings and Loan Insurance Corporation, or by a mutual deposit guaranty association authorized by Article 7A of Chapter 54 of the North Carolina General Statutes.

(d) The term "money" as used in this section means the principal of the ward's estate and does not include the income earned by the principal which may be withdrawn without any authorization of the court. (1987, c. 550, s. 1.)

Editor's Note. — Article 7A of Chapter 54, referred to in subsection (c), was repealed. For similar provisions, see G.S. 54B-236 et seq.

§ 35A-1233. Clerk's authority to reduce penalty of bond.

When a guardian has disbursed either income or income and principal of the estate according to law, for the purchase of real estate or the support and maintenance of the ward or the ward and his dependents or any lawful cause, and when the personal assets and income of the estate from all sources in the hands of the guardian have been diminished, the penalty of the guardian's bond may be reduced in the discretion of the clerk to an amount not less than the amount that would be required if the guardian were first qualifying to administer the personal assets and income. (1987, c. 550, s. 1.)

§ 35A-1234. Action on bond.

Any person injured by a breach of the condition of the guardian's bond may prosecute a suit thereon, as in other actions. (1987, c. 550, s. 1.)

CASE NOTES

Editor's Note. — *The cases cited below were decided under former law.*

Jurisdiction of Action. — The clerk has no jurisdiction of a suit on a guardian's bond. Such suit must be brought in the superior court. Rowland v. Thompson, 65 N.C. 110 (1871).

Action in Name of State. — An action on a guardian's bond should be in the name of the State, for the benefit of the plaintiff, and not in the name of the plaintiff. Carmichael v. Moore, 88 N.C. 29 (1883); Williams v. McNair, 98 N.C. 332, 4 S.E. 131 (1887); Norman v. Walker, 101 N.C. 24, 7 S.E. 468 (1888).

Proper Relator. — When the share of an infant in an estate in the hands of his guardian is assigned, the assignee, and not the infant, is the proper relator in an action on the guardian's bond. State ex rel. Petty v. Rousseau, 94 N.C. 355 (1886).

A creditor of a guardian is not the proper relator in an action upon his bond. McKinnon v. McKinnon, 81 N.C. 201 (1879).

Unnecessary Parties. — In an action against the surety on a guardian's bond, when the guardian has defaulted and his whereabouts is unknown, and the defendant is the sole surety, and claims that the guardian, who was assistant clerk of the superior court, had given to the clerk a bond for the faithful performance of his duties as assistant clerk, neither the clerk nor the bonding company on the assistant clerk's bond is a necessary or proper party to said action. Phipps v. Royal Indem. Co., 201 N.C. 561, 161 S.E. 69 (1931).

Condition of Bond Set Out in Complaint. — In an action on a guardian's bond, it is necessary that conditions of the bond which are alleged to have been broken should be set forth in the complaint. McKinnon v. McKinnon, 81 N.C. 201 (1879).

Bond Must Be Proved. — A guardian's bond is not a record, and, before it can be read in evidence in any case, it must be proved like all other bonds. Butler v. Durham, 38 N.C. 589 (1845).

Evidence of a balance in the hands of a guardian as shown of his annual account was admissible against a surety under the Laws of 1884. Loftin v. Cobb, 126 N.C. 58, 35 S.E. 230 (1900).

Defenses. — The same defense which might be made to an action at law or suit in equity, brought in the name of the ward himself against the guardian, is good in an action brought on the guardian's bond. State ex rel. Clark v. Cordon, 30 N.C. 179 (1847).

Same — Settlement. — A full settlement of a suit brought by a ward on a guardian's bond, made after the ward becomes of age, in the presence of the ward's mother, and by the advice of her counsel, and a final judgment thereon, is a bar to a subsequent action on the bond. State ex rel. Dean v. Ragsdale, 80 N.C. 215 (1879).

Where in a suit on a guardian's bond it appeared that the account between the guardian and the ward had been settled, and that the guardian gave his own bond to the ward, which was received by the latter in satisfaction of the balance due, and he then gave his guardian a receipt, this was a sufficient defense to the suit on the bond. State ex rel. Clark v. Cordon, 30 N.C. 179 (1847).

Same — Statute of Limitations. — An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes 21 years old if the guardian makes no final settlement, and within six years if the guardian makes a final settlement. Self v. Shugart, 135 N.C. 185, 47 S.E. 484 (1904).

Amount of Recovery. — In an action upon a guardian's bond the recovery against either the principal or the surety cannot exceed the penalty thereof, but should be for the penal sum of the bond, and to be discharged on payment of the damages sustained. Anthony v. Estes, 101 N.C. 541, 8 S.E. 347 (1888).

Same — Measure of Damages. — The measure of damages in an action upon a guardian's bond for a failure to perform any duty required of him is the amount of the principal received, with compound interest at 6% until the ward arrives at full age. Topping v. Windley, 99 N.C. 4, 5 S.E. 14 (1888).

§ 35A-1235. One bond sufficient when several wards have estate in common.

When the same person is appointed guardian for two or more minors or incompetent persons possessed of one estate in common, the clerk may take one bond only in such case, upon which each of the wards or their heirs or personal representatives may have a separate action. (1987, c. 550, s. 1.)

§ 35A-1236. Renewal of bond.

Every guardian who is required to post a bond and who does so other than through a duly authorized surety company shall renew his bond before the clerk every three years during the continuance of the guardianship. The clerk shall issue a citation against every such guardian failing to renew his bond, requiring the guardian to renew the bond within 20 days after service of the citation. On return of the citation duly served and failure of the guardian to comply, the clerk shall remove the guardian and appoint a successor. This section shall not apply to a guardian whose bond is executed by a duly authorized surety company. (1987, c. 550, s. 1.)

CASE NOTES

Editor's Note. — *The cases cited below were decided under former law.*

An ordinary guardian has no fixed term of office. While the former statute requires a renewal of the bond every three years there is no requirement for a new appointment. Thornton v. Barbour, 204 N.C. 583, 169 S.E. 153 (1933).

Liability for Failure to Enforce Renewal. — A clerk and his sureties are not liable upon his official bond for his failure to issue a citation requiring a guardian to renew his bond. State ex rel. Jones v. Biggs, 46 N.C. 364 (1854); Sullivan v. Lowe, 64 N.C. 500 (1870).

§ 35A-1237. Relief of endangered sureties.

Any surety of a guardian, who is in danger of sustaining loss by his suretyship, may file a motion in the cause before the clerk where the guardianship is docketed, setting forth the circumstances of his case and demanding relief. The guardian shall have 10 days after service of the motion to answer the motion. If, upon the hearing, the clerk deems the surety entitled to relief, the clerk may order the guardian to give a new bond or to indemnify the surety against apprehended loss, or may remove the guardian from his trust. If the guardian fails to give a new bond or security to indemnify within a reasonable time when required to do so, the clerk must enter a peremptory order for his removal, and his authority as guardian shall cease. (1987, c. 550, s. 1; 1989, c. 473, s. 20.)

CASE NOTES

***Editor's Note.** — The cases cited below were decided under former G.S. 33-17 and prior law.*

A surety is not discharged from liability by the guardian giving a new bond with other sureties. Jones v. Blanton, 41 N.C. 115 (1848).

New Bond Is Additional Security. — When, under former section, new sureties are ordered to be given, the obligation of the bond given by the new sureties extends to the entire guardianship, retrospective as well as prospective. Such a bond is at least an additional and cumulative security for the ward. Bell's Adm'r v. Jasper, 37 N.C. 597 (1843).

And where a guardian gives several successive bonds, the sureties on each stand in the relation of cosureties to the sureties on every other bond; the only qualification to the rule being that the sureties are bound to contribution only according to the amount of the penalty of the bond in which each class is bound. Jones v. Hays, 38 N.C. 502 (1845); Thornton v. Barbour, 204 N.C. 583, 169 S.E. 153 (1933).

Where Counter-Security Given. — Where the sureties of a guardian obtained an order for counter-security, and at that time the guardian owed his ward, and never afterwards returned an account nor made a payment, no presumption of satisfaction at that or any subsequent time arose from the fact that he was then able to pay the sum he owed; and the sureties on the first bond were liable for it, though the order for counter-security expressly released them. Foye v. Bell, 18 N.C. 475 (1836).

The clerk is not empowered by any express statute to release sureties, upon bonds approved by him, especially at a time when the principal is in default. Former section provides a remedy for dissatisfied sureties upon guardian bonds, but release is not one of the remedies therein contemplated. Thornton v. Barbour, 204 N.C. 583, 169 S.E. 153 (1933).

Successor Guardian and Ward Are Not Bound by Adjudication if Not Parties. — A determination in a proceeding between the surety and the former guardian is not conclusive as against a successor guardian and the ward, neither of whom was a party to that proceeding when the adjudication was made. State ex rel. N.W. Bank v. Fidelity & Cas. Co., 268 N.C. 234, 150 S.E.2d 396 (1966).

§ 35A-1238. Clerk's liability.

(a) If any clerk commits the estate of a ward to the guardianship of any person without taking good and sufficient bond for the same as required by law, the clerk shall be liable on his official bond, at the suit of the aggrieved party, for all loss and damages sustained for want of sufficient bond being taken; but if the sureties were good at the time of their being accepted, the clerk shall not be liable.

(b) If any clerk willfully or negligently does, or omits to do, any other act prohibited, or other duty imposed on him by law, by which act or omission the estate of any ward suffers damage, the clerk shall be liable on his official bond, at the suit of the aggrieved party, for all loss and damages sustained from such act or omission. (1987, c. 550, s. 1.)

CASE NOTES

***Editor's Note.** — The cases cited below were decided under former law.*

A clerk and sureties on his official bond are liable for loss resulting from a failure to take a good guardian's bond, and the record of the appointment of the guardian is sufficient evidence of such appointment. Topping v. Windley, 99 N.C. 4, 5 S.E. 14 (1888).

The giving of the bond required of a guardian is not essential to the validity of the appointment itself. The failure to take the bond, however, subjects the clerk to the consequences of such omission. Howerton v. Sexton, 104 N.C. 75, 10 S.E. 148 (1889).

When Action Lies. — No action can be maintained on the bond given by a clerk conditioned for the faithful performance of his duty, except where there have been such damages sustained as would give the party a right to maintain an action on the case for the neglect of his official duty. State ex rel. Jones v. Briggs, 46 N.C. 364 (1854).

§ 35A-1239. Health and Human Services bond.

The Secretary of the Department of Health and Human Services shall require or purchase individual or blanket bonds for all disinterested public agents appointed to be guardians, whether they serve as guardians of the estate, guardians of the person, or general guardians, or one blanket bond covering all agents, the bond or bonds to be conditioned upon faithful performance of their duties as guardians and made payable to the State. The premiums shall be paid by the State. (1987, c. 550, s. 1; 1997-443, s. 11A.17.)

ARTICLE 8.

Powers and Duties of Guardian of the Person.

§ 35A-1240. Applicability of Article.

This Article applies only to guardians of the person, including general guardians exercising authority as guardian of the person. (1987, c. 550, s. 1.)

§ 35A-1241. Powers and duties of guardian of the person.

(a) To the extent that it is not inconsistent with the terms of any order of the clerk or any other court of competent jurisdiction, a guardian of the person has the following powers and duties:

(1) The guardian of the person is entitled to custody of the person of the guardian's ward and shall make provision for the ward's care, comfort, and maintenance, and shall, as appropriate to the ward's needs, arrange for the ward's training, education, employment, rehabilitation or habilitation. The guardian of the person shall take reasonable care of the ward's clothing, furniture, vehicles, and other personal effects that are with the ward.

(2) The guardian of the person may establish the ward's place of abode within or without this State. In arranging for a place of abode, the guardian of the person shall give preference to places within this State over places not in this State if in-State and out-of-State places are substantially equivalent. The guardian also shall give preference to places that are not treatment facilities. If the only available and appropriate places of domicile are treatment facilities, the guardian shall give preference to community-based treatment facilities, such as group homes or nursing homes, over treatment facilities that are not community-based.

(3) The guardian of the person may give any consent or approval that may be necessary to enable the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service; provided that, if the patient has a health care agent appointed pursuant to a valid health care power of attorney, the health care agent shall have the right to exercise the authority granted in the health care power of attorney unless the Clerk has suspended the authority of that health care agent in accordance with G.S. 35A-1208. The guardian shall not, however, consent to the sterilization of a mentally ill or mentally retarded ward unless the guardian obtains an order from the clerk in accordance with G.S. 35A-1245. The guardian of the person may give any other consent or approval on the ward's behalf that may be required or in the ward's best interest. The guardian may petition the clerk for the clerk's concurrence in the consent or approval.

(b) A guardian of the person is entitled to be reimbursed out of the ward's estate for reasonable and proper expenditures incurred in the performance of his duties as guardian of the ward's person.

(c) A guardian of the person, if he has acted within the limits imposed on him by this Article or the order of appointment or both, shall not be liable for damages to the ward or the ward's estate, merely by reason of the guardian's:

(1) Authorizing or giving any consent or approval necessary to enable the ward to receive legal, psychological, or other professional care, counsel, treatment, or service, in a situation where the damages result from the negligence or other acts of a third person; or

(2) Authorizing medical treatment or surgery for his ward, if the guardian acted in good faith and was not negligent. (1987, c. 550, s. 1; 2003-13, s. 4; 2007-502, s. 9.)

Editor's Note. — Subsection (a)(3), as rewritten by Session Laws 2003-13, s. 4, effective April 17, 2003, is applicable to all petitions for sterilization pending and orders authorizing sterilization that have not been executed as of April 17, 2003.

Session Laws 2007-502, s. 18, provides: "The Legislative Research Commission shall study the issue of whether North Carolina law should be amended to allow a person to require life-prolonging measures. The LRC shall involve all stakeholders in the study. The LRC shall report its recommendations to the 2008 Session of the 2007 General Assembly."

Session Laws 2007-502, s. 19, provides: "The North Carolina Institute of Medicine (Institute) shall study issues related to the provision of end-of-life medical care in North Carolina. As part of the study, the Division of Health Service Regulation, Department of Health and Human Services, and the North Carolina Board of Medicine shall provide to the Institute nonidentifying information regarding claims and complaints related to end-of-life medical treatment by health care providers that was contrary to the express wishes of either the patient or a person authorized by law to make treatment decisions on behalf of the patient. The Institute may review any other data related to end-of-life medical care and treatment the Institute determines is relevant.

"The purpose of this study is to determine whether statutory changes related to advance directives and health care powers of attorney impact the type and quantity of end-of-life medical care provided to patients, whether the patient's or patient representative's express wishes regarding the provision of treatment at the end of life are being honored, and whether there is any change in the number of persons who request continued treatment at the end of their lives, but do not receive that treatment.

"The Institute shall report its findings to the following entities no later than January 30, 2013:

"(1) The 2013 General Assembly.

"(2) The North Carolina Bar Association.

"(3) The North Carolina Medical Society."

Effect of Amendments. — Session Laws 2007-502, s. 9, effective October 1, 2007, inserted the proviso following "counsel, treatment, or service" near the middle of subdivision (a)(3).

CASE NOTES

Powers of Appointment. — Given supreme court precedent, the limited powers granted to a guardian of the person in G.S. 35A-1241, and the implied requirement of North Carolina's Rules of Civil Procedure, which imposed the requirement of appointment of a guardian ad litem where no general or testamentary guardian had been appointed under G.S. 1A-1-17(b)(2), a ward of a guardian of the person was neither properly sued nor served in the absence of a guardian ad litem or general guardian, and the verdict against the ward was set aside. Clawser v. Campbell, — N.C. App. —, 646 S.E.2d 779, 2007 N.C. App. LEXIS 1467 (2007).

Cited in In re L.A.B., 178 N.C. App. 295, 631 S.E.2d 61, 2006 N.C. App. LEXIS 1409 (2006).

§ 35A-1242. Status reports for incompetent wards.

(a) Any corporation or disinterested public agent that is guardian of the person for an incompetent person, within six months after being appointed, shall file an initial status report with the designated agency, if there is one, or with the clerk. Such guardian shall file a second status report with the designated agency or the clerk one year after being appointed, and subsequent reports annually thereafter. The clerk may order any other guardian of the person to file status reports. If a guardian required by this section to file a status report is employed by the designated agency, the guardian shall file any required status report with both the designated agency and the clerk.

(b) Each status report shall be filed under the guardian's oath or affirmation that the report is complete and accurate so far as he is informed and can determine.

(c) A clerk or designated agency that receives a status report shall not make the status report available to anyone other than the guardian, the ward, the court, or State or local human resource agencies providing services to the ward. (1987, c. 550, s. 1.)

§ 35A-1243. Duties of designated agency.

(a) Within 30 days after it receives a status report, the designated agency shall certify to the clerk that it has reviewed the report and shall mail a copy of its certification to the guardian.

(b) At the same time, the designated agency may:

(1) Send its written comments on the report to the clerk, the guardian, or any other person who may have an interest in the ward's welfare;

(2) Notify the guardian that it is able to help the guardian in the performance of his duties;

(3) Petition the clerk for an order requiring the guardian to perform the duties imposed on him by the clerk or this Article if it appears that the guardian is not performing those duties;

(4) Petition the clerk for an order modifying the terms of the guardianship or the guardianship program or plan if it appears that such should be modified;

(5) Petition the clerk for an order removing the guardian from his duties and appointing a successor guardian if it appears that the guardian should be removed for cause;

(6) Petition the clerk for an adjudication of restoration to competency; or

(7) Petition the clerk for any other appropriate orders.

(c) If the designated agency files such a petition, it shall cause the petition to be signed and acknowledged by the officer, official, employee, or agent who has personal knowledge of the facts set forth in the petition, and it shall set forth all facts known to it that tend to support the relief sought by the petition.

(d) The clerk shall take appropriate action upon the petition in accordance with other provisions or requirements of this Chapter. (1987, c. 550, s. 1.)

§ 35A-1244. Procedure to compel status reports.

If a guardian of the person fails to file a status report as required, or renders an unsatisfactory report, the clerk shall, on his own motion or the request of an interested party, promptly order the guardian to render a full and satisfactory report within 20 days after service of the order. If, after due service of the order, the guardian does not file such report, or obtain further time in which to file it, on or before the return day of the order, the clerk may remove him from office or may issue an order or notice to show cause for civil or criminal contempt as provided in Chapter 5A of the General Statutes. In such proceedings, the defaulting guardian may be held personally liable for the costs of the proceeding, including the costs of service of all notices or motions incidental thereto, or the amount of the costs of the proceeding may be deducted from any commissions due to the guardian of the person. Where a corporation or disinterested public agent is guardian of the person, the president or director or person or persons having charge of the guardianship for the corporation or agency, or the person to whom the duty of making status reports has been assigned by the corporation or agency, may be proceeded against as herein provided as if he or they were the guardian personally, provided, the corporation or agency itself may also be fined and/or removed as guardian for such failure or omission. (1987, c. 550, s. 1.)

§ 35A-1245. Procedure to permit the sterilization of a mentally ill or a mentally retarded ward in the case of medical necessity.

(a) A guardian of the person shall not consent to the sterilization of a mentally ill or mentally retarded ward unless an order from the clerk has been obtained in accordance with this section.

(b) If a mentally ill or mentally retarded ward needs to undergo a medical procedure that would result in sterilization, the ward's guardian shall petition the clerk for an order to permit the guardian to consent to the procedure. The petition shall contain the following:

(1) A sworn statement from a physician licensed in this State who has examined the ward that the proposed procedure is medically necessary and not for the sole purpose of sterilization or for the purpose of hygiene or convenience.

(2) The name and address of the physician who will perform the procedure.

(3) A sworn statement from a psychiatrist or psychologist licensed in this State who has examined the ward as to whether the mentally ill or mentally retarded ward is able to comprehend the nature of the proposed procedure and its consequences and provide an informed consent to the procedure.

(4) If the ward is able to comprehend the nature of the proposed procedure and its consequences, the sworn consent of the ward to the procedure.

(c) A copy of the petition shall be served on the ward personally. If the ward is unable to comprehend the nature of the proposed procedure and its consequences and is unable to provide an informed consent, the clerk shall appoint an attorney to represent the ward in accordance with rules adopted by the Office of Indigent Defense Services.

(d) Should the ward or the ward's attorney request a hearing, a hearing shall be held. Otherwise, the clerk may enter an order without the appearance of witnesses. If a hearing is held, the guardian and the ward may present evidence.

(e) If the clerk finds the following, the clerk shall enter an order permitting the guardian to consent to the proposed procedure:

(1) The ward is capable of comprehending the procedure and its consequences and has consented to the procedure, or the ward is unable to comprehend the procedure and its consequences.

(2) The procedure is medically necessary and is not solely for the purpose of sterilization or for hygiene or convenience.

(f) The guardian or the ward, the ward's attorney, or any other interested party may appeal the clerk's order to the superior court in accordance with G.S. 1-301.2(e). (2003-13, s. 1(a); 2005-250, s. 5.)

Cross References. — As to procedure when surgical operations on prison inmates are necessary, see G.S. 148-22.2.

Legal Periodicals. — For note, "Legislative Naiveté in Involuntary Sterilization Laws," see 12 Wake Forest L. Rev. 1064 (1976).

For comment on In re Sterilization of Moore, 289 N.C. 95, 221 S.E.2d 307 (1976), see 8 N.C. Cent. L.J. 307 (1977).

For article discussing sterilization of retarded persons, see 60 N.C.L. Rev. 943 (1982).

For note, "In re Truesdell: North Carolina

Adopts Two New and Conflicting Standards for Sterilization of Mentally Retarded Persons, " see 64 N.C.L. Rev. 1196 (1986).

For article, "Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy, " see 5 Duke L.J. 806 (1986).

CASE NOTES

I. General Consideration.
II. Hearings.

I. GENERAL CONSIDERATION.

Editor's Note. — *The cases cited below were decided under former Chapter 35, Article 7, G.S. 35-36 through 35-50, which was repealed by Session Laws 2003, c. 13, s. 1, effective April 17, 2003.*

Legislative Classification Is Reasonable. — Considering the object of this Article (former Chapter 35, Article 7), which is to prevent the procreation of children by a mentally ill or retarded individual who probably would be unable to care for a child or children and who is likely to procreate a child or children who probably would have serious physical, mental or nervous diseases or deficiencies, the classification under this statute (former G.S. 35-36) is reasonable. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The legislative classification of mentally retarded persons is neither arbitrary nor capricious, but rests upon respectable medical knowledge and opinion that such persons are in fact different from the general population and may rationally be accorded different treatment for their benefit and the benefit of the public. North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976).

Article Not Unconstitutionally Vague or Arbitrary. — This section (former G.S. 35-36) and former G.S. 35-37 through 35-50, inclusive, provide a sufficient judicial standard and are not unconstitutionally vague or arbitrary. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Not a Violation of Equal Protection. — Since the North Carolina law applies equally to all those named, this section (former G.S. 35-36) and former G.S. 35-37 through 35-50, inclusive, do not violate the equal protection clauses of the United States or North Carolina Constitutions. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

This section (former G.S. 35-36) and former G.S. 35-37 do not violate the equal protection clauses of the United States or North Carolina Constitutions since they provide for the sterilization of all mentally ill or retarded persons inside or outside an institution who meet the requirements of these statutes. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The legislative dual purpose — to prevent the birth of a defective child or the birth of a nondefective child that cannot be cared for by its parent — reflects a compelling state interest, and the classification rests upon a difference having a fair and substantial relation to the object of the legislation and does not, therefore, violate the equal protection clause of the U.S. Const., Amend. XIV. North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976).

Compelling State Interest Involved. — State interests in the sterilization of mentally ill or retarded persons rise to the level of a compelling state interest. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

All mentally retarded persons are sufficiently different from the general population to justify classification for some purposes without meeting the compelling governmental interest test. But the right to procreate is a fundamental one and under equal protection challenge sterilization cannot be ordered short of demonstrating a compelling governmental interest. This Article (former Chapter 35, Article 7) is narrowly drawn to express only the legitimate state interest of preventing the birth of a defective child or the birth of a nondefective child that cannot be cared for by its parent, and so viewed, the state's interest rises to the dignity of a compelling one. North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976).

Valid Exercise of Police Power. — The sterilization of mentally ill or retarded persons under the safeguards set out in this Article (former Chapter 35, Article 7) is a valid and reasonable exercise of the police power. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Not Cruel and Unusual Punishment. — The contention that sterilization amounts to cruel and unusual punishment is without basis in law since the cruel and unusual punishment clause of the Constitution refers to those persons convicted of a crime, and sterilization under this section (former G.S. 35-36) is not a criminal proceeding. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Application of Statute by Courts. — Though the sterilization statutes have been determined to meet the tests of constitutionality, the absence of standards and statutory definitions requires that the courts construe and apply the statutory provisions to the evidence in each case so as to adequately protect the respondent's fundamental rights. In re

Johnson, 45 N.C. App. 649, 263 S.E.2d 805, cert. denied and appeal dismissed, 300 N.C. 373, 267 S.E.2d 686 (1980).

The object of this Article (former Chapter 35, Article 7) is to prevent the procreation of children by a mentally ill or retarded individual who, because of physical, mental or nervous disease or deficiency which is not likely to materially improve, would probably be unable to care for a child or children and who would likely, unless sterilized, procreate a child or children who probably would have serious physical, mental or nervous diseases or deficiencies. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Concerns of State in Authorizing Sterilization. — The welfare of the parent and the future life and health of the unborn child are the chief concerns of the State in authorizing sterilization of individuals under certain circumstances. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The right to procreate is not absolute but is vulnerable to a certain degree of state regulation. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The welfare of all citizens should take precedence over the rights of individuals to procreate. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Right to Prevent Procreation of Children Who Will Become State Burden. — The people of North Carolina have a right to prevent the procreation of children who will become a burden on the State. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Former Law Unconstitutional. — See Brewer v. Valk, 204 N.C. 186, 167 S.E. 638 (1933).

Section (former G.S. 35-39) Neither Overbroad Nor Vague. — This section (former G.S. 35-39) is not overly broad. Although it permits initiation of the sterilization procedure against any and all members of the class, it does not contemplate that all members of the class will be sterilized. Nor is the standard of selection so vague that it cannot be comprehended and applied. North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976).

The legislative classification is itself narrowed as to impact so that only mentally retarded persons who are sexually active, and unwilling or incapable of controlling procreation by other contraceptive means, and who are found to be likely to procreate a defective child, or who would be unable because of the degree of retardation to be able to care for a child, may be sterilized. North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976).

The purpose of the standards governing mentally ill or retarded persons is to prevent unnecessary and unwarranted abridgment of the respondent's fundamental procreative rights while at the same time allowing the State to further its interests. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983), modified and aff'd, 313 N.C. 421, 329 S.E.2d 630 (1985).

The statutory phrase "care for a child" is not defined, but the courts in construing the phrase must find whether the evidence establishes a minimum standard of care consistent with both State interest and fundamental parental rights. The petitioner has the burden of proving at least probable inability to provide a reasonable domestic environment for the child. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983), modified and aff'd, 313 N.C. 421, 329 S.E.2d 630 (1985).

Findings Required. — In each case the trial court must carefully review the living conditions of the respondent to determine the substantial likelihood that he or she will voluntarily, or otherwise, engage in sexual activity likely to cause impregnation. This will necessarily include an inquiry into the respondent's home environment, daily schedule, social activities, and the degree of supervision entailed in each aspect of this schedule. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983), modified and aff'd, 313 N.C. 421, 329 S.E.2d 630 (1985).

For purposes of instituting sterilization proceedings under this section (former G.S. 35-39), a determination that a proposed sterilization is in the respondent's best interests must include a determination that the respondent is sexually active and that no temporary measure for birth control or contraception will adequately meet the respondent's needs, in addition to the statutory grounds regarding defective offspring and parental unfitness. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983), modified and aff'd, 313 N.C. 421, 329 S.E.2d 630 (1985).

Before a sterilization can be ordered there must be a showing that the subject be shown to be likely to engage in sexual activity without utilizing contraceptive devices and is, therefore, likely to become impregnated. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983), modified and aff'd, 313 N.C. 421, 329 S.E.2d 630 (1985).

Before the district court judge may enter an order requiring that the operation be performed, he must make the findings of fact required by this section, which amounts to a judicial determination that the allegations contained in the petition are true. North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976).

This section (former G.S. 35-43) means that the judge must find that the subject is likely to engage in sexual activity without utilizing contraceptive devices and is therefore likely to impregnate or become impregnated. North Carolina Ass'n for Retarded Children v. North

Carolina, 420 F. Supp. 451 (M.D.N.C. 1976).

The court must consider and make findings relative to the possibility that the respondent will experience trauma or psychological damage if she becomes pregnant or gives birth, and, conversely, the possibility of trauma or psychological damage from the sterilization operation. The latter consideration, of course, would also be applicable to a male candidate for sterilization. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

The petitioner must prove by clear, strong and convincing evidence that there is a substantial likelihood that respondent will voluntarily or otherwise engage in sexual activity likely to cause impregnation before the district court judge may enter an order and judgment authorizing a sterilization procedure. In re Truesdell, 313 N.C. 421, 329 S.E.2d 630 (1985).

"Best Interest" Alone as Basis for Compulsory Sterilization. — Although subdivision (1) (of former G.S. 35-39) provides that social services shall petition for sterilization if it would be in the "best interests" of the mentally retarded individual, this language is not contained in former G.S. 35-43, the provision which specifically outlines the findings to be made by the trial judge. It is, therefore, doubtful whether compulsory sterilization can be ordered on the basis of undefined "best interests" alone in view of the fundamental interest at stake. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983).

Petitioner must establish by clear, strong and convincing evidence that respondent is unable or unwilling to control procreation by alternative, less drastic contraceptive methods, including, but not limited to, supervision, education and training. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983), modified and aff'd, 313 N.C. 421, 329 S.E.2d 630 (1985).

This Article (former Chapter 35, Article 7) does not define sterilization or indicate which medical procedure is to be used when a sterilization is ordered. This section (former G.S. 35-39) suggests the existence of various alternative means of sterilization. The statutes are otherwise silent as to the procedures to be used. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983), modified and aff'd, 313 N.C. 421, 329 S.E.2d 630 (1985).

Cited in Clawser v. Campbell, — N.C. App. —, 646 S.E.2d 779, 2007 N.C. App. LEXIS 1467 (2007).

II. HEARINGS.

Legislative Intent. — It is clear from the language of this section (former G.S. 35-43) that the General Assembly intended to provide the mentally ill and defective with sufficient safeguards to prevent misuse of this potentially dangerous procedure. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The purpose of the standards governing mentally ill or retarded persons is to prevent unnecessary and unwarranted abridgment of the respondent's fundamental procreative rights while at the same time allowing the State to further its interests. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983), modified and aff'd, 313 N.C. 421, 329 S.E.2d 630 (1985).

Sterilization may not be ordered if there is a less drastic means available. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983), modified and aff'd, 313 N.C. 421, 329 S.E.2d 630 (1985).

The statute does not limit unfitness to mental retardation. The term "physical, mental or nervous disease or deficiency" includes qualities other than diminished intelligence, and the range of retardation can vary from mild to severe. In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805, cert. denied and appeal dismissed, 300 N.C. 373, 267 S.E.2d 686 (1980).

A presumption of unfitness founded solely on retardation is unwarranted. In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805, cert. denied and appeal dismissed, 300 N.C. 373, 267 S.E.2d 686 (1980).

Emergency Situations. — Under former G.S. 35-49, in life-threatening or emergency situations where sterilization is medically necessary, a petition could be granted absent a showing of the factors required by this section. In re Truesdell, 313 N.C. 421, 329 S.E.2d 630 (1985).

The burden on the petitioner to show personality defects or traits of unfitness apart from retardation increases as the retardation ranges from severe to mild. In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805, cert. denied and appeal dismissed, 300 N.C. 373, 267 S.E.2d 686 (1980).

Inability to Provide Child a Reasonable Environment Must Be Shown. — The petitioner has the burden of proving at least probable inability to provide a reasonable domestic environment for the child. In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805, cert. denied and appeal dismissed, 300 N.C. 373, 267 S.E.2d 686 (1980).

Evidence Must Establish Compelling State Interest. — The absence of statutory guidance for determining what constitutes proper care of a child and a person's inability to provide that care places on the courts the burden of requiring that the evidence establishes conclusively a compelling state interest before the fundamental right of procreation can be infringed. In re Johnson, 45 N.C. App. 649, 263 S.E.2d 805, cert. denied and appeal dismissed, 300 N.C. 373, 267 S.E.2d 686 (1980).

Relevant Evidence. — In an involuntary sterilization proceeding based on the ground that respondent because of mental deficiency would probably be unfit to care for a child, evidence concerning respondent's morals, sexual activity, and attitude toward birth control and her statements to a psychiatrist that in her youth she would get impatient and angry with children left in her care by her parents were relevant on the issues of fitness and care and whether respondent's condition was likely to improve materially. In re Johnson, 45 N.C. App. 644, 263 S.E.2d 822 (1980).

There is no statutory or constitutional authority for considering menstrual problems with respect to involuntary sterilization. The State's compelling interest is in the prevention of conception, not in the problems respondent's menstruation may pose for her, and certainly not in the problem it poses for her caretaker. Rather, the inquiry must focus on which method or surgical procedure for sterilization poses the least health risk and the least intrusion into respondent's bodily integrity. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983), modified and aff'd, 313 N.C. 421, 329 S.E.2d 630 (1985).

No constitutional mandate requires the State to obtain a medical expert on behalf of an indigent respondent. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

The right of cross-examination is specifically provided by this section (former G.S. 35-43). In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Only Requirement Is Written Objection to Sterilization. — In order to assure the right of cross-examination under this section (former G.S. 35-43), the only requirement is that the respondent, his guardian, attorney or other interested party object in writing to the sterilization. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Such Requirement Is Not Unduly Burdensome. — Since respondent is represented at every stage of the proceeding, the requirement that respondent, his guardian, attorney or other interested party object in writing to the sterilization is not unduly burdensome. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

Burden and Standard of Proof. — Although this section (former G.S. 35-43) does not specify the burden of proof that the petitioner must meet before the order authorizing the sterilization can be entered, in keeping with the intent of the General Assembly that the rights of the individual must be fully protected, the evidence must be clear, strong and convincing before such an order may be entered. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976).

This section (former G.S. 35-43) means that before an order of sterilization can be entered, there must be findings from evidence that is clear, strong and convincing that the subject is likely to engage in sexual activity without using contraceptive devices and that either a defective child is likely to be born or a child born that cannot be cared for by its parent. North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976).

The petitioner must establish by clear, strong and convincing evidence that respondent is unable or unwilling to control procreation by alternative, less drastic contraceptive methods, including, but not limited to, supervision, education and training. In re Truesdell, 63 N.C. App. 258, 304 S.E.2d 793 (1983), modified and aff'd, 313 N.C. 421, 329 S.E.2d 630 (1985).

The petitioner who seeks sterilization pursuant to this section (former G.S. 35-43) must satisfy the standards listed by the Court of Appeals in its opinion in North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451 (M.D.N.C. 1976). In addition, the trial judge, in his discretion, may consider certain other factors that he considers to be reflective of the best interests of the respondent in any particular circumstance. In re Truesdell, 313 N.C. 421, 329 S.E.2d 630 (1985).

Instruction on Standard of Proof. — Where the judge in his charge in effect equated proof by clear, strong and convincing evidence and proof by the greater weight of the evidence, the instruction was error. In re Johnson, 36 N.C. App. 133, 243 S.E.2d 386 (1978).

The judge should not attempt to define the term "clear, strong and convincing" in his charge. Whether the evidence is clear, strong and convincing is for the jury to resolve. In re Johnson, 36 N.C. App. 133, 243 S.E.2d 386 (1978).

Prejudicial Comment on Effect of Sterilization Laws. — An explanation by the judge in his charge of the necessity and effect of laws authorizing sterilization could only result in prejudice to the respondent. It is very likely that it led the jury to believe that the judge felt it should answer the issue in favor of petitioner. In re Johnson, 36 N.C. App. 133, 243 S.E.2d 386 (1978).

Prejudicial Comment on Procreation of Mentally Defective Child. — Where there was no allegation and no evidence to support a finding on the second ground, the likelihood of procreating a mentally defective child, but the judge, nevertheless, repeatedly gave instructions on that part of the statute and included in his final mandate an instruction that the jury answer the issue in favor of petitioner if it found that respondent would be likely, unless sterilized, to procreate a child who would probably have serious mental, physical, or nervous disease or deficiency, the instruction was erroneous and prejudicial to respondent. In re Johnson, 36 N.C. App. 133, 243 S.E.2d 386 (1978).

§§ 35A-1246 through 35A-1249: Reserved for future codification purposes.

ARTICLE 9.

Powers and Duties of Guardian of the Estate.

§ 35A-1250. Applicability of Article.

(a) This Article applies only to guardians of the estate, including general guardians exercising authority as guardian of the estate. A guardian of the estate or general guardian shall have all the powers and duties under this Article unless those are inconsistent with the clerk's order appointing a guardian, in which case the clerk's order shall prevail.

(b) Nothing contained in this Article shall be construed as authorizing any departure from the express terms or limitations set forth in any court order creating or limiting the guardian's powers and duties. (1987, c. 550, s. 1.)

§ 35A-1251. Guardian's powers in administering incompetent ward's estate.

In the case of an incompetent ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:

(1) To take possession, for the ward's use, of all the ward's estate, as defined in G.S. 35A-1202(5).

(2) To receive assets due the ward from any source.

(3) To maintain any appropriate action or proceeding to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.

(4) To complete performance of contracts entered into by the ward that continue as obligations of the ward or his estate, or to refuse to complete the contracts, as the guardian determines to be in the ward's best interests, taking into account any cause of action that might be maintained against the ward for failure to complete the contract.

(5) To abandon or relinquish all rights in any property when, in the guardian's opinion, acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in a condition that it is of no benefit or value to the ward or his estate.

(5a) To renounce any interest in property as provided in Chapter 31B of the General Statutes, or as otherwise allowed by law.

(6) To vote shares of stock or other securities in person or by general or limited proxy, and to pay sums chargeable or accruing against or on account of securities owned by the ward.

(7) To insure the ward's assets against damage or loss, at the expense of the ward's estate.

(8) To pay the ward's debts and obligations that were incurred prior to the date of adjudication of incompetence or appointment of a guardian when the debt or obligation was incurred for necessary living ex-

penses or taxes; or when the debt or obligation involves a specific lien on real or personal property, if the ward has an equity in the property on which there is a specific lien; or when the guardian is convinced that payment of the debt or obligation is in the best interest of the ward or his estate.

(9) To renew the ward's obligations for the payment of money. The guardian's execution of any obligation for the payment of money pursuant to this subsection shall not be held or construed to be binding on the guardian personally.

(10) To pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the ward's estate.

(11) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(12) To expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal.

(13) To pay from the ward's estate necessary expenses of administering the ward's estate.

(14) To employ persons, including attorneys, auditors, investment advisors, appraisers, or agents to advise or assist him in the performance of his duties as guardian.

(15) To continue any business or venture or farming operation in which the ward was engaged, where that continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the ward's interest in the business.

(16) To acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the generality of the foregoing, bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.

(17)a. Without a court order to lease any of the ward's real estate for a term of not more than three years, or to sell, lease or exchange any of the ward's personal property including securities, provided that the aggregate value of all items of the ward's tangible personal property sold without court order over the duration of the estate shall not exceed one thousand five hundred dollars ($1,500). When any item of the ward's tangible personal property has a value which when increased by the value of all other tangible personal property previously sold in the estate without a court order would exceed one thousand five hundred dollars ($1,500), a guardian may sell the item only as provided in subdivision (17)b.

b. A guardian who is required by subdivision (17)a to do so shall, and any other guardian who so desires may, by motion in the cause, request the court to issue him an order to lease any of the ward's real estate or to sell any item or items of the ward's personal property. Notice of the motion and of the date, time and place of a hearing thereon shall be served, as provided in G.S. 1A-1, Rule 5, Rules of Civil Procedure, upon all parties of record and upon any other persons the clerk may direct, and the court may issue the order after conducting a hearing and upon any conditions that the court may require; provided that:

1. A sale, lease, or exchange under this subdivision may not be subject to Article 29A of Chapter 1 of the General Statutes unless the order so requires; and
2. The power granted in this subdivision shall not affect the power of the guardian to petition the court for prior approval of expenditures from estate principal under subdivision (12) of this section.

(18) To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed or trust, or other lien securing the bond, note or other obligation, and to bid in the property at a foreclosure sale, or to acquire the property deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(19) To borrow money for any periods of time and upon the terms and conditions as to rates, maturities, renewals, and security as the guardian shall deem advisable, including the power of a corporate guardian to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the ward, and to mortgage, pledge, or otherwise encumber that portion of the ward's estate as may be required to secure the loan or loans; provided, in respect to the borrowing of money on the security of the ward's real property, Subchapter III of this Chapter is controlling.

(20) To execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian.

(21) To expend estate income for the support, maintenance, and education of the ward's minor children, spouse, and dependents, and to petition the court for prior approval of expenditures from estate principal for these purposes; provided, the clerk, in the original order appointing the guardian or a subsequent order, may require that the expenditures from estate income also be approved in advance. In determining whether and in what amount to make or approve these expenditures, the guardian or clerk shall take into account the ward's legal obligations to his minor children, spouse, and dependents; the sufficiency of the ward's estate to meet the ward's needs; the needs and resources of the ward's minor children, spouse, and dependents; and the ward's conduct or expressed wishes, prior to becoming incompetent, in regard to the support of these persons.

(22) To transfer to the spouse of the ward those amounts authorized for transfer to the spouse pursuant to 42 United States Code § 1396r-5.

(23) To create a trust for the benefit of the ward pursuant to 42 United States Code § 1396p(d)(4), provided that all amounts remaining in the trust upon the death of the ward, other than those amounts which must be paid to a state government and those amounts retained by a nonprofit association as set forth in 42 United States Code § 1396p(d)(4)(C), are to be paid to the estate of the ward.

(24) To petition the court for approval of the exercise of any of the following powers with respect to a revocable trust that the ward, if competent, could exercise as settlor of the revocable trust:

a. Revocation of the trust.
b. Amendment of the trust.
c. Additions to the trust.
d. Direction to dispose of property of the trust.
e. The creation of the trust, notwithstanding the provisions of G.S. 36C-4-402(a)(1) and (2).

The exercise of the powers described in this subdivision (i) shall not alter the designation of beneficiaries to receive property on the ward's death under that ward's existing estate plan; and (ii) shall be subject to the provisions of Articles 17, 18, and 19 of this Chapter concerning gifts. (1987, c. 550, s. 1; 1989, c. 473, ss. 3, 13; 1995, c. 235, ss. 6, 8; 1999-270, s. 9; 2004-199, s. 15; 2007-106, s. 52.)

Cross References. — As to criminal liability of guardian for embezzlement of funds, see G.S. 14-90. As to power of guardians to lend portions of estates of wards, and compound interest on obligations due to guardians, see G.S. 24-4. As to investment and deposit of funds generally, see G.S. 36A-1 et seq. As to personal liability of guardian for stock held for ward, see G.S. 53-40. As to authority to invest in bonds guaranteed by United States, see G.S. 53-44; in mortgages of federal housing administration, etc., see G.S. 53-45; in federal farm loans, see G.S. 53-60. As to corporation treating guardian as holder of record of shares, see G.S. 55-7-24. As to income taxes, see G.S. 105-154.

Editor's Note. — Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 52, effective October 1, 2007, rewrote subdivision (24). See Editor's note for applicability.

CASE NOTES

Editor's Note. *— Most of the cases cited below were decided under former G.S. 33-20 and prior law.*

Guardian Is Under Fiduciary Obligation to Manage Estate Reasonably and Prudently. — The guardian is always under a fiduciary obligation to manage the estate reasonably, prudently, and in the ward's best interest, and in all cases, the guardian's management of the estate will eventually be subject to judicial scrutiny. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Guardian Must Preserve Estate and Enforce Ward's Rights. — It is the duty of the guardian to preserve the estate of the ward and to take practicable action to enforce the ward's rights against others. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

He Must Diligently Collect Obligation Owing Ward. — It is the duty of a guardian of the estate of an incompetent person to exercise due diligence in the collection of an obligation owing to the ward. The guardian is liable to the ward's estate for any loss to it by his failure to do so. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

Including Damages for Wrongs Done Ward. — It is the duty of the guardian of the estate of an incompetent to collect, insofar as practicable, all moneys due the ward, including damages for wrongs done to the ward which are known to the guardian. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967); State ex rel. Duckett v. Pettee, 50 N.C. App. 119, 273 S.E.2d 317 (1980).

He Is Liable for All He Ought to Have Received. — A guardian is liable not only for what he receives, but for all he ought to have received of his ward's estate. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

A guardian is liable for what he ought to receive, as well as for what he does receive; and if he ought to receive a certain amount of money and does not, but takes something else, his own bond for instance, in the place of money, he and his sureties are liable. State ex rel. Avent v. Womack, 72 N.C. 397 (1875).

Where a guardian carelessly and without deliberation accepts for his wards from an insolvent debtor an amount less than they are entitled to receive from a fund, he is liable to the wards for what he failed to collect. Culp v. Stanford, 112 N.C. 664, 16 S.E. 761 (1893), distinguishing Luton v. Wilcox, 83 N.C. 20 (1880).

By Exercise of Diligence and Good Faith. — A guardian is responsible, not only for what he receives, but for all he might have received by the exercise of ordinary diligence and the highest degree of good faith. State ex rel. Armfield v. Brown, 73 N.C. 81 (1875).

But He Need Not Resort to Extraordinary Remedies. — Guardians are not responsible for losses to their wards attributable to their not having resorted to new and extraordinary remedies, the force and effect of which are doubtful. White v. Robinson, 64 N.C. 698 (1870).

A guardian in managing his ward's estate must act in good faith and with that care and judgment that a man of ordinary prudence exercises in his own affairs. Luton v. Wilcox, 83 N.C. 20 (1880).

Guardian Is Empowered to Make Expenditures Without Prior Court Approval Except When Property Mortgaged or Sold. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Accepting Unsecured Note. — A guardian who accepts an unsecured note in payment of a debt due his ward is guilty of laches, and is liable to his ward for the amount of such note. Covington v. Leak, 65 N.C. 594 (1871).

Where a guardian accepts from an administrator a smaller sum than the wards' share in the estate, the wards may, at their option, sue the guardian or the administrator for the deficiency. Alexander v. Alexander, 120 N.C. 472, 27 S.E. 121 (1897).

Failure to Sue before Insolvency of Debtor. — Where a guardian negligently fails to sue on note due his ward's estate until the parties thereto are insolvent, he is liable for his negligence. Coggins v. Flythe, 113 N.C. 102, 18 S.E. 96 (1893).

Where a guardian waited six months after the principal in a note held by him as guardian died insolvent before he sued the surety, who also became insolvent before the suit was brought, the guardian having an opportunity all the time of knowing the true condition of the obligors, it was held that by his laches he made himself responsible for the loss of the debt. Williamson v. Williams, 59 N.C. 62 (1860), distinguishing Deberry v. Ivey, 55 N.C. 370 (1856); Davis v. Marcum, 57 N.C. 189 (1858).

Failure to Collect Note during Civil War. — A guardian, who acted in good faith and was not guilty of culpable negligence, was held not to be responsible for omitting to collect a note during the Civil War, when it appeared that both of the two obligors were solvent during the war, and were made insolvent by its results. Love v. Logan, 69 N.C. 70 (1873).

The guardian can select the forum, under former section, as there is no statute to the contrary. Lawson v. Langley, 211 N.C. 526, 191 S.E. 229 (1937).

No Authority to Bring Divorce Action. — Nowhere in former Chapter 33 or Chapter 35 is there express statutory authority for the general guardian of an incompetent to bring an action for divorce. Freeman v. Freeman, 34 N.C. App. 301, 237 S.E.2d 857 (1977).

An action for divorce based upon one year's separation cannot be maintained by a general guardian on behalf of an incompetent. Freeman v. Freeman, 34 N.C. App. 301, 237 S.E.2d 857 (1977).

An action for divorce based upon one year's separation is not a necessary action within former G.S. 33-20. Freeman v. Freeman, 34 N.C. App. 301, 237 S.E.2d 857 (1977).

Payment of funds to guardian under War Risk Insurance Act vests title in the ward and operates to discharge the obligation of the United States. Hence, the deposit of the funds in a bank duly appointed guardian, and which later became insolvent, does not entitle the surety on the guardianship bond to a preference for the amount of the deposit. In re Home Sav. Bank, 204 N.C. 454, 168 S.E. 688 (1933).

As to exchange of security for debt due ward, see Christman v. Wright, 38 N.C. 549 (1845).

As to compromise of claim for personal injury to ward, see Bunch v. Foreman Blades Lumber Co., 174 N.C. 8, 93 S.E. 374 (1917).

As to statute of limitations upon discovery of fraud, see Johnson v. Pilot Life Ins. Co., 217 N.C. 139, 7 S.E.2d 475, 128 A.L.R. 1375 (1940).

Settlement of Ward's Partnership Interest upon Incorporation. — Court had jurisdiction under former G.S. 33-20 to determine guardian's petition relative to acceptance of settlement of ward's interest in partnership under contemplated organization of corporation to take over assets of partnership, since matter involved was not a sale, lease or mortgage of ward's property cognizable under former G.S. 35-10 and 35-11. In re Edwards, 243 N.C. 70, 89 S.E.2d 746 (1955).

The clerk properly denied petitioner's request for leave to disclaim her incompetents' interests in an estate where no evidence in the record indicated that either of the incompetents would, if mentally competent, disclaim her inheritance under the will in favor of the other legatees (although the sisters of one of the incompetents had disclaimed their inheritances in favor of their children so as to avoid estate taxes) and where the petitioner had a personal, albeit indirect, stake in the disclaimer; additionally, such a disclaimer would also create an artificial need for public assistance. Currin v. Johnson, 140 N.C. App. 767, 538 S.E.2d 626, 2000 N.C. App. LEXIS 1256 (2000).

Conclusion of Law. — The court committed reversible error in allowing a assistant clerk to testify in the embezzlement and perjury case against an attorney regarding the legality of his actions in handling decedent's estate, since that was the fundamental question the jury had to answer. State v. Linney, 138 N.C. App. 169, 531 S.E.2d 245, 2000 N.C. App. LEXIS 538 (2000).

Applied in Clawser v. Campbell, — N.C. App. —, 646 S.E.2d 779, 2007 N.C. App. LEXIS 1467 (2007).

Cited in Payne ex rel. Rabil v. State, Dep't of Human Resources, 126 N.C. App. 672, 486 S.E.2d 469 (1997).

§ 35A-1252. Guardian's powers in administering minor ward's estate.

In the case of a minor ward, a general guardian or guardian of the estate has the power to perform in a reasonable and prudent manner every act that a reasonable and prudent person would perform incident to the collection, preservation, management, and use of the ward's estate to accomplish the desired result of administering the ward's estate legally and in the ward's best interest, including but not limited to the following specific powers:

(1) To take possession, for the ward's use, of all the ward's estate, as defined in G.S. 35A-1202(5).

(2) To receive assets due the ward from any source.

(3) To maintain any appropriate action or proceeding to obtain support to which the ward is legally entitled, to recover possession of any of the ward's property, to determine the title thereto, or to recover damages for any injury done to any of the ward's property; also, to compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle any other claims in favor of or against the ward.

(4) To abandon or relinquish all rights in any property when, in the guardian's opinion, acting reasonably and in good faith, it is valueless, or is so encumbered or is otherwise in such condition that it is of no benefit or value to the ward or his estate.

(4a) To renounce any interest in property as provided in Chapter 31B of the General Statutes, or as otherwise allowed by law.

(5) To vote shares of stock or other securities in person or by general or limited proxy, and to pay sums chargeable or accruing against or on account of securities owned by the ward.

(6) To insure the ward's assets against damage or loss, at the expense of the ward's estate.

(7) To pay taxes, assessments, and other expenses incident to the collection, care, administration, and protection of the ward's estate.

(8) To sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(9) To expend estate income on the ward's behalf and to petition the court for prior approval of expenditures from estate principal; provided, neither the existence of the estate nor the guardian's authority to make expenditures therefrom shall be construed as affecting the legal duty that a parent or other person may have to support and provide for the ward.

(10) To pay from the ward's estate necessary expenses of administering the ward's estate.

(11) To employ persons, including attorneys, auditors, investment advisors, appraisers, or agents to advise or assist him in the performance of his duties as guardian.

(12) To continue any business or venture or farming operation in which the ward was engaged, where such continuation is reasonably necessary or desirable to preserve the value, including goodwill, of the ward's interest in such business.

(13) To acquire and retain every kind of property and every kind of investment, including specifically, but without in any way limiting the

generality of the foregoing bonds, debentures, and other corporate or governmental obligations; stocks, preferred or common; real estate mortgages; shares in building and loan associations or savings and loan associations; annual premium or single premium life, endowment, or annuity contracts; and securities of any management type investment company or investment trust registered under the Federal Investment Company Act of 1940, as from time to time amended.

(14)a. Without a court order to lease any of the ward's real estate for a term of not more than three years, or to sell, lease or exchange any of the ward's personal property including securities, provided that the aggregate value of all items of the ward's tangible personal property sold without court order over the duration of the estate shall not exceed one thousand five hundred dollars ($1,500). When any item of the ward's tangible personal property has a value which when increased by the value of all other tangible personal property previously sold in the estate without a court order would exceed one thousand five hundred dollars ($1,500), a guardian may sell the item only as provided in subdivision (14)b.

b. A guardian who is required by subdivision (14)a to do so shall, and any other guardian who so desires may, by motion in the cause, request the court to issue him an order to lease any of the ward's real estate or to sell any item or items of the ward's personal property. Notice of the motion and of the date, time and place of a hearing thereon shall be served, as provided in G.S. 1A-1, Rule 5, Rules of Civil Procedure, upon all parties of record and upon such other persons as the clerk may direct, and the court may issue the order after hearing and upon such conditions as the court may require; provided that:

1. A sale, lease, or exchange under this subdivision may not be subject to Article 29A of Chapter 1 of the General Statutes unless the order so requires; and
2. The power granted in this subdivision shall not affect the power of the guardian to petition the court for prior approval of expenditures from estate principal under subdivision (9) of this section.

(15) To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed of trust, or other lien securing such bond, note or other obligation, and to bid in the property at such foreclosure sale, or to acquire the property by deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.

(16) To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the guardian shall deem advisable, including the power of a corporate guardian to borrow from its own banking department, for the purpose of paying debts, taxes, and other claims against the ward, and to mortgage, pledge, or otherwise encumber such portion of the ward's estate as may be required to secure such loan or loans; provided, in respect to the borrowing of money on the security of the ward's real property, Subchapter III of this Chapter is controlling.

(17) To execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 4; 1995, c. 235, s. 7.)

Cross References. — As to criminal liability of guardian for embezzlement of funds, see G.S. 14-90. As to power of guardians to lend portions of estates of wards, and compound interest on obligations due to guardians, see G.S. 24-4. As to investment and deposit of funds generally, see G.S. 36A-1 et seq. As to personal liability of guardian for stock held for ward, see G.S. 53-40. As to authority to invest in bonds guaranteed by United States, see G.S. 53-44; in mortgages of federal housing administration, etc., see G.S. 53-45; in federal farm loans, see G.S. 53-60. As to corporation treating guardian as holder of record of shares, see G.S. 55-7-24. As to income taxes, see G.S. 105-154. As to payment of taxes, see G.S. 105-207.

CASE NOTES

Editor's Note. — *The cases cited below were decided under former G.S. 33-20 and prior law.*

Guardian Must Preserve Estate and Enforce Ward's Rights. — It is the duty of the guardian to preserve the estate of the ward and to take practicable action to enforce the ward's rights against others. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

He Must Diligently Collect Obligation Owing Ward. — It is the duty of a guardian of the estate of an incompetent person to exercise due diligence in the collection of an obligation owing to the ward. The guardian is liable to the ward's estate for any loss to it by his failure to do so. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

Including Damages for Wrongs Done Ward. — It is the duty of the guardian of the estate of an incompetent to collect, insofar as practicable, all moneys due the ward, including damages for wrongs done to the ward which are known to the guardian. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967); State ex rel. Duckett v. Pettee, 50 N.C. App. 119, 273 S.E.2d 317 (1980).

He Is Liable for All He Ought to Have Received. — A guardian is liable not only for what he receives, but for all he ought to have received of his ward's estate. Kuykendall v. Proctor, 270 N.C. 510, 155 S.E.2d 293 (1967).

A guardian is liable for what he ought to receive, as well as for what he does receive; and if he ought to receive a certain amount of money and does not, but takes something else, his own bond for instance, in the place of money, he and his sureties are liable. State ex rel. Avent v. Womack, 72 N.C. 397 (1875).

Where a guardian carelessly and without deliberation accepts for his wards from an insolvent debtor an amount less than they are entitled to receive from a fund, he is liable to the wards for what he failed to collect. Culp v. Stanford, 112 N.C. 664, 16 S.E. 761 (1893), distinguishing Luton v. Wilcox, 83 N.C. 20 (1880).

By Exercise of Diligence and Good Faith. — A guardian is responsible, not only for what he receives, but for all he might have received by the exercise of ordinary diligence and the highest degree of good faith. State ex rel. Armfield v. Brown, 73 N.C. 81 (1875).

But He Need Not Resort to Extraordinary Remedies. — Guardians are not responsible for losses to their wards attributable to their not having resorted to new and extraordinary remedies, the force and effect of which are doubtful. White v. Robinson, 64 N.C. 698 (1870).

A guardian in managing his ward's estate must act in good faith and with that care and judgment that a man of ordinary prudence exercises in his own affairs. Luton v. Wilcox, 83 N.C. 20 (1880).

Accepting Unsecured Note. — A guardian who accepts an unsecured note in payment of a debt due his ward is guilty of laches, and is liable to his ward for the amount of such note. Covington v. Leak, 65 N.C. 594 (1871).

Where a guardian accepts from an administrator a smaller sum than the wards' share in the estate, the wards may, at their option, sue the guardian or the administrator for the deficiency. Alexander v. Alexander, 120 N.C. 472, 27 S.E. 121 (1897).

Failure to Sue before Insolvency of Debtor. — Where a guardian negligently fails to sue on note due his ward's estate until the parties thereto are insolvent, he is liable for his negligence. Coggins v. Flythe, 113 N.C. 102, 18 S.E. 96 (1893).

Where a guardian waited six months after the principal in a note held by him as guardian died insolvent before he sued the surety, who also became insolvent before the suit was brought, the guardian having an opportunity all the time of knowing the true condition of the obligors, it was held that by his laches he made himself responsible for the loss of the debt. Williamson v. Williams, 59 N.C. 62 (1860), distinguishing Deberry v. Ivey, 55 N.C. 370 (1856); Davis v. Marcum, 57 N.C. 189 (1858).

Failure to Collect Note during Civil War. — A guardian, who acted in good faith and was not guilty of culpable negligence, was held not to the responsible for omitting to collect a note during the Civil War, when it appeared that both of the two obligors were solvent during the war, and were made insolvent by its results. Love v. Logan, 69 N.C. 70 (1873).

The guardian can select the forum, under former section, as there is no statute to the contrary. Lawson v. Langley, 211 N.C. 526, 191 S.E. 229 (1937).

Payment of funds to guardian under War Risk Insurance Act vests title in the ward and operates to discharge the obligation of the United States. Hence, the deposit of the funds in a bank duly appointed guardian, and which later became insolvent, does not entitle the surety on the guardianship bond to a preference for the amount of the deposit. In re Home Sav. Bank, 204 N.C. 454, 168 S.E. 688 (1933).

As to exchange of security for debt due ward, see Christman v. Wright, 38 N.C. 549 (1845).

As to compromise of claim for personal injury to ward, see Bunch v. Foreman Blades Lumber Co., 174 N.C. 8, 93 S.E. 374 (1917).

As to statute of limitations upon discovery of fraud, see Johnson v. Pilot Life Ins. Co., 217 N.C. 139, 7 S.E.2d 475, 128 A.L.R. 1375 (1940).

Settlement of Ward's Partnership Interest upon Incorporation. — Court had jurisdiction under former G.S. 33-20 to determine guardian's petition relative to acceptance of settlement of ward's interest in partnership under contemplated organization of corporation to take over assets of partnership, since matter involved was not a sale, lease or mortgage of ward's property cognizable under former G.S. 35-10 and 35-11. In re Edwards, 243 N.C. 70, 89 S.E.2d 746 (1955).

§ 35A-1253. Specific duties of guardian of estate.

In addition to any other duties imposed by law or by order of the clerk, a general guardian or guardian of the estate shall have the following specific duties:

(1) To take possession, for the ward's use, of all his estate.
(2) To diligently endeavor to collect, by all lawful means, all bonds, notes, obligations, or moneys due his ward.
(3) To pay income taxes, property taxes, or other taxes or assessments owed by the ward, out of the ward's estate, as required by law. If any guardian allows his ward's lands to be sold for nonpayment of taxes or assessments, he shall be liable to his ward for the full value thereof.
(4) To observe the standard of judgment and care under the circumstances then prevailing that an ordinarily prudent person of discretion and intelligence, who is a fiduciary of the property of others, would observe as such fiduciary in acquiring, investing, reinvesting, exchanging, retaining, selling, and managing the ward's property. If the guardian has special skills or is named as guardian on the basis of representations of special skills or expertise, to use those skills.
(5) To obey all lawful orders of the court pertaining to the guardianship and to comply with the accounting requirements of this Subchapter.

Nothing in this section shall be construed as broadening the powers granted in G.S. 35A-1251 or G.S. 35A-1252. (1987, c. 550, s. 1.)

§§ 35A-1254 through 35A-1259: Reserved for future codification purposes.

ARTICLE 10.

Returns and Accounting.

§ 35A-1260. Applicability.

This Article applies only to general guardians and guardians of the estate. (1987, c. 550, s. 1.)

§ 35A-1261. Inventory or account within three months.

Every guardian, within three months after his appointment, shall file with the clerk an inventory or account, upon oath, of the estate of his ward; but the clerk may extend such time not exceeding six months, for good cause shown. (1987, c. 550, s. 1; 1989, c. 473, s. 26.)

CASE NOTES

Editor's Note. — *The case cited below was decided under former law.*

Guardian Subject to Orders of Clerk by Whom Appointed. — In the administration of the estate of an incompetent, the guardian is subject to the orders of the clerk by whom he was appointed and to whom he is required by former sections to account. Read v. Turner, 200 N.C. 773, 158 S.E. 475 (1931).

§ 35A-1262. Procedure to compel inventory or account.

(a) In cases of default to file the inventory or account required by G.S. 35A-1261, the clerk must issue an order requiring the guardian to file the inventory or account within the time specified in the order, or to show cause why he should not be removed from office or held in civil contempt, or both. If after due service of the order, the guardian does not, within the time specified in the order, file such inventory or account, or obtain further time to file the same, the clerk may remove him from office, hold him in civil contempt as provided in Article 2 of Chapter 5A, or both.

(b) The guardian shall be personally liable for the costs of any proceeding incident to his failure to file the inventory or account required by G.S. 35A-1261. Such costs shall be taxed against him by the clerk and may be collected by deduction from any commissions that may be found due the guardian upon final settlement of the estate. (1987, c. 550, s. 1; 1989, c. 473, s. 27.)

§ 35A-1263: Repealed by Session Laws 1989, c. 473, s. 28.

§ 35A-1263.1. Supplemental inventory.

Whenever any property not included in the original inventory report becomes known to the guardian or whenever the guardian learns that the valuation or description of any property or interest therein indicated in the original inventory is erroneous or misleading, he shall prepare and file with the clerk a supplementary inventory in the same manner as prescribed for the original inventory. The clerk shall record the supplemental inventory with the original inventory. A guardian who fails to file a supplementary inventory as required by this section shall be subject to the enforcement provisions of G.S. 35A-1262. (1989, c. 473, s. 29.)

§ 35A-1264. Annual accounts.

Every guardian shall, within 30 days after the expiration of one year from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file in the office of the clerk an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. The guardian shall produce vouchers for all payments or verified proof for all payments in lieu of vouchers. The clerk may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must endorse his approval thereon, which shall be deemed prima facie evidence of correctness. (1987, c. 550, s. 1.)

Cross References. — As to clerk's power to audit the account of guardian, see G.S. 7A-103. As to vouchers being evidence of disbursement, see G.S. 28A-21-5.

CASE NOTES

Editor's Note. — *The cases cited below were decided under former law.*

Definition of "Account". — An "account" is used in former section in the sense of a statement in writing of debits and credits, or of receipts and payments. And when not only an account, but payment or settlement is intended, additional words are used to express that idea. State v. Dunn, 134 N.C. 663, 46 S.E. 949 (1904).

Ward Can Demand Annual Statement. — A ward is entitled to demand of her guardian an annual statement of the manner and nature of his investments of her estate. Moore v. Askew, 85 N.C. 199 (1881).

What to Be Set Out. — It is the duty of a guardian in making his annual returns to set out the manner in which he has invested the ward's estate, and the nature of the securities which he holds as guardian. State ex rel. Collins v. Gooch, 97 N.C. 186, 1 S.E. 653 (1887).

The annual account of a guardian is competent evidence against him, and presumptive evidence against his sureties. Loftin v. Cobb, 126 N.C. 58, 35 S.E. 230 (1900).

Of Good Faith. — No higher evidence can be offered of that good faith required of a guardian than perfect candor, full information, and minute, detailed accounts. Moore v. Askew, 85 N.C. 199 (1881).

And Is Prima Facie Correct When Accepted by the Court. — The ex parte settlement made by a guardian with the court having jurisdiction of such matters, is, when accepted by the court, prima facie correct, and while not conclusive upon creditors or next of kin, and strict proof and specific assignment of errors are not required as in actions to surcharge a stated account, nevertheless the burden is on the party attacking such settlement to establish, by a preponderance of testimony, its incorrectness. State ex rel. Turner v. Turner, 104 N.C. 566, 10 S.E. 606 (1889).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinion cited below was issued under former G.S. 33-39.*

Disapproval of Guardian's Final Account Where Distribution of Ward's Estate Is to Ward's Distributee Rather Than Ward's Administrator. — Honorable Lanie M. Hayes, Clerk of Superior Court, Warren County, 40 N.C.A.G. 32 (1969).

§ 35A-1265. Procedure to compel accounting.

(a) If any guardian omits to account, as directed in G.S. 35A-1264, or renders an insufficient and unsatisfactory account, the clerk shall forthwith order such guardian to render a full and satisfactory account, as required by law, within 20 days after service of the order. Upon return of the order, duly served, if the guardian fails to appear or refuses to exhibit such account, the clerk may issue an attachment against him for contempt and commit him until he exhibits such account, and may likewise remove him from office. In all proceedings hereunder the defaulting guardian will be liable personally for the costs of the said proceedings, including the costs of service of all notices or writs incidental to, or thereby acquiring, and also including reasonable attorney fees and expenses incurred by a successor guardian or other person in bringing any such proceeding, or other proceedings deemed reasonable and necessary to discover or obtain possession of assets of the ward in the possession of the defaulting guardian or which the defaulting guardian should have discovered or which the defaulting guardian should have turned over to the successor guardian. The amount of the costs and attorney fees and expenses of such proceeding may be deducted from any commissions which may be found due said guardian on settlement of the estate.

(b) Where a corporation is guardian, the president, cashier, trust officer or the person or persons having charge of the particular estate for the corporation, or the person to whom the duty of making reports of said estate has been assigned by the officers or directors of the corporation, may be proceeded against and committed to jail as herein provided as if he or they were the guardian or guardians personally: Provided, it is found as a fact that the failure or omission to file such account or to obey the order of the court in reference thereto is willful on the part of the officer charged therewith: Provided further, the corporation itself may be fined and/or removed as such guardian for such failure or omission. (1987, c. 550, s. 1; 1989, c. 473, s. 16.)

CASE NOTES

Editor's Note. — *The case cited below was decided under former law.*

Removal for Failure to Account. — See Sanderson v. Sanderson, 79 N.C. 369 (1878); In re Dixon, 156 N.C. 26, 72 S.E. 71 (1911).

§ 35A-1266. Final account and discharge of guardian.

Within 60 days after a guardianship is terminated under G.S. 35A-1295, the guardian shall file a final account for the period from the end of the period of his most recent annual account to the date of that event. If the clerk, after review of the guardian's account, approves the account, the clerk shall enter an order discharging the guardian from further liability. (1987, c. 550, s. 1; 1989, c. 473, s. 32.)

Cross References. — As to accounting for compound interest in final settlement, see G.S. 24-4. As to necessity for payment of taxes before final accounting, see G.S. 105-240.

CASE NOTES

Editor's Note. — *The cases cited below were decided under former law.*

Former section is not intended to bestow upon the guardian the ward's moneys and properties for six months (now 60 days) after he becomes of age, nor to deprive him of the right to bring an action to recover them during the period, but simply means that the guardian is presumed to have settled with his ward within such six months (now 60 days), and after its lapse the clerk can call on the guardian to file his final account, with the receipts of the ward, in full settlement, to complete the record in his office, for the section states that such return shall be "audited and recorded." Self v. Shugart, 135 N.C. 185, 47 S.E. 484 (1904).

Jurisdiction. — The clerk of the superior court has jurisdiction of settlements between guardian and ward, and, of course, between the guardian and the ward's personal representative. McNeill v. Hodges, 105 N.C. 52, 11 S.E. 265 (1890); McLean v. Breece, 113 N.C. 390, 18 S.E. 694 (1893).

"Audit" Construed. — When the former section directs that the clerk shall "audit" the account, it implies that he shall pursue the usual course which has been found to be just and convenient in such cases. Rowland v. Thompson, 64 N.C. 714 (1870).

Action Barred 10 Years after Ward Comes of Age. — Ten years after the ward comes of age bars an action by him against his guardian for settlement. Dunn v. Beaman, 126 N.C. 766, 36 S.E. 172, petition to rehear dismissed, 127 N.C. 578, 38 S.E. 1006 (1900).

When Action Barred as to Sureties. — An action for breach of the guardianship bond based upon former section is barred as to the sureties after three years from the date the guardian should have made payment, and the fact that the guardian continued to pay the ward interest on the amount due the ward for several years after the ward's majority does not affect the running of the statute as to the sureties. State ex rel. Finn v. Fountain, 205 N.C. 217, 171 S.E. 85 (1933). See Copley v. Scarlett, 214 N.C. 31, 197 S.E. 623 (1938).

Judgment Is an Estoppel. — The clerk of the superior court, having jurisdiction of proceedings against a guardian for a settlement, a judgment rendered therein is an estoppel to an action in the superior court between the same parties and upon the same question, and cannot be attacked collaterally, but can be impeached for fraud only by a direct proceeding for that purpose. Donnelly v. Wilcox, 113 N.C. 408, 18 S.E. 339 (1893).

Distributees May Have Accounting. — The express trust existing between the guardian and ward terminates at death of the latter, and the ward's distributees may have letters of administration taken out and call for an accounting. Lowder v. Hathcock, 150 N.C. 438, 64 S.E. 194 (1909).

Effect of Wrongful Settlement. — Where a guardian surrendered his office in March to one whom he supposed to be his legal successor and made a settlement with him, though he was not regularly appointed guardian until December following, but in the meantime acted as such in good faith, it was held that the management of the fund from March to December must be treated as an exercise of an agency of the former guardian, whose bond is responsible for any loss resulting therefrom. Jennings v. Copeland, 90 N.C. 572 (1884).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinions cited below were issued under former G.S. 33-41.*

Disapproval of Guardian's Final Account Where Distribution of Ward's Estate Is to Ward's Distributee Rather Than to Ward's Administrator. — See opinion of the Attorney General to Honorable Lanie M. Hayes, Clerk of Superior Court, Warren County, 40 N.C.A.G. 32 (1969).

Coming of Age Occurs at Age 18. — See opinion of Attorney General to Mr. Fred P. Parker, Jr., 41 N.C.A.G. 450 (1971).

§ 35A-1267. Expenses and disbursements credited to guardian.

Every guardian may charge in his annual account all reasonable disbursements and expenses; and if it appear that he has really and bona fide disbursed more in one year than the profits of the ward's estate, for his education and maintenance, the guardian shall be allowed and paid for the same out of the profits of the estate in any other year; but such disbursements must, in all cases, be suitable to the degree and circumstances of the estate of the ward. (1987, c. 550, s. 1.)

Cross References. — As to expense of bond being lawful expense, see G.S. 58-73-35.

CASE NOTES

Editor's Note. *— The cases cited below were decided under former law.*

A guardian should be charged with what he receives and credited with what he pays out, when it does not appear that he collected anything prematurely or kept on hand any unreasonable sum. Freeman v. Wilson, 74 N.C. 368 (1876).

Credit for Paying Debts Due. — When the guardian in good faith pays debts that ought to be paid, and by so doing the ward's estate suffers no prejudice, he will be allowed credit for disbursements of assets in his hands in such respects. Adams v. Thomas, 83 N.C. 521 (1880); McLean v. Breece, 113 N.C. 390, 18 S.E. 694 (1893).

Disbursement Where Ward Deceased and Only Child Is of Age. — Where, in the settlement of the guardian's account, the ward is dead and his only child is of age, and it appears that the guardian, in good faith, paid debts without prejudice to the estate, the disbursement would be allowed. McLean v. Breece, 113 N.C. 390, 18 S.E. 694 (1893).

Exceeding Income of Estate. — In paying the accounts of a guardian, he cannot, except under rare circumstances, be allowed disbursements beyond the income of his ward. Caffey v. McMichael, 64 N.C. 507 (1870); Johnston v. Haynes, 68 N.C. 514 (1873).

A guardian will not be permitted to use more than the accruing profits of his ward's estate in the maintenance and education of the ward, except with the sanction of the court, or in extreme cases of urgent necessity. Tharington v. Tharington, 99 N.C. 118, 5 S.E. 414 (1888).

Same — Clerk May Allow Credit. — The clerk of the superior court may allow a guardian credit for money necessarily expended in the education of the ward, though the amount exceeded the income and was made without the permission of the clerk. Duffy v. Williams, 133 N.C. 195, 45 S.E. 548 (1903).

Same — Setting Ward Up in Business. — A guardian who advances money for his ward over and above the income of his estate, in order to set him up in business, or for other purposes, without applying to the court for leave, is not entitled to charge the ward with it. Shaw v. Coble, 63 N.C. 377 (1869).

Father as Guardian May Not Charge Children for Education. — A father, or his trustee, in settling his accounts as guardian for his children, has no right to charge the children with the amount expended for their education. Walker v. Crowder, 37 N.C. 478 (1843).

Nor for Child's Maintenance without Court Approval. — A father, though he be the guardian of his minor child's estate, is not ordinarily permitted to charge for its maintenance, and, if able, he is himself bound to maintain his child; if not so, he must, before applying any of his ward's income to that end, procure the sanction of the proper court. Burke v. Turner, 85 N.C. 500 (1881).

May Not Charge for Board and Other Necessaries. — Where a stepfather becomes guardian to his stepchild, he is not entitled to charge for board and other necessaries furnished to his ward antecedently to his appointment as guardian; the infant being incompetent to contract therefor. Barnes v. Ward, 45 N.C. 93 (1852).

Payments to Mother for Board of Wards after Majority. — A guardian is not chargeable with moneys paid to the mother of his wards for their board after their arrival at full age, no objection being urged against the propriety or justness of the claim, or of the price paid. McNeill v. Hodges, 83 N.C. 504 (1880).

Counsel Fees. — A guardian should be allowed reasonable attorneys' fees paid in good faith. Burke v. Turner, 85 N.C. 500 (1881).

The employment of counsel for legal advice and assistance in connection with the administration of the wards' estate is a proper expense to be charged in the guardian's account, if in reasonable amount, and for the benefit of the wards. Maryland Cas. Co. v. Lawing, 225 N.C. 103, 33 S.E.2d 609 (1945).

Fees paid by a guardian to the counsel for services rendered in obtaining an unfair settlement with the ward, and in aiding the guardian to cover up the fraud, cannot be allowed the latter in his settlement. Johnston v. Haynes, 68 N.C. 509 (1873).

Where the interests of the guardian and wards are antagonistic and the services rendered by the attorney are in the interest of the former rather than the latter the obligation to pay therefor is the individual liability of the guardian. Maryland Cas. Co. v. Lawing, 225 N.C. 103, 33 S.E.2d 609 (1945), citing Lightner v. Boone, 221 N.C. 78, 19 S.E.2d 144 (1942).

§ 35A-1268. Guardian to exhibit investments and bank statements.

At the time the accounts required by this Article and other provisions of law are filed, the clerk shall require the guardian to exhibit to the court all investments and bank statements showing cash balance, and the clerk shall certify on the original account that an examination was made of all investments and the cash balance, and that the same are correctly stated in the account: Provided, such examination may be made by the clerk in the county in which such guardian resides or the county in which such securities are located and, when the guardian is a duly authorized bank or trust company, such examination may be made by the clerk in the county in which such bank or trust company has its principal office or in which such securities are located; the certificate of the clerk of such county shall be accepted by the clerk of any county in which such guardian is required to file an account; provided that banks organized under the laws of North Carolina or the acts of Congress, engaged in doing a trust and fiduciary business in this State, when acting as guardian or in other fiduciary capacity, shall be exempt from the requirements of this section, when a certificate executed by a trust examiner employed by a governmental unit, by a bank's internal auditors who are responsible only to the bank's board of directors or by an independent certified public accountant who is responsible only to the bank's board of directors is exhibited to the clerk and when said certificate shows that the securities have been examined within one year and that the securities were held at the time of the examination by the fiduciary or by a clearing corporation for the fiduciary and that the person making such certification has no reason to believe said securities are not still so held. Nothing herein contained shall be construed to abridge the inherent right of the clerk to require the production of securities, should he desire to do so. (1987, c. 550, s. 1.)

§ 35A-1269. Commissions.

The clerk shall allow commissions to the guardian for his time and trouble in the management of the ward's estate, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators and collectors under the provisions of G.S. 28A-23-3 and G.S. 28A-23-4. (1987, c. 550, s. 1; 1989, c. 473, s. 21.)

CASE NOTES

Editor's Note. — *Most of the cases cited below were decided under former law.*

Commissions are only a compensation to the guardian for his time and trouble in managing his ward's estate. Walton v. Erwin, 36 N.C. 136 (1840).

And the time spent in the management of his ward's estate may be considered in fixing his commissions, but cannot be separately charged. Shutt v. Carloss, 36 N.C. 232 (1840).

Guardian is entitled to commissions, although he omitted to keep and render regular accounts, where no imputation is cast upon his integrity by reason of the neglect. McNeill v. Hodges, 83 N.C. 504 (1880).

But where he is grossly negligent, it is otherwise. Topping v. Windley, 99 N.C. 4, 5 S.E. 14 (1888).

Payments to Guardian's Firm. — A guardian is entitled to commissions on payments made for his ward for goods bought of a firm of which the guardian was a member. Williamson v. Williams, 59 N.C. 62 (1860).

When Ward Boards with Guardian. — A guardian is not entitled to commissions on charges for board while the ward lived with the guardian's family. Williamson v. Williams, 59 N.C. 62 (1860).

Securities Delivered at Majority. — Commissions should be allowed a guardian on the amount of the notes and other securities for debt delivered to the ward upon the termination of the guardianship. Whitford v. Foy, 65 N.C. 265 (1871).

Disbursement after Ward's Majority. — A guardian is not entitled to commissions upon any disbursement made after his ward arrives at full age. McNeill v. Hodges, 83 N.C. 504 (1880).

Bank as Administrator and Guardian of Distributee. — Where a bank, acting as administrator and as guardian for one of the distributees, pays over to itself as guardian the distributive share of its ward, such amount is cash received by it as guardian, and it is entitled by law to commissions thereon. Rose v. Bank of Wadesboro, 217 N.C. 600, 9 S.E.2d 2 (1940).

Using Ward's Money in Own Business. — A guardian will be allowed commissions, although he uses his ward's money in his business, if he makes regular returns, so as to show at all times what amount is due his ward. Carr v. Askew, 94 N.C. 194 (1886), distinguishing Burke v. Turner, 85 N.C. 500 (1881). See Fisher v. Brown, 135 N.C. 198, 47 S.E. 398 (1904).

Same — Gross Negligence. — A guardian is not entitled to commissions on money collected and used by him in his own business where he was guilty of gross negligence in not making his returns. Burke v. Turner, 85 N.C. 500 (1881).

Rate of Commission. — Reasonable commissions will always be allowed to a guardian unless in cases of fraud or very culpable negligence. The rate will depend upon a variety of circumstances, such as the amount of the estate, the trouble in managing it, whether fees have been paid to counsel for assisting him in the management, the last of which will lessen it. Whitford v. Foy, 65 N.C. 265 (1871).

Same — Two and One-Half Percent. — Two and one-half percent was ample commission to a guardian receiving most of the ward's property, without litigation or difficulty, in the shape of notes payable to himself, which he retained six years collecting but little interest, when he voluntarily resigned and delivered the notes to his successor. Walton v. Erwin, 36 N.C. 136 (1840).

Same — Five Percent. — Five percent was not an unreasonable allowance to a guardian as commissions on his receipts and disbursements, when these were numerous, and extended over a period of 14 years. Covington v. Leak, 65 N.C. 594 (1871).

Commission of the highest percentage allowed by statute, will be allowed to a guardian only in a case of the greatest merit, as where his duties have been troublesome and of long continuance. Walton v. Erwin, 36 N.C. 136 (1840).

Referee's Decision Usually Adopted. — The amount of allowance of commissions to a guardian by a referee is usually adopted by the court, unless it is shown to be excessive. Johnston v. Haynes, 68 N.C. 514 (1873); Whitford v. Foy, 71 N.C. 527 (1874).

Appellate Review of Referee's Finding. — An appellate court will not review the finding of a referee as to the commissions allowed a guardian, unless such commissions are shown to be grossly erroneous. Whitford v. Foy, 71 N.C. 527 (1874).

Applied in In re Estate of Moore, 160 N.C. App. 85, 584 S.E.2d 807, 2003 N.C. App. LEXIS 1664 (2003).

ARTICLE 11.

Public Guardians.

§ 35A-1270. Appointment; term; oath.

There may be in every county a public guardian, to be appointed by the clerk for a term of eight years. The public guardian shall take and subscribe an oath or affirmation faithfully and honestly to discharge the duties imposed upon him; the oath or affirmation so taken and subscribed shall be filed in the office of the clerk. (1987, c. 550, s. 1.)

§ 35A-1271. Bond of public guardian; increasing bond.

The public guardian shall enter into bond with three or more sureties, approved by the clerk in the penal sum of six thousand dollars ($6,000), payable to the State of North Carolina, conditioned faithfully to perform the duties of his office and obey all lawful orders of the superior or other courts touching said guardianship of all wards, money or estate that may come into his hands. Whenever the aggregate value of the real and personal estate belonging to his several wards exceeds one-half the bond herein required the clerk shall require him to enlarge his bond in amount so as to cover at least double the aggregate amount under his control as guardian. (1987, c. 550, s. 1.)

§ 35A-1272. Powers, duties, liabilities, compensation.

The powers and duties of said public guardian shall be the same as other guardians, and he shall be subject to the same liabilities as other guardians under the existing laws, and shall receive the same compensation as other guardians. (1987, c. 550, s. 1.)

§ 35A-1273. When letters issue to public guardian.

The public guardian shall apply for and obtain letters of guardianship in the following cases:

(1) When a period of six months has elapsed from the discovery of any property belonging to any minor or incompetent person without guardian.

(2) When any person entitled to letters of guardianship shall request in writing the clerk to issue letters to the public guardian; but it is lawful and the duty of the clerk to revoke said letters of guardianship at any time after issuing the same upon application in writing by any person entitled to qualify as guardian, setting forth a sufficient cause for such revocation. (1987, c. 550, s. 1.)

§§ 35A-1274 through 35A-1279: Reserved for future codification purposes.

ARTICLE 12.

Nonresident Ward Having Property in State.

§ 35A-1280. Appointment of ancillary guardian.

(a) A clerk may appoint an ancillary guardian whenever it appears by petition or application and due proof to the satisfaction of the clerk that:

(1) There is in the county of the clerk's jurisdiction real or personal property in which a nonresident of the State of North Carolina has an ownership or other interest; and

(2) The nonresident is incompetent or is a minor and a guardian of the estate or general guardian, or a comparable fiduciary, has been appointed and is still serving for the nonresident in the state of his or her residence; and

(3) That the nonresident ward has no guardian in the State of North Carolina.

(b) Except as otherwise ordered by the clerk or provided herein, an ancillary guardian shall have all the powers, duties, and responsibilities with respect to the nonresident ward's estate in the State of North Carolina as guardians otherwise appointed have. An ancillary guardian shall annually make an accounting to the court in this State and remit to the guardian in the state of the ward's residence any net rents of the real estate or any proceeds of sale.

(c) A certified or exemplified copy of letters of appointment or other official record of a court of record appointing a guardian for a nonresident in the state of his residence shall be conclusive proof of the fact of the ward's minority or incompetence and of the appointment of the guardian in the state of the ward's residence; provided, that the letters of appointment or other record shall show that the guardianship is still in effect in the state of the ward's residence and that the ward's incompetence or minority still exists.

(d) Upon the appointment of an ancillary guardian under this Article, the clerk shall notify the appropriate court in the county of the ward's residence and the guardian in the state of the ward's residence. (1987, c. 550, s. 1.)

§ 35A-1281. Removal of ward's personalty from State.

(a) For purposes of this section, the term "personal estate" means:

(1) Personal property;

(2) Personal property substituted for realty by decree of court;

(3) Any money arising from the sale of real estate, whether the same be in the hands of any guardian residing in this State; or in the hands of any executor, administrator, or other person holding for the ward; or, if not being adversely held and claimed, not in the lawful possession or control of any person.

(b) Where any ward residing in another state or territory, or in the District of Columbia, or Canada, or other foreign country, is entitled to any personal estate in this State, the ward's guardian or trustee duly appointed at the place where such ward resides, or, in the event no guardian or trustee has been appointed, the court or officer of the court authorized by the laws of such place to receive moneys belonging to any ward when no guardian or trustee has been appointed, may apply to have such estate removed to the residence of the ward by petition filed before the clerk in the county in which the property or some portion thereof is situated. Such petition shall be proceeded with as in other cases of special proceedings.

(c) The petitioner must show to the court a copy of his appointment as a guardian or trustee and bond duly authenticated, and must prove to the court that the bond is sufficient, in the ability of the sureties as well as in amount, to secure all the estate of the ward wherever situated: Provided, that in all cases where a banking institution, resident and doing business in a foreign state, is a guardian or trustee of any person and is not required to execute a bond to qualify as guardian or trustee under the laws of the state in which such guardian or trustee qualified and was appointed, and no sureties are or were required by the state in which said banking institution qualified as guardian or trustee, and this fact affirmatively appears to the court, then the personal estate of the ward may be removed from this State without the finding of a court with reference to any sureties, and the court in which the petition for the removal of the property of the ward is filed may order the transfer and removal of the property of the ward and the payment and delivery of the same to the nonresident guardian or trustee without regard to whether a nonresident guardian or trustee has filed a bond with sureties; and the finding of the court that the said guardian or trustee is a banking institution and has duly qualified and been appointed guardian or trustee under the laws of the state where the ward is resident shall be sufficient. Any person may be made a party defendant to the proceeding who may be made a party defendant in civil actions under the provisions of Chapter 1A of the General Statutes. (1987, c. 550, s. 1.)

Cross References. — As to removal of trust funds of nonresidents from State, see G.S. 36A-13.

CASE NOTES

Editor's Note. — *The cases cited below were decided under former G.S. 33-48 and prior law.*

When Local Guardian Not Necessary. — Where a foreign guardian has been duly appointed in the state of his own residence and that of his wards, and has filed a certified copy of his appointment, with a bond sufficient both as to the amount and the financial ability of the sureties to protect the estate of his wards and in conformity with former G.S. 33-48 and former G.S. 33-49, with his petition to the clerk of the court as required by these statutes, it is not necessary that a local guardian be appointed, but the court in this State, before which the matter is properly pending, may order that the foreign guardian be permitted to withdraw the estate of his wards to the place of foreign jurisdiction. Cilley v. Geitner, 183 N.C. 528, 111 S.E. 866 (1922).

When Guardian Must Be Resident. — Where the infant grandchildren of the testator take upon a contingency, as directed by the will, properly probated here, it is required that the guardian appointed be a resident of this State, according to our law, unless the funds have been properly removed to another state, under former G.S. 33-48 and 33-49; and the law of this State governs the interpretation of the will when the testator died domiciled here. Cilley v. Geitner, 182 N.C. 714, 110 S.E. 61 (1921).

Foreign Guardian as Next Friend. — A guardian appointed in another state has no authority to represent his wards in suits and proceedings in this State, but when he brings suit for them as guardian it will be treated as if he were their next friend. Tate v. Mott, 96 N.C. 19, 2 S.E. 176 (1887).

Removal Held Properly Refused. — Where it appeared that the property in this State of a ward residing in another state consisted of good bonds at interest in the hands of his guardian here, a part of which arose from the sale of land, and the ward was nearly of age, and there was no special necessity made to appear for making a transfer of the property, the court of equity, in the exercise of its discretion, refused to order a transfer of the estate to the hands of a guardian appointed in such other state. Douglas v. Caldwell, 59 N.C. 20 (1860).

A guardian in another state of nonresident wards may proceed to obtain possession of the property bequeathed to the wards and in the hands of an executor in this State under a will duly probated here under the provisions of former G.S. 33-48 and G.S. 36A-13, relating to property in the hands of a trustee residing in this State, is not applicable. Fidelity Trust Co. v. Walton, 198 N.C. 790, 153 S.E. 401 (1930).

The petition and proceeding prescribed by former § 33-48 are jurisdictional, in order to authorize the transfer of the funds of an infant domiciled in this State to a guardian in another state; and an order, by the judge of the superior court or clerk, for its transfer otherwise is void. State ex rel. Page v. Sawyer, 223 N.C. 102, 25 S.E.2d 443 (1943).

§§ **35A-1282 through 35A-1289:** Reserved for future codification purposes.

ARTICLE 13.

Removal or Resignation of Guardian; Successor Guardian; Estates Without Guardians; Termination of Guardianship.

§ 35A-1290. Removal by Clerk.

(a) The clerk has the power and authority on information or complaint made to remove any guardian appointed under the provisions of this Subchapter, to appoint successor guardians, and to make rules or enter orders for the better management of estates and the better care and maintenance of wards and their dependents.

(b) It is the clerk's duty to remove a guardian or to take other action sufficient to protect the ward's interests in the following cases:

(1) The guardian wastes the ward's money or estate or converts it to his own use.
(2) The guardian in any manner mismanages the ward's estate.
(3) The guardian neglects to care for or maintain the ward or his dependents in a suitable manner.
(4) The guardian or his sureties are likely to become insolvent or to become nonresidents of the State.
(5) The original appointment was made on the basis of a false representation or a mistake.
(6) The guardian has violated a fiduciary duty through default or misconduct.
(7) The guardian has a private interest, whether direct or indirect, that might tend to hinder or be adverse to carrying out his duties as guardian.

(c) It is the clerk's duty to remove a guardian or to take other action sufficient to protect the ward's interests in the following cases:

(1) The guardian has been adjudged incompetent by a court of competent jurisdiction and has not been restored to competence.
(2) The guardian has been convicted of a felony under the laws of the United States or of any state or territory of the United States or of the District of Columbia and his citizenship has not been restored.
(3) The guardian was originally unqualified for appointment and continues to be unqualified, or the guardian would no longer qualify for appointment as guardian due to a change in residence, a change in the charter of a corporate guardian, or any other reason.
(4) The guardian is the ward's spouse and has lost his rights as provided by Chapter 31A of the General Statutes.
(5) The guardian fails to post, renew, or increase a bond as required by law or by order of the court.
(6) The guardian refuses or fails without justification to obey any citation, notice, or process served on him in regard to the guardianship.
(7) The guardian fails to file required accountings with the clerk.
(8) The clerk finds the guardian unsuitable to continue serving as guardian for any reason.
(9) The guardian is a nonresident of the State and refuses or fails to obey any citation, notice, or process served on the guardian or the guardian's process agent. (1987, c. 550, s. 1; 2004-203, s. 31(b).)

Cross References. — As to criminal liability for embezzlement, see G.S. 14-90. As to disqualifications to act as administrator, see G.S. 28A-4-2. As to removal of an administrator, see G.S. 28A-9-1.

CASE NOTES

Editor's Note. — *Most of the cases cited below were decided under former G.S. 33-9 and prior law.*

Testamentary guardian ought not to be removed without a showing of such waste, insolvency, or misconduct that the ward will be unable to recover the balance due on the final settlement. Sanderson v. Sanderson, 79 N.C. 369 (1878).

Personal Use of Ward's Funds. — The use by a guardian of the funds of his ward for his own use is sufficient to warrant his removal. Ury v. Brown, 129 N.C. 270, 40 S.E. 4 (1901).

Showing Required for Removal of Legal Guardian. — A legal guardian of a child's person, unlike a mere custodian, is not removable for a mere change of circumstances; unfitness or neglect of duty must be shown. In re Williamson, 77 N.C. App. 53, 334 S.E.2d 428 (1985), cert. denied, 316 N.C. 194, 341 S.E.2d 584 (1986).

Subsection (b)(7) authorizes the removal of a guardian where there is a showing of any potential for conflict between the interests of the ward and those of the guardian. In re Estate of Armfield, 113 N.C. App. 467, 439 S.E.2d 216 (1994).

Order changing the guardianship of a protected person was proper because both the clerk and the trial court applied the correct standard to the petition for removal of a guardian, and the appointment of a substitute guardian under G.S. 35A-1290(a): the better care and maintenance of the ward. Thomas v. Birchard (In re Thomas), — N.C. App. —, 644 S.E.2d 608, 2007 N.C. App. LEXIS 1102 (2007).

The words "might tend" in subsection (b)(7) established a minimal showing of possible conflicting interest for the removal of a guardian. In re Estate of Armfield, 113 N.C. App. 467, 439 S.E.2d 216 (1994).

Section 1-276 [see now § 1-301.1 et seq.] Is Inapplicable to Removals. — Appeals under G.S. 1-276 [see now G.S. 1-301.1 et seq.] are confined to civil actions and special proceedings. The decisions are plenary that the removal of a guardian is neither. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

Appellate Jurisdiction of Superior Court over Removals Is Derivative. — In the appointment and removal of guardians, the appellate jurisdiction of the superior court is derivative, and appeals present for review only errors of law committed by the clerk. In re Simmons, 266 N.C. 702, 147 S.E.2d 231 (1966).

A ward may not bring action in superior court by next friend to remove guardian appointed by the clerk, and for the appointment of another guardian, the superior court in such instance being without jurisdiction. Moses v. Moses, 204 N.C. 657, 169 S.E. 273 (1933).

Under Former Law. — As to removal of guardian by county court, see Bray v. Brumsey, 5 N.C. 227 (1809); Cooke v. Beale, 33 N.C. 36 (1850).

§ 35A-1291. Emergency removal; interlocutory orders on revocation.

The clerk may remove a guardian without hearing if the clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate. In all cases where the letters of a guardian are revoked, the clerk may, pending the resolution of any controversy in respect to such removal, make such interlocutory orders and decrees as the clerk finds necessary for the protection of the ward or the ward's estate or the other party seeking relief by such revocation. (1987, c. 550, s. 1; 2004-203, s. 31(c).)

§ 35A-1292. Resignation.

(a) Any guardian who wishes to resign may apply in writing to the clerk, setting forth the circumstances of the case. If a general guardian or guardian of the estate, at the time of making the application, also exhibits his final account for settlement, and if the clerk is satisfied that the guardian has fully accounted, the clerk may accept the resignation of the guardian and discharge him and appoint a successor guardian, but the guardian so discharged and his sureties are still liable in relation to all matters connected with the guardianship before the discharge.

(b) A general guardian who wishes to resign as guardian of the estate of the ward but continue as guardian of the person of the ward may apply for the partial resignation by petition as provided in subsection (a) of this section. If the general guardian also exhibits his final account as guardian of the estate for settlement, and if the clerk is satisfied that the general guardian has fully accounted as guardian of the estate, the clerk may accept the resignation of the general guardian as guardian of the estate, discharge him as guardian of the estate, and issue to him letters of appointment as guardian of the person, but the general guardian so discharged as guardian of the estate and his sureties are still liable in relation to all matters connected with the guardianship of the estate before the discharge. (1987, c. 550, s. 1.)

Cross References. — As to final account by the resigning guardian, see G.S. 35A-1292. As to resignation of trustees, see G.S. 36A-22 et seq.

CASE NOTES

Editor's Note. — *The case cited below was decided under former law.*

Liability Continues. — Where permission is given to a guardian by the judge of probate to file an ex parte final account and turn over his guardianship to another, he is not thereby discharged from liabilities connected with his trust and arising before such resignation. He is still bound to account with the ward, or the succeeding guardian, when so required. Luton v. Wilcox, 83 N.C. 20 (1880).

§ 35A-1293. Appointment of successor guardian.

Upon the removal, death, or resignation of a guardian, the clerk shall appoint a successor guardian following the same criteria that would apply to the initial appointment of a guardian. (1987, c. 550, s. 1.)

§ 35A-1294. Estates without guardians.

(a) Whenever a general guardian or guardian of the estate is removed, resigns, or stops serving without making a full and proper accounting, the successor guardian, or the clerk if there is no successor guardian, shall initiate a proceeding to compel an accounting. The surety or sureties on the previous guardian's bond shall be served with notice of the proceeding.

(b) If no successor guardian has been appointed, the clerk may act as receiver or appoint some discreet person as a receiver to take possession of the ward's estate, to collect all moneys due the ward, and to secure, lend, invest, or apply the same for the benefit and advantage of the ward, under the direction of the clerk until a successor guardian is appointed. The accounts of the receiver shall be returned, audited, and settled as the clerk may direct. The receiver shall be allowed such amounts for his time, trouble, and responsibility as seem to the clerk reasonable and proper. Such receivership may continue until a suitable guardian can be appointed.

(c) When another guardian is appointed, he may apply by motion, on notice, to the clerk for an order directing the receiver to pay over all the money, estate, and effects of the ward. If no such guardian is appointed, the ward shall have the same remedy against the receiver on becoming age 18 or otherwise emancipated if the ward is a minor or on being restored to competence if the ward is an incompetent person. In the event of the ward's death, his executor, administrator, or collector, and the heir or personal representative of the ward shall have the same remedy against the receiver. (1987, c. 550, s. 1.)

Cross References. — As to receivers, see G.S. 1-501 et seq.

CASE NOTES

***Editor's Note.** — The cases cited below were decided under former law.*

The receiver does not have the powers of a guardian, but acts under the control of the court until another guardian is appointed. Temple v. Williams, 91 N.C. 82 (1884).

Liability of Receiver. — As a general rule, a receiver is responsible for his own neglect only, and is protected when he acts in entire good faith. State ex rel. Collins v. Gooch, 97 N.C. 186, 1 S.E. 653 (1887).

Same — Similar to Guardian's. — When a receiver is appointed to take charge of an infant's estate who has no guardian, and is directed to lend out the money and pay the income over to the ward, he will be held to the same accountability as a guardian. State ex rel. Collins v. Gooch, 97 N.C. 186, 1 S.E. 653 (1887).

Liability for Failure of Bank. — A receiver may keep money in a bank as a safe place of deposit, or may use the bank as a means of transmitting money to distant places, and if he uses reasonable diligence, he will not be held liable if the bank fails. State ex rel. Collins v. Gooch, 97 N.C. 186, 1 S.E. 653 (1887).

Where a receiver was appointed to take charge of an infant's estate and invest the same, and report to the court annually, and he deposited a portion of the money in a bank in another state to his credit as receiver, on which deposit he was paid interest by the bank, which afterwards failed, it was held that the receiver was liable for the loss, as he had failed to report to the court the manner in which he had invested the infant's estate, although he had acted in the best faith. State ex rel. Collins v. Gooch, 97 N.C. 186, 1 S.E. 653 (1887).

Liability on Official Bond of Clerk. — When the clerk of the superior court is appointed receiver of a minor's estate under this section, he takes and holds the funds by virtue of his office as clerk, and his sureties upon his official bond as such officer are liable for any failure of duty on his part in that respect. State ex rel. Boothe v. Upchurch, 110 N.C. 62, 14 S.E. 642 (1892). See State ex rel. Rogers v. Odom, 86 N.C. 432 (1882).

The sureties on the clerk's official bond are liable for any breach of his duties as receiver. Waters v. Melson, 112 N.C. 89, 16 S.E. 918 (1893).

Action Against Receiver. — It is not necessary to obtain leave of the court before commencing an action for failure of the clerk to fulfill his duty when appointed receiver under former section. State ex rel. Boothe v. Upchurch, 110 N.C. 62, 14 S.E. 642 (1892).

Same — Burden of Proof. — The burden is upon a receiver and his sureties to show that he used due diligence in investing the money in his hands. Waters v. Melson, 112 N.C. 89, 16 S.E. 918 (1893).

Settlement Not Conclusive against Ward. — A settlement made with a receiver appointed under former section, even if had under direction of the court, is not conclusive against the ward, but only raises a presumption that the account and settlement are correct. Such presumption may be disproved. Temple v. Williams, 91 N.C. 82 (1884).

§ 35A-1295. Termination of guardianship.

(a) Every guardianship shall be terminated and all powers and duties of the guardian provided in Article 9 of this Chapter shall cease when the ward:

(1) Ceases to be a minor as defined in G.S. 35A-1202(12),
(2) Is adjudicated to be restored to competency pursuant to the provisions of G.S. 35A-1130, or
(3) Dies.

(b) Notwithstanding subsection (a), a guardian of the estate or a general guardian is responsible for all accountings required by Article 10 of this Chapter until the guardian is discharged by the clerk. (1989, c. 473, s. 31.)

§§ 35A-1296 through 35A-1300: Reserved for future codification purposes.

SUBCHAPTER III. MANAGEMENT OF WARD'S ESTATE.

ARTICLE 14.

Sale, Mortgage, Exchange or Lease of Ward's Estate.

§ 35A-1301. Special proceedings to sell, exchange, mortgage, or lease.

(a) Whenever used herein, the word "guardian" shall be construed to include general guardian, guardian of the estate, ancillary guardian, next friend, guardian ad litem, or commissioner of the court acting pursuant to this Article, but not a guardian who is guardian of the person only; and the word "mortgage" shall be construed to include deeds of trust.

(b) A guardian may apply to the clerk, by verified petition setting forth the facts, to sell, mortgage, exchange, or lease for a term of more than three years, any part of his ward's real estate, and such proceeding shall be conducted as in other cases of special proceedings. The clerk, in his discretion, may direct that the next of kin or presumptive heirs of the ward be made parties to such proceeding. The clerk may order a sale, mortgage, exchange, or lease to be made by the guardian in such way and on such terms as may be most advantageous to the interest of the ward, upon finding by satisfactory proof that:

(1) The ward's interest would be materially promoted by such sale, mortgage, exchange, or lease, or

(2) The ward's personal estate has been exhausted or is insufficient for his support and the ward is likely to become chargeable on the county, or

(3) A sale, mortgage, exchange, or lease of any part of the ward's real estate is necessary for his maintenance or for the discharge of debts unavoidably incurred for his maintenance, or

(4) Any part of the ward's real estate is required for public purposes, or

(5) There is a valid debt or demand against the estate of the ward; provided, when an order is entered under this subdivision, (i) it shall authorize the sale of only so much of the real estate as may be sufficient to discharge such debt or demand, and (ii) the proceeds of sale shall be considered as assets in the hands of the guardian for the benefit of creditors, in like manner as assets in the hands of a personal representative, and the same proceedings may be had against the guardian with respect to such assets as might be taken against an executor, administrator or collector in similar cases.

The order shall specify particularly the property thus to be disposed of, with the terms of leasing or sale or exchange or mortgage, and shall be entered at length on the records of the court. The guardian may not mortgage the property of his ward for a term of years in excess of the term fixed by the court in its order.

(c) In the case of a ward who is a minor, no sale, mortgage, exchange, or lease under this Article shall be made until approved by the superior court judge, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale, mortgage, exchange, or lease shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify.

(d) All petitions filed under this section wherein an order is sought for the sale, mortgage, exchange, or lease of the ward's real estate shall be filed in the county in which all or any part of the real estate is situated.

(e) The procedure for a sale pursuant to this section shall be as provided by Article 29A of Chapter 1 of the General Statutes.

(f) Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases.

(g) On and after June 1, 1973, no sales of property belonging to minors or incompetent persons prior to that date by next friend, guardian ad litem, or commissioner of the court regular in all other respects shall be declared invalid nor shall any claim or defense be asserted on the grounds that said sale was not made by a duly appointed guardian as provided herein or on the grounds that said minor or incompetent person was not represented by a duly appointed guardian. (1987, c. 550, s. 1; 1989, c. 473, s. 6.)

Cross References. — For the Uniform Custodial Trust Act, see G.S. 33B-1 et seq. As to sale of estate of an inebriate or incompetent, see former G.S. 35-10 and 35-11. As to release of land condemned under eminent domain, see G.S. 40A-30. As to procedure for sale of remainders, see G.S. 41-11.

Legal Periodicals. — For brief comment on the 1949 amendment, see 27 N.C.L. Rev. 458 (1949).

For 1984 survey, "North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims," see 63 N.C.L. Rev. 1327 (1985).

CASE NOTES

I. General Consideration.
II. Payment of Debts or Demands Against Estate.

I. GENERAL CONSIDERATION.

Editor's Note. — *Most of the cases cited below were decided under former G.S. 33-31 and prior law.*

Not Applicable to Settlement or Partition. — Former section does not apply either to the settlement of estates or to partition. Clark v. Carolina Homes, Inc., 189 N.C. 703, 128 S.E. 20 (1925).

Jurisdiction of Court. — The superior courts have authority in all proper cases to direct a sale of the property of infants, both real and personal, for their benefit and advantage. Williams v. Harrington, 33 N.C. 616 (1850); Ex parte Dodd, 62 N.C. 97 (1867); Sutton v. Schonwald, 86 N.C. 198 (1882); Morris v. Gentry, 89 N.C. 248 (1883); Tate v. Mott, 96 N.C. 19, 2 S.E. 176 (1887).

Clerk and Court Have Concurrent Jurisdiction. — By former section the clerk and court in term have concurrent jurisdiction in the manner of ordering a sale of infants' lands upon petition of their guardian. Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

Clerk's Jurisdiction Is Statutory. — A clerk of the superior court has no jurisdiction with respect to infants or with respect to property, real or personal, of infants, except such as in conferred by statute. Wilson v. Pemberton, 266 N.C. 782, 147 S.E.2d 217 (1966).

Petition Signed by Person Not a Qualified Guardian Confers No Jurisdiction on Clerk. — A clerk of the superior court has jurisdiction to order the sale of a ward's lands only upon petition verified by the duly appointed and qualified guardian of the ward, and where such petition is filed and signed by a person purporting to act as guardian, but who had not been appointed guardian and had not qualified by filing bond, the petition confers no jurisdiction on the clerk. Buncombe County v. Cain, 210 N.C. 766, 188 S.E. 399 (1936).

And in Such Case the Purchaser at Sale Acquires No Title Adverse to Infant. — A purchaser of an infant's property at a sale made under an order which is void because the clerk who made the order had no jurisdiction of the proceeding in which the order was made, acquires no right, title, interest, or estate in said property, adverse to the infant. Buncombe County v. Cain, 210 N.C. 766, 188 S.E. 399 (1936).

When Prior Court Approval of Expenditures Required. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Compliance with Statutory Requirements Presumed. — Although former section must be strictly complied with, where a guardian has applied for permission to mortgage her wards' land, and the clerk has entered an order therefor, which order has been approved by the court, there is a presumption that the statutory requirements have been met. Quick v. Federal Land Bank, 208 N.C. 562, 181 S.E. 746 (1935).

The power of a guardian to make disposition of his ward's estate is very carefully regulated, and the sale is not allowed except by order of court, which order must have the supervision, approval and confirmation of the resident judge of the district or the judge regularly holding the courts of the district. Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

Proof Required. — Former section contemplates that, in addition to the verified petition of the guardian, there shall be required other satisfactory proof of the truth of the matter alleged. In re Propst, 144 N.C. 562, 144 N.C. 563, 57 S.E. 342, 57 S.E. 342 (1907).

The "satisfactory proof" required under former section must be some proof in addition to the guardian's petition and must show the necessity for the proposed sale. In re Thomas, 290 N.C. 410, 226 S.E.2d 371 (1976).

Sale May Be Private. — The sale by order of the court may be either public or private. Former G.S. 33-21 does not apply when the sale is by order of court. Barcello v. Hapgood, 118 N.C. 712, 24 S.E. 124 (1896).

Title at Unauthorized Private Sale. — A guardian, having offered at public sale the land of his wards in accordance with an order of the court, and having failed to sell for want of a bid at a fair price, subsequently sold the land at private sale upon terms approved by the court. It was held that the purchaser at such private sale obtained a good title. Rowland v. Thompson, 73 N.C. 504 (1875).

The court may sell the land of minors for better investment, when they are properly represented before the court. Hutchinson v. Hutchinson, 126 N.C. 671, 36 S.E. 149 (1900).

When Foreign Guardian May Sell. — Where a foreign guardian has complied with the provisions of former G.S. 33-48 and 33-49 which authorize him to withdraw the estate of his wards to the place of their residence and to a court of foreign jurisdiction, he may, in the same proceedings, and incident thereto, have the real property of his wards sold and converted into money in conformity with the provisions of former section, when the wards are represented therein by their next friend, and it is made to appear that their interests will be promoted thereby, etc. Cilley v. Geitner, 183 N.C. 528, 111 S.E. 866 (1922).

As to sale of contingent interests, see Smith v. Witter, 174 N.C. 616, 94 S.E. 402 (1917).

Guardian Cannot Purchase. — It is well settled that a guardian cannot purchase at his own sale, and that all such purchases may be treated as invalid, at the option of the wards, even when no unfairness in the sale and purchase has been shown. But this does not apply to a sale made by a master. Patton v. Thompson, 55 N.C. 285 (1855); Lee v. Howell, 69 N.C. 200 (1873).

When Guardian Liable. — Where a guardian obtains a decree for the sale of his ward's land, it must appear, in order to make him liable for any loss in consequence of such sale, that he wilfully practiced a deception on the court by false allegations and false evidence, or by industriously concealing material facts. Harrison v. Bradley, 40 N.C. 136 (1847).

No Liability on Implied Warranty of Authority. — A guardian who contracts to convey the property of his ward is not liable on an implied warranty of authority. Pike v. Wachovia Bank & Trust Co., 274 N.C. 1, 161 S.E.2d 453 (1968).

A guardian may not be authorized to join with the life tenant in executing a mortgage on lands in which his wards own the remainder in order to refund notes executed by the life tenant representing a part of the moneys expended by the life tenant in making permanent improvements upon the land, since the remaindermen being in no way liable for the sums expended by the life tenant, the execution of the mortgage could not be to the interest of the remaindermen. Hall v. Hall, 219 N.C. 805, 15 S.E.2d 273 (1941).

Mortgage Valid in Part. — Under the presumption that the provisions of former section were followed, mortgage executed by guardian was held valid as to funds used for permanent improvements on land, but void as to funds used to purchase livestock. Quick v. Federal Land Bank, 208 N.C. 562, 181 S.E. 746 (1935).

Court May Authorize Lease Extending Beyond Period of Minority. — Since the superior courts in proper instances have authority to order a sale of infants' real estate and to order and approve execution of a mortgage on same by the guardian for a period exceeding the minority of the wards, such statutory power, together with the inherent jurisdiction of courts of equity over the estates of infants, give courts of equity plenary jurisdiction to order and empower a guardian to execute a lease on the real estate belonging to his wards for a period exceeding the guardianship or the minority of the wards, upon its findings that such would be to the best interest of the infant wards. Coxe v. Charles Stores Co., 215 N.C. 380, 1 S.E.2d 848, 121 A.L.R. 959 (1939).

Confirmation of Sale. — While a formal direction to make title is not always necessary a confirmation of the sale cannot be dispensed with. In re Dickerson, 111 N.C. 108, 15 S.E. 1025 (1892).

Where an order confirming a sale of lands for partition does not provide for the disbursement of the funds, and the sum received in cash is properly paid into court and properly disbursed to the parties, the share of the minors therein being less than $100 and being paid to their mother for their benefit, under G.S. 2-53 (see now 7A-111), the sale was not void. Ex parte Huffstetler, 203 N.C. 796, 167 S.E. 65 (1933).

Order of Sale Must Be Approved. — The power of a guardian to make disposition of his ward's real estate is very carefully regulated and a sale is not allowed except on petition filed, and the order must in all cases have the supervision and approval of the judge. Morton v. Pine Lumber Co., 178 N.C. 163, 100 S.E. 322 (1919).

Approval of Order by Emergency Judge. — An emergency judge has no power to approve and confirm an order of the clerk for the sale or mortgage of lands by a guardian when such emergency judge is not holding court in the county. Ipock v. North Carolina Joint Stock Land Bank, 206 N.C. 791, 175 S.E. 127 (1934).

Approval of Order Nunc Pro Tunc. — Where a guardian executed a note and deed of trust under an order made by the clerk without the approval of the judge, and the judge later approved the order nunc pro tunc, the defect was cured so as to come within former section. Powell v. Armour Fertilizer Works, 205 N.C. 311, 170 S.E. 916 (1933); Ipock v. North Carolina Joint Stock Land Bank, 206 N.C. 791, 175 S.E. 127 (1934).

When Sale May Be Set Aside. — Where the court, without taking any means to ascertain the necessity for a sale, directed it to be made, and that it should be "first advertised at the courthouse and three other public places," and no bid be received less than $125, and that the guardian should make conveyance, it was held that it was not error to set aside the sale and direct another. In re Dickerson, 111 N.C. 108, 15 S.E. 1025 (1892).

Title Not Affected by Reversal of Decree. — Where land of an infant was sold under a decree of the court upon petition of a guardian, the title acquired is not rendered invalid by the reversal of the decree on account of irregularity in the proceeding of which the purchaser had no notice. Sutton v. Schonwald, 86 N.C. 198 (1882).

Prior Debts of Mentally Disordered Person. — As to debts contracted prior to inquisition of incompetence, see Blake v. Respass, 77 N.C. 193 (1877); Adams v. Thomas, 81 N.C. 296 (1879).

As to sale of contingent interest, see Smith v. Witter, 174 N.C. 616, 94 S.E. 402 (1917).

As to satisfaction of judgment, see Blake v. Respass, 77 N.C. 193 (1877).

II. PAYMENT OF DEBTS OR DEMANDS AGAINST ESTATE.

Court should first ascertain that there are debts due from the ward, which render the sale of his property expedient, and should also select the part or parts of the property which can be disposed of with least injury to the ward. Leary v. Fletcher, 23 N.C. 259 (1840).

Same — Sufficiency of Order. — An order authorizing a guardian, under certain circumstances, to sell the land of his ward, must first show that it was ascertained that there were debts due from the ward, and then specify what particular land is to be sold for their payment. Spruill v. Davenport, 48 N.C. 42 (1855).

Sufficient Specification of Land. — An order "to sell the land of the ward named in the petition, adjoining the lands of A, B, and others, containing about 110 acres," it not appearing that the ward had other land, was held a sufficient specification of the land under the statute. Pendleton v. Trueblood, 48 N.C. 96 (1855).

Insufficient Specification of Land. — An order that the guardian sell the land of his ward, or so much thereof as will be sufficient to discharge his debts, is fatally defective and void, and vests no title in those who bought at the sale. Leary v. Fletcher, 23 N.C. 259 (1840); Ducket v. Skinner, 33 N.C. 431 (1850).

Sale Void Where Debts Not Shown. — A sale of a ward's land on petition of the guardian to pay debts is void where it is not made to appear that the court passed on and ascertained the fact that there were debts against the ward's estate. Coffield v. McLean, 49 N.C. 15 (1856).

But the amount of the debts, or to whom due, need not be set forth in the order. Spruill v. Davenport, 48 N.C. 42 (1855); Pendleton v. Trueblood, 48 N.C. 96 (1855).

Proceeds Subject to Attachment. — Money from the sale of land which belonged to wards is subject to attachment in the hands of the clerk after the confirmation of the sale. Leroy v. Jacobsky, 136 N.C. 443, 48 S.E. 796 (1904).

Priority in Payment of Debts. — When a guardian of an infant, under an order of court, sells his ward's land for payment of the debts of the ancestor, he is bound to observe the same priority in the payment of the debts as an administrator or executor in applying the personal assets. Merchant v. Sanderlin, 25 N.C. 501 (1843).

Sale of Incompetent's Property. — See Howard v. Thompson, 30 N.C. 367 (1848).

§ 35A-1302. Procedure when real estate lies in county in which guardian does not reside.

In all cases where a guardian is appointed under the authority of Chapter 35A and such guardian applies to the court for an order to sell, mortgage, or exchange all or part of his ward's real estate, and such real estate is situated in a county other than the county in which the guardian is appointed and qualified, the guardian shall first apply to the clerk of the county in which he was appointed and qualified for an order showing that the sale, mortgage, or exchange of his ward's real estate is necessary or that the ward's interest would be materially promoted thereby. The clerk to whom such application is made shall hear and pass upon the same and enter his findings and order as to whether said sale, mortgage, or exchange is necessary or would materially promote the ward's interest, and said order and findings shall be certified to the clerk of the county in which the ward's land, or some part of it, is located and before whom any petition or application is filed for the sale, mortgage, or exchange of said land. Such findings and orders so certified shall be considered by the court along with all other evidence and circumstances in passing upon the petition in which an order is sought for the sale, mortgage, or exchange of said land. In the case of a ward who is a minor, before such findings and orders shall become effective the same shall be approved by the superior court judge holding the courts of the district or by the resident judge. (1987, c. 550, s. 1.)

§ 35A-1303. Fund from sale has character of estate sold and subject to same trusts.

Whenever, in consequence of any sale under G.S. 35A-1301, the real or personal property of the ward is saved from demands to which in the first instance it may be liable, the final decree shall declare and set apart a portion of the personal or real estate thus saved, of value equal to the real and personal estate sold, as property exchanged for that sold; and in all sales by guardians whereby real is substituted by personal, or personal by real property, the beneficial interest in the property acquired shall be enjoyed, alienated, devised or bequeathed, and shall descend and be distributed, as by law the property sold might and would have been had it not been sold, until it be reconverted from the character thus impressed upon it by some act of the owner and restored to its character proper. (1987, c. 550, s. 1.)

CASE NOTES

Editor's Note. — *The cases cited below were decided under former G.S. 33-32 and prior law.*

Proceeds of Sale of Land Retain Character of Real Estate. — When an undivided interest of an insane person in land was sold by his guardian under court order, the proceeds of sale retained the character of real estate for the purpose of devolution on his death intestate while still insane, and would go as his interest in the land would had it not been sold. Brown v. Cowper, 247 N.C. 1, 100 S.E.2d 305 (1957).

The general rule is that where the real estate of an incompetent is sold under a statute or by order of court, the proceeds of sale remain realty for the purpose of devolution on his death intestate while still an incompetent. Grant v. Banks, 270 N.C. 473, 155 S.E.2d 87 (1967), commented on in 46 N.C.L. Rev. 687 (1968).

Purchase Back of Identical Real Property Sold. — In view of the general rule as to the sale of an insane person's real property under a court order, and in view of this section, a conveyance of real property by the guardian of an insane person and the purchase back of the identical real property at a foreclosure sale by the use of unpaid purchase money notes would not break the line of descent. Brown v. Cowper, 247 N.C. 1, 100 S.E.2d 305 (1957).

Exchange of Real Property for Real Property. — Former G.S. 33-32 does not in explicit words refer to the case where real property is substituted for real property. However, considering the general rule as to the sale of an insane person's real property under a court order, and the purpose and intent of former G.S. 33-32, an undivided interest in land conveyed to an insane person in exchange for his interest in other tracts of land transmitted to him by descent from his mother would, upon his death intestate and continuously insane since before the appointment of his guardian until his death, nothing else appearing, descend as by law his undivided interest in the other tracts would descend, if his undivided interest in the other tracts of land had not been sold, conveyed and exchanged. Brown v. Cowper, 247 N.C. 1, 100 S.E.2d 305 (1957).

Husband Who Received Proceeds Had No Right to Complain of Procedure. — It is the duty of the court, when the real estate of an infant is sold under its decree, to direct the proceeds to be held as real estate, yet the husband of such infant, who has received the proceeds from his wife's guardian, has no right to complain that such course has not been adopted. Harrison v. Bradley, 40 N.C. 136 (1847).

Where infant's land was sold for her benefit and she married and died before becoming of age, it was held that the money retained the character of real property. Wood v. Reeves, 58 N.C. 271 (1859).

§ **35A-1304:** Repealed by Session Laws 1989, c. 473, s. 7.

§ 35A-1305. When timber may be sold.

In case the land cannot be rented for enough to pay the taxes and other dues thereof, and there is not money sufficient for that purpose, the guardian, with the consent of the clerk, may annually dispose of or use so much of the lightwood, and box or rent so many pine trees, or sell so much of the timber on the same, as may raise enough to pay the taxes and other duties thereon, and no more. In addition, the guardian, with the consent of the clerk, may annually dispose of, use, or sell so much of the timber as is necessary to maintain good forestry practices. (1987, c. 550, s. 1.)

CASE NOTES

Editor's Note. — *The case cited below was decided under former law.*

Sale without Authority. — Where a guardian sold timber on the land of his ward without an order of the court (now consent of superior court clerk), and took a note for the purchase money, the maker of such note cannot set up the failure of the guardian to observe the statutory mandate. Evans v. Williamson, 79 N.C. 86 (1878).

§ 35A-1306. Abandoned incompetent spouse.

(a) A guardian of a married person found incompetent who has been abandoned, whether the guardian was appointed before or after the abandonment, may initiate a special proceeding before the clerk having jurisdiction over the ward requesting the issuance of an order authorizing the sale of the ward's separate real property without the joinder of the abandoning spouse.

(b) The ward's spouse shall be served with notice of the special proceeding in accordance with G.S. 1A-1, Rule 4.

(c) If the clerk finds:

(1) That the spouse of the ward has willfully and without just cause abandoned the ward for a period of more than one year; and

(2) That the spouse of the ward has knowledge of the guardianship, or that the guardian has made a reasonable attempt to notify the spouse of the guardianship; and

(3) That an order authorizing the sale of the separate real property of the ward is in the best interest of the ward;

the clerk may issue such an order thereby barring the abandoning spouse from all right, title and interest in any of the ward's separate real property sold pursuant to such an order. (1987, c. 550, s. 1.)

CASE NOTES

When Prior Court Approval of Expenditures Required. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 35A-1307. Spouse of incompetent husband or wife entitled to special proceeding for sale of real property.

Every married person whose husband or wife is adjudged incompetent and is confined in a mental hospital or other institution in this State, and who was living with the incompetent spouse at the time of commitment shall, if he or she be in needy circumstances, have the right to bring a special proceeding before the clerk to sell the real property of the incompetent spouse, or so much thereof as is deemed expedient, and have the proceeds applied for support: Provided, that said proceeding shall be approved by the judge of the superior court holding the courts of the superior court district or set of districts as defined in G.S. 7A-41.1 where the said property is situated. When the deed of the commissioner appointed by the court, conveying the lands belonging to the incompetent spouse is executed, probated, and registered, it conveys a good and indefeasible title to the purchaser. (1987, c. 550, s. 1; 1987 (Reg. Sess., 1988), c. 1037, s. 83; 1989, c. 473, s. 8.)

CASE NOTES

The duty to provide support to a dependent spouse is a continuing obligation, fairly chargeable to the estate of an incompetent; therefore, incompetent's wife's complaint for support stated a legally recognized claim. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Clerk of Superior Court Has Power to Determine Whether Spouse Should Be Granted Support. — The clerk of superior court—after first ensuring that the estate is ample to meet the expenses of caring for the incompetent—has residual equitable power under Chapter 35A to examine the facts and circumstances of the case to determine whether the incompetent's spouse should be granted support from her husband's estate and the right to continue to live in his home; factors the clerk may consider include the size and condition of the estate, the present and future demands against it, and the spouse's needs. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

The district court was not the proper forum in which to seek spousal support from the estate of an incompetent; the superior court is the only proper division to hear matters regarding the administration of incompetents' estates; therefore, the incompetent's spouse should have made her demand for support before the clerk of superior court either as a motion in the cause pursuant to G.S. 35A-1207, or as a special proceeding for the sale of her husband's property under this section. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§§ 35A-1308, 35A-1309: Reserved for future codification purposes.

ARTICLE 15.

Mortgage or Sale of Estates Held by the Entireties.

§ 35A-1310. Where one spouse or both incompetent; special proceeding before clerk.

In all cases where a husband and wife shall be seized of property as an estate by the entireties, and the wife or the husband or both shall be or become mentally incompetent to execute a conveyance of the estate so held, and the interest of said parties shall make it necessary or desirable that such property be mortgaged or sold, it shall be lawful for the mentally competent spouse and/or the guardian of the mentally incompetent spouse, and/or the guardians of both (where both are mentally incompetent) to file a petition with the clerk of the superior court in the county where the lands are located, setting forth all facts relative to the status of the owners, and showing the necessity or desirability of the sale or mortgage of said property, and the clerk, after first finding as a fact that either the husband or wife, or both, are mentally incompetent, shall have power to authorize the interested parties and/or their guardians to execute a mortgage, deed of trust, deed, or other conveyance of such property, provided it shall appear to said clerk's satisfaction that same is necessary or to the best advantage of the parties, and not prejudicial to the interest of the mentally incompetent spouse. All petitions filed under the authority of this section shall be filed in the office of the clerk of the superior court of the county where the real estate or any part of same is situated. (1935, c. 59, s. 1; 1945, c. 426, s. 5; c. 1084, s. 5; 1987, c. 550, s. 2.)

Editor's Note. — This Article is former Article 4 of Chapter 35, as recodified by Session Laws 1987, c. 550, s. 2.

Legal Periodicals. — For analysis of Article, see 13 N.C.L. Rev. 376 (1935).

For note on tenancy by the entirety in real property during marriage, see 47 N.C.L. Rev. 963 (1969).

CASE NOTES

When Prior Court Approval of Expenditures Required. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

§ 35A-1311. General law applicable; approved by judge.

The proceedings herein provided for shall be conducted under and shall be governed by laws pertaining to special proceedings, and it shall be necessary for any sale or mortgage or other conveyance herein authorized to be approved by a superior court judge who has jurisdiction pursuant to G.S. 7A-47.1 or G.S. 7A-48 in the district or set of districts as defined in G.S. 7A-41.1 wherein the property or any part of same is located. (1935, c. 59, s. 2; 1945, c. 426, s. 6; 1987, c. 550, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 84.)

Cross References. — As to general law on special proceedings, see G.S. 1-393 et seq.

CASE NOTES

When Prior Court Approval of Expenditures Required. — In most cases, a guardian is empowered under Chapter 35A to make expenditures from an incompetent ward's estate without prior court approval; prior approval of expenditures is necessary only when the incompetent's property is to be mortgaged or sold, or when the expenditures will be made from estate principal. Cline v. Teich, 92 N.C. App. 257, 374 S.E.2d 462 (1988).

Sale May Be Authorized. — Former G.S. 35-15 does not limit the court's power in authorizing a mortgage. The court may authorize a sale. Perry v. Jolly, 259 N.C. 305, 130 S.E.2d 654 (1963), decided under § 35-15, which was recodified as this section by Session Laws 1987, c. 550, s. 2.

Sale Transfers Right of Survivorship to Fund. — A sale does not destroy or separate the interests of the tenants by entireties if one of the parties is incompetent. The right of survivorship is transferred to the fund. Perry v.

Jolly, 259 N.C. 305, 130 S.E.2d 654 (1963), decided under § 35-15, which was recodified as this section by Session Laws 1987, c. 550, s. 2.

§ 35A-1312. Proceeding valid in passing title.

Any mortgage, deed, or deed of trust executed under authority of this Article by a regularly conducted special proceeding as provided shall have the force and effect of passing title to said property to the same extent as a deed executed jointly by husband and wife, where both are mentally capable of executing a conveyance. (1935, c. 59, s. 3; 1987, c. 550, s. 2.)

§ 35A-1313. Clerk may direct application of funds; purchasers and mortgagees protected.

In all cases conducted under this Article it shall be competent for the court, in its discretion, to direct the application of funds arising from a sale or mortgage of such property in such manner as may appear necessary or expedient for the protection of the interest of the mentally incompetent spouse: Provided, however, this section shall not be construed as requiring a purchaser or any other party advancing money on the property to see to the proper application of such money, but such purchaser or other party shall acquire title unaffected by the provisions of this section. (1935, c. 59, s. 4; 1987, c. 550, s. 2.)

CASE NOTES

Editor's Note. *— The case cited below was decided under G.S. 35-17, which was recodified as this section by Session Laws 1987, c. 550, s. 2.*

The discretion given the court by former § 35-17 is limited to the protection of the incompetent's interests. Perry v. Jolly, 259 N.C. 305, 130 S.E.2d 654 (1963).

The power to dissolve the rights of survivorship incident to the entireties estate is not within the court's discretion. Perry v. Jolly, 259 N.C. 305, 130 S.E.2d 654 (1963).

§ 35A-1314. Prior sales and mortgages validated.

Any and all special proceedings under which estates by the entireties have been sold or mortgaged prior to March 5, 1935, under circumstances contemplated in this Article are hereby in all respects ratified and confirmed, provided that such proceeding or proceedings are otherwise regular and conformable to law. (1935, c. 59, s. 5; 1987, c. 550, s. 2.)

§§ 35A-1315 through 35A-1319: Reserved for future codification purposes.

ARTICLE 16.

Surplus Income and Advancements.

§ 35A-1320: Repealed by Session Laws 1989, c. 473, s. 14.

Editor's Note. — This Article is former Article 5 of Chapter 35, as recodified by Session Laws 1987, c. 550, s. 3.

§ 35A-1321. Advancement of surplus income to certain relatives.

When any incompetent person, of full age, and not having made a valid will, has children or grandchildren (such grandchildren being the issue of a deceased child), and is possessed of an estate, real or personal, whose annual income is more than sufficient abundantly and amply to support himself, and to support, maintain and educate the members of his family, with all the necessaries and suitable comforts of life, it is lawful for the clerk of the superior court for the county in which such person has his residence to order from time to time, and so often as may be judged expedient, that fit and proper advancements be made, out of the surplus of such income, to any such child, or grandchild, not being a member of his family and entitled to be supported, educated and maintained out of the estate of such person. Whenever any incompetent person of full age, not being married and not having issue, be possessed, or his guardian be possessed for him, of any estate, real or personal, or of an income which is more than sufficient amply to provide for such person, it shall be lawful for the clerk of the superior court for the county in which such person resided prior to incompetency to order from time to time, and so often as he may deem expedient, that fit and proper advancements be made, out of the surplus of such estate or income, to his or her parents, brothers and sisters, or grandparents to whose support, prior to his incompetency, he contributed in whole or in part. (R.C., c. 57, s. 9; Code, s. 1677; Rev., s. 1900; C.S., s. 2296; Ex. Sess. 1924, c. 93; 1971, c. 528, s. 32; 1977, c. 725, s. 5; 1987, c. 550, s. 3.)

Cross References. — As to payment of pension funds to dependent relatives of incompetent veterans, see G.S. 34-14.1.

CASE NOTES

Editor's Note. — *The cases cited below were decided under G.S. 35-20, which was recodified as this section by Session Laws 1987, c. 550, s. 3, and under former provisions.*

History of former §§ 35-20 through 35-27. — See Ford v. Security Nat'l Bank, 249 N.C. 141, 105 S.E.2d 421 (1958).

Home Purchased in Name of Incompetent for Use by Sister. — The evidence tended to show that petitioner was the sister of an insane veteran, that prior to and after entering the army he assisted in her support, that he was unmarried and had no other dependents, that his guardian had on hand more than enough to amply provide for his support, and that petitioner was destitute and without means of support. It was held that the clerk of the superior court, with the approval of the resident judge or presiding judge, had the power, upon proper findings from the evidence, to order guardian to purchase a home in the name of the incompetent for the use of petitioner, and to advance petitioner a reasonable sum monthly for her support. Patrick v. Branch Banking & Trust Co., 216 N.C. 525, 5 S.E.2d 724 (1939).

Cited in In re Jones, 211 N.C. 704, 191 S.E. 511 (1937).

§ 35A-1322. Advancement to adult child or grandchild.

When such incompetent person is possessed of a real or personal estate in excess of an amount more than sufficient to abundantly and amply support himself with all the necessaries and suitable comforts of life and has no minor children nor immediate family dependent upon him for support, education or maintenance, such advancements may be made out of such excess of the principal of his estate to such child or grandchild of age for the better promotion or advancement in life or in business of such child or grandchild: Provided, that the order for such advancement shall be approved by the resident or presiding judge of the district who shall find the facts in said order of approval. (1925, c. 136, s. 1; 1977, c. 725, s. 5; 1987, c. 550, s. 3.)

CASE NOTES

***Editor's Note.** — The case cited below was decided under G.S. 35-21, which was recodified as this section by Session Laws 1987, c. 550, s. 3.*

Findings Sufficient to Support Order for Advancements. — Finding to the effect that an incompetent was incurably insane, that his estate was greatly in excess of any needs for his support, hospitalization and maintenance, that his adult children were in dire financial need, and that advancements to them from their father's estate under this section would operate for the better promotion and advancement in life of the children, support an order directing advancements to be made to the children out of the surplus estate of the incompetent. Ford v. Security Nat'l Bank, 249 N.C. 141, 105 S.E.2d 421 (1958).

§ 35A-1323. For what purpose and to whom advanced.

Such advancements shall be ordered only for the better promotion in life of such as are of age, or married, and for the maintenance, support and education of such as are under the age of 21 years and unmarried; and in all cases the sums ordered shall be paid to such persons as, in the opinion of the clerk, will most effectually execute the purpose of the advancement. (R.C., c. 57, s. 10; Code, s. 1678; Rev., s. 1901; C.S., s. 2297; 1987, c. 550, s. 3.)

CASE NOTES

***Editor's Note.** — The case cited below was decided under G.S. 35-22, which was recodified as this section by Session Laws 1987, c. 550, s. 3.*

Evidence Showing Need and Proper Purpose for Advancements. — Where the impoverished condition of an incompetent's adult children and the adequacy of his estate were not challenged, and while the order for advancements did not restrict the use of the funds to the purchase of a home, the applicants had requested advancements for that purpose, it was held that the evidence demonstrated a need and a proper purpose for advancements, and was sufficient to support the findings and the judgment. Ford v. Security Nat'l Bank, 249 N.C. 141, 105 S.E.2d 421 (1958).

§ 35A-1324. Distributees to be parties to proceeding for advancements.

In every application for such advancements, the guardian of the incompetent person and all such other persons shall be parties as would at that time be entitled to a distributive share of his estate if he were then dead. (R.C., c. 57, s. 11; Code, s. 1679; Rev., s. 1902; C.S., s. 2298; 1977, c. 725, s. 5; 1987, c. 550, s. 3.)

CASE NOTES

***Editor's Note.** — The case cited below was decided under G.S. 35-23, which was recodified as this section by Session Laws 1987, c. 550, s. 3.*

In a proceeding requesting an increase in the allowance to the dependent of a permanently insane veteran, all persons who would be entitled to a distributive share of the estate in case of death are necessary parties under this section. Patrick v. Branch Banking & Trust Co., 241 N.C. 76, 84 S.E.2d 277 (1954).

§ 35A-1325. Advancements to be equal; accounted for on death.

The clerk, in ordering such advancements, shall, as far as practicable, so order the same as that, on the death of the incompetent person, his estate shall be distributed among his distributees in the same equal manner as if the advancements had been made by the person himself; and on his death every sum advanced to a child or grandchild shall be an advancement, and shall bear interest from the time it may be received. (R.C., c. 57, s. 12; Code, s. 1680; Rev., s. 1903; C.S., s. 2299; 1977, c. 725, s. 5; 1987, c. 550, s. 3.)

§ 35A-1326. Advancements to those most in need.

When the surplus aforesaid or advancement from the principal estate is not sufficient to make distribution among all the parties, the clerk may select and decree advancement to such of them as may most need the same, and may apportion the sum decreed in such amounts as are expedient and proper. (R.C., c. 57, s. 13; Code, s. 1681; Rev., s. 1904; C.S., s. 2300; 1925, c. 136, s. 2; 1987, c. 550, s. 3.)

§ 35A-1327. Advancements to be secured against waste.

It is the duty of the clerk to withhold advancements from such persons as will probably waste them, or so to secure the same, when they may have families, that it may be applied to their support and comfort; but any sum so advanced shall be regarded as an advancement to such persons. (R.C., c. 57, s. 14; Code, s. 1682; Rev., s. 1905; C.S., s. 2301; 1987, c. 550, s. 3.)

CASE NOTES

Editor's Note. *— The case cited below was decided under G.S. 35-26, which was recodified as this section by Session Laws 1987, c. 550, s. 3.*

Order Not Reversed Because Advancements Not Secured against Waste. — An order under former G.S. 35-21 would not be held erroneous for want of direction in the order securing the advancements from being wasted, where the finding that the advancements would operate for the better promotion in life of the children was supported by evidence, even though it might later turn out that the advancements were wasted. Ford v. Security Nat'l Bank, 249 N.C. 141, 105 S.E.2d 421 (1958).

§ 35A-1328. Appeal; removal to superior court.

Any person made a party may appeal from any order of the clerk; or may, when the pleadings are finished, require that all further proceedings shall be had in the superior court. (R.C., c. 57, s. 15; Code, s. 1683; Rev., s. 1906; C.S., s. 2302; 1987, c. 550, s. 3.)

§ 35A-1329. Advancements only when incompetence permanent.

No such application shall be allowed under this Article but in cases of such permanent and continued incompetence as that the incompetent person shall be judged by the clerk to be incapable, notwithstanding any lucid intervals, to make advancements with prudence and discretion. (R.C., c. 57, s. 16; Code, s. 1684; Rev., s. 1907; C.S., s. 2303; 1987, c. 550, ss. 3, 3.1.)

CASE NOTES

Editor's Note. *— The case cited below was decided under G.S. 35-28, which was recodified as this section by Session Laws 1987, c. 550, s. 3.*

Veterans Administration Is Proper Party to Proceeding. — In a proceeding requesting an increase in the allowance of a permanently insane veteran, the Veterans Administration is a proper party under former G.S. 35-28 and 35-29. Patrick v. Branch Banking & Trust Co., 241 N.C. 76, 84 S.E.2d 277 (1954).

§ 35A-1330. Orders suspended upon restoration of competence.

Upon such incompetent person's being restored to competence, every order made for advancements shall cease to be further executed, and his estate shall be discharged of the same. (R.C., c. 57, s. 17; Code, s. 1685; Rev., s. 1908; C.S., s. 2304; 1987, c. 550, ss. 3, 3.2.)

§§ 35A-1331 through 35A-1334: Reserved for future codification purposes.

Article 17.

Gifts from Income for Certain Purposes.

§ 35A-1335. Gifts authorized with approval of judge of superior court.

With the approval of the resident judge of the superior court of the district in which the guardian was appointed, upon a duly verified petition the guardian of a person judicially declared to be incompetent may, from the income of the incompetent, make gifts to the State of North Carolina, its agencies, counties or municipalities, or to the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes, or to individuals including the guardian. References in this Article to the "guardian" include any Trustee appointed by the court under prior law as fiduciary for the incompetent ward's estate. (1963, c. 111, s. 1; 1987, c. 550, s. 4; 1999-270, s. 1.)

Editor's Note. — This Article is former Article 5A of Chapter 35, as recodified by Session Laws 1987, c. 550, s. 4.

Legal Periodicals. — For comment on gifts by guardian from estate of incompetent ward, see 43 N.C.L. Rev. 616 (1965).

CASE NOTES

Editor's Note. — *The cases cited below were decided under G.S. 35-29.1, which was recodified as this section by Session Laws 1987, c. 550, s. 4.*

Article Limits Power of Trustee or Guardian to Make Gifts. — Former Articles 5A, 5B, and 5C of Chapter 35 limit the power of a guardian or a trustee to make gifts of the character enumerated therein. He may do so only with the approval of the resident judge of the superior court of the county in which the guardian or trustee was appointed. To secure approval, the guardian or trustee must file a verified petition setting out what authority he wishes and the reasons justifying his request. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

Income or Corpus of Incompetent's Estate Cannot Be Taken Except for His Support or Debts. — A court of equity may not, either in the exercise of its inherent jurisdiction or with legislative sanction granted by former G.S. 35-29.1, 35-29.4, 35-29.5, 35-29.10, 35-29.11 and 35-29.16, authorize the taking of income or corpus of the estate of an incompetent for a purpose other than the incompetent's own support and the discharge of the incompetent's legal obligations. In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

Thus, Court May Not Authorize Gift Because It Believes Gift Should Be Made. — To authorize a gift from an incompetent's estate "if the court under all of the circumstances believes that such gift should be made," would permit the court to do that which the incompetent had not done and would not do if sane. Such an order would amount to a taking of property in derogation of incompetent's constitutional rights. In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

But Proposed Act by Trustee Need Not Enhance Ward's Estate. — No court should authorize a guardian, or trustee, of an estate of an incompetent to act in a manner which will prove detrimental to the estate of his ward; but it does not follow that the proposed action must be one which benefits or enhances the estate of the ward. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

And Gifts of Income or Principal May Be Authorized. — While an incompetent's property may not, either with legislative sanction or court order, be taken for charitable purposes notwithstanding the part not taken is ample for incompetent's needs, it is nonetheless true that courts of equity have authorized the gift of a part of incompetent's income or principal. In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

On Finding Incompetent Would Probably Have Made Gift if Sane. — A court may authorize a fiduciary to make a gift of a part of the estate of an incompetent only on a finding, on a preponderance of the evidence, at a hearing of which interested parties have notice, that the incompetent, if then of sound mind, would make the gift. In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964); In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

What it is necessary to establish is that the act proposed by the trustee of an incompetent is that which it is probable the incompetent would himself have done, or as it is probable he would have acted for himself, if he were of sound mind. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

§ 35A-1336. Prerequisites to approval by judge of gifts for governmental or charitable purposes.

The judge shall not approve gifts from income for governmental or charitable purposes unless it appears to the judge's satisfaction that all of the following apply:

(1) After making the gifts and the payment of federal and State income taxes, the remaining income of the incompetent will be reasonable and adequate to provide for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and those dependents in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life.

(2) Each donee is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability.

(3) Each donee is a donee qualified to receive tax deductible gifts under federal and State income tax laws.

(4) The aggregate of the gifts does not exceed the percentage of income fixed by federal law as the maximum deduction allowable for the gifts in computing federal income tax liability. (1963, c. 111, s. 2; 1987, c. 550, s. 4; 1999-270, s. 2.)

§ 35A-1336.1. Prerequisites to approval by judge of gifts to individuals.

The judge shall not approve gifts from income to individuals unless it appears to the judge's satisfaction that both the following requirements are met:

(1) After making the gifts and paying federal and State income taxes, the remaining income of the incompetent will be reasonable and adequate to provide for the support, maintenance, comfort, and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and those dependents in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life;

(2) The judge determines that either:

a. The incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by the laws of North Carolina for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent, and each donee is entitled to one or more specific legacies, bequests, devises, or distributions of specific amounts of money, income, or property under the paper-writing or the revocable trust or both or is a residuary legatee, devisee, or beneficiary designated in the paper-writing or revocable trust or both; or

b. That so far as is known the incompetent has not, prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent, and each donee is a person who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of the approval of the gifts; or

c. The donee is the spouse, parent, descendent of the incompetent, or descendant of the incompetent's parent, and the amount of the gift does not exceed the federal annual gift tax exclusion.

The judge may order that the gifts be made in cash or in specific assets and may order that the gifts be made outright, in trust, under the North Carolina Uniform Transfers to Minors Act, under the North Carolina Uniform Custodial Trust Act, or otherwise. The judge may also order that the gifts be treated as an advancement of some or all of the amount the donee would otherwise receive at the incompetent's death. (1999-270, s. 3.)

§ 35A-1337. Fact that incompetent had not previously made similar gifts.

The judge shall not withhold his approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type. (1963, c. 111, s. 3; 1987, c. 550, s. 4.)

§ 35A-1338. Validity of gift.

A gift made with the approval of the judge under the provisions of this Article shall be deemed a gift by the incompetent and shall be as valid in all respects as if made by a competent person. (1963, c. 111, s. 4; 1987, c. 550, s. 4.)

CASE NOTES

Editor's Note. — *The case cited below was decided under G.S. 35-29.4, which was recodified as this section by Session Laws 1987, c. 550, s. 4.*

Income or Corpus of Incompetent's Estate Cannot Be Taken Except for His Support or Debts. — A court of equity may not, either in the exercise of its inherent jurisdiction or with legislative sanction granted by former G.S. 35-29.1, 35-29.4, 35-29.5, 35-29.10, 35-29.11 and 35-29.16, authorize the taking of income or corpus of the estate of an incompetent for a purpose other than the incompetent's own support and the discharge of the incompetent's legal obligations. In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

§ 35A-1339: Reserved for future codification purposes.

Article 18.

Gifts from Principal for Certain Purposes.

§ 35A-1340. Gifts authorized with approval of judge of superior court.

With the approval of the resident judge of the superior court of the district in which the guardian was appointed upon a duly verified petition, the guardian of a person judicially declared to be incompetent may, from the principal of the incompetent's estate, make gifts to the State of North Carolina, its agencies, counties or municipalities, or the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes, or to individuals including the guardian. The incompetent's estate shall consist of all assets owned by the incompetent, including nonprobate assets. For purposes of this Article, nonprobate assets are those which would not be distributable in accordance with the incompetent's valid probated will or the provisions of Chapter 29 at the incompetent's death. The incompetent's nonprobate estate would include nonprobate assets only. References in this Article to the "guardian" include any Trustee appointed by the court under prior law as fiduciary for the incompetent ward's estate. (1963, c. 112, s. 1; 1987, c. 550, s. 5; 1999-270, s. 4.)

Editor's Note. — This Article is former Article 5B of Chapter 35, as recodified by Session Laws 1987, c. 550, s. 5.

CASE NOTES

Editor's Note. — *The case cited below was decided under G.S. 35-29.5, which was recodified as this section by Session Laws 1987, c. 550, s. 5.*

Income or Corpus of Incompetent's Estate Cannot Be Taken Except for His Support or Debts. — A court of equity may not, either in the exercise of its inherent jurisdiction or with legislative sanction granted by former G.S. 35-29.1, 35-29.4, 35-29.5, 35-29.10, 35-29.11 and 35-29.16, authorize the taking of income or corpus of the estate of an incompetent for a purpose other than the incompetent's own support and the discharge of the incompetent's legal obligations. In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

§ 35A-1341. Prerequisites to approval by judge of gifts for governmental or charitable purposes.

The judge shall not approve any gifts from principal for governmental or charitable purposes unless it appears to the judge's satisfaction all of the following requirements are met:

(1) The making of the gifts will not leave the incompetent's remaining principal estate insufficient to provide reasonable and adequate income for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and these dependents in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life.

(2) Each donee is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability.

(3) Each donee is a donee qualified to receive tax deductible gifts under federal and State income tax laws.

(4) The making of the gifts will not jeopardize the rights of any creditor of the incompetent.

(5) It is improbable that the incompetent will recover competency during his or her lifetime.

(5a) Sufficient credible evidence is presented to the court that the proposed gift is of a nature which the incompetent would have approved prior to being declared incompetent.

(6) Either a. or b. applies:
  a. All of the following apply:

1. The incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by the laws of North Carolina for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent.
2. Specific legacies, bequests, devises, or nondiscretionary distributions of specific amounts of money, income or property included in the paper-writing or revocable trust or both, will not be jeopardized by making the gifts.
3. All residuary legatees, devisees and beneficiaries designated in the paper-writing or revocable trust or both, who would take under the paper-writing or revocable trust or both, if the incompetent died contemporaneously with the signing of the order of approval of the gifts and the paper-writing was probated as the incompetent's will and the spouse, if any, of the incompetent have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of superior court of the county in which the guardian was appointed, within the 10-day period.

b. Both of the following apply:

1. That so far as is known the incompetent has not prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent; and
2. All persons who would share in the incompetent's intestate estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian was appointed, within the 10-day period.

(7) If the gift for which approval is sought is of a nonprobate asset, all persons who would share in that nonprobate asset if the incompetent died contemporaneously with the signing of the order of approval have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of superior court of the county in which the guardian was appointed within the 10-day period. This notice requirement shall be in addition to the notice requirements contained in G.S. 35A-1341(6)a.3. and (6)b.2. (1963, c. 112, s. 2; 1987, c. 550, s. 5; 1999-270, s. 5.)

CASE NOTES

Editor's Note. — *The case cited below was decided under G.S. 35-29.6, which was recodified as this section by Session Laws 1987, c. 550, s. 5.*

The proceeding under former Article 5B of Chapter 35 is in personam. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

The incompetent and her guardian are the only necessary parties. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

Section Requires Notice to Those Who May Benefit on Incompetent's Death. — Former G.S. 35-29.6 makes a condition precedent to the judge's approval "at least 10 days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian or trustee was appointed," to those named as legatees or devisees, if incompetent has executed a will, or to those who would be heirs and distributees if the incompetent died intestate contemporaneously with the filing of the petition. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

And They Are Given Opportunity to Present Facts to Court. — Former G.S. 35-29.6 recognizes the contingent or potential interest of those who would probably benefit financially by the death of an incompetent; and, because of their interest, notice must be given to them. Those who must have notice are given an opportunity to present to the court facts which will assist the court in determining whether the action proposed by the trustee is detrimental to the estate of the incompetent, or whether the incompetent, if then competent, would probably not act as the trustee proposes to act. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

But They Are Not Parties to Trustee's Proceeding. — Those named as beneficiaries in an incompetent's will have no interest in her properties so long as she lives. They take at her death only such properties as she then owns. They are not parties, and former G.S. 35-29.6 does not purport to make them parties, to a proceeding initiated by the trustee. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

Personal Service of Notice Outside State. — See In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

§ 35A-1341.1. Prerequisites to approval by judge of gifts to individuals.

The judge shall not approve gifts from principal to individuals unless it appears to the judge's satisfaction that all of the following requirements have been met:

(1) Making the gifts will not leave the incompetent's remaining principal estate insufficient to provide reasonable and adequate income for the support, maintenance, comfort, and welfare of the incompetent in order to maintain the incompetent and any dependents legally entitled to support from the incompetent in the manner to which the incompetent and those dependents are accustomed and in keeping with their station in life.

(2) The making of the gifts will not jeopardize the rights of any existing creditor of the incompetent.

(3) It is improbable that the incompetent will recover competency during his or her lifetime.

(4) The judge determines that either a., b., c., or d. applies.

- a. All of the following apply:
  - 1. The incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by the laws of North Carolina for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent.
  - 2. Each donee is entitled to one or more specific legacies, bequests, devises, or distributions of specific amounts of money, income, or property under either the paper-writing or revocable trust or both or is a residuary legatee, devisee, or beneficiary designated in the paper-writing or revocable trust or both.
  - 3. The making of the gifts will not jeopardize any specific legacy, bequest, devise, or distribution of specific amounts of money, income, or property.
- b. That so far as is known the incompetent has not, prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent, and each donee is a person who would share in the incompetent's intestate estate, if the incompetent died contemporaneously with the signing of the order of approval of the gifts.
- c. The donee is a person who would share in the incompetent's nonprobate estate, if the incompetent died contemporaneously with the signing of the order of approval.
- d. The donee is the spouse, parent, descendant of the incompetent, or descendant of the incompetent's parent, and the amount of the gift does not exceed the federal annual gift tax exclusion.

(5) If the incompetent, prior to being declared incompetent, executed a paper-writing with the formalities required by the laws of North Carolina for the execution of a valid will, including a paper-writing naming as beneficiary a revocable trust created by the incompetent; then all residuary legatees, devisees, and beneficiaries designated in the paper-writing or revocable trust or both, who would take under the paper-writing or revocable trust or both if the incompetent died contemporaneously with the signing of the order of approval of the gifts and the paper-writing was probated as the incompetent's will, the spouse, if any, of the incompetent and all persons identified in G.S. 35A-1341.1(7) have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of superior court of the county in which the guardian was appointed, within the 10-day period.

(6) If so far as is known, the incompetent has not, prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent, all persons who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of the superior court of the county in which the guardian was appointed, within the 10-day period.

(7) If the gift for which approval is sought is of a nonprobate asset, all persons who would share in that nonprobate asset if the incompetent died contemporaneously with the signing of the order of approval have been given at least 10 days' written notice that approval for the gifts will be sought and that objection may be filed with the clerk of the superior court of the county in which the guardian was appointed within the 10-day period. This notice requirement shall be in addition to the notice requirements contained in G.S. 35A-1341.1(5) and (6) above.

The judge may order that the gifts be made in cash or in specific assets and may order that the gifts be made outright, in trust, under the North Carolina Uniform Transfers to Minors Act, under the North Carolina Uniform Custodial Trust Act, or otherwise. The judge may also order that the gifts be treated as an advancement of some or all of the amount the donee would otherwise receive at the incompetent's death. (1999-270, s. 6.)

§ 35A-1342. Who deemed specific and residuary legatees and devisees of incompetent under § 35A-1341.

For purposes of G.S. 35A-1341(6)a and G.S. 35A-1341.1(4) and (5), if the paper-writing provides for the residuary estate to be placed in trust for a term of years, or if the paper-writing names as beneficiary a revocable trust created by the incompetent, and the trust or trusts include dispositive provisions which provide that assets continue in trust for a term of years with stated amounts of income payable to designated beneficiaries during the term and stated amounts payable to designated beneficiaries upon termination of the trust or trusts, the designated beneficiaries shall be deemed to be specific legatees, devisees, and beneficiaries and those taking the remaining income of the trust or trusts and, at the end of the term, the remaining principal shall be deemed to be residuary legatees, devisees, and beneficiaries who would take under the paper-writing or revocable trust or both if the incompetent died contemporaneously with the signing of the order of approval of the gifts. In no case shall any prospective executor or trustee be considered either a specific or residuary legatee, devisee, or beneficiary on the sole basis of prospective service as executor or trustee. (1963, c. 112, s. 3; 1987, c. 550, s. 5; 1999-270, s. 7.)

§ 35A-1343. Notice to minors and incompetents under § 35A-1341 and § 35A-1341.1.

If any person, to whom notice must be given under the provisions of G.S. 35A-1341 and G.S. 35A-1341.1 is a minor or is incompetent, or is an unborn or unascertained beneficiary, then the notice shall be given to his duly appointed guardian or other duly appointed representative: Provided, that if a minor, incompetent, unborn, or unascertained beneficiary has no guardian or representative, then a guardian ad litem shall be appointed by the judge and the guardian ad litem shall be given the notice herein required. (1963, c. 112, s. 4; 1987, c. 550, s. 5; 1999-270, s. 8.)

§ 35A-1344. Objections to proposed gift; fact that incompetent had previously made similar gifts.

If any objection is filed by one to whom notice has been given under the terms of this Article, the clerk shall bring it to the attention of the judge, who shall hear the same, and determine the validity and materiality of such objection and make his order accordingly. If no such objection is filed, the judge shall include a finding to that effect in such order as he may make. The judge shall not withhold his approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type. (1963, c. 112, s. 5; 1987, c. 550, s. 5.)

§ 35A-1345. Validity of gift.

A gift made with the approval of the judge under the provisions of this Article shall be deemed to be a gift made by the incompetent, and shall be as valid in all respects as if made by a competent person. (1963, c. 112, s. 6; 1987, c. 550, s. 5.)

CASE NOTES

***Editor's Note.** — The case cited below was decided under G.S. 35-29.10, which was recodified as this section by Session Laws 1987, c. 550, s. 5.*

Income or Corpus of Incompetent's Estate Cannot Be Taken Except for His Support or Debts. — A court of equity may not, either in the exercise of its inherent jurisdiction or with legislative sanction granted by former G.S. 35-29.1, 35-29.4, 35-29.5, 35-29.10, 35-29.11 and 35-29.16, authorize the taking of income or corpus of the estate of an incompetent for a purpose other than the incompetent's own support and the discharge of the incompetent's legal obligations. In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

§§ 35A-1346 through 35A-1349: Reserved for future codification purposes.

Article 19.

Declaring Revocable Trust Irrevocable and Making Gift of Incompetent's Life Interest Therein.

§ 35A-1350. Declaration and gift for certain purposes authorized with approval of judge of superior court.

When a person has created a revocable trust, reserving the income for life, and thereafter has been judicially declared to be incompetent, the guardian or trustee of such incompetent, with the approval of the resident judge of the superior court of the district in which he was appointed, upon a duly verified petition may declare the trust to be irrevocable and make a gift of the life interest of the incompetent to the State of North Carolina, its agencies, counties or municipalities, or to the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes. (1963, c. 113, s. 1; 1987, c. 550, s. 6.)

Editor's Note. — This Article is former Article 5C of Chapter 35, as recodified by Session Laws 1987, c. 550, s. 6.

CASE NOTES

Editor's Note. — *The cases cited below were decided under G.S. 35-29.11, which was recodified as this section by Session Laws 1987, c. 550, s. 6.*

Income or Corpus of Incompetent's Estate Cannot Be Taken Except for His Support or Debts. — A court of equity may not, either in the exercise of its inherent jurisdiction or with legislative sanction granted by former G.S. 35-29.1, 35-29.4, 35-29.5, 35-29.10, 35-29.11 and 35-29.16, authorize the taking of income or corpus of the estate of an incompetent for a purpose other than the incompetent's own support and the discharge of the incompetent's legal obligations. In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

Modification of Trust Does Not Rewrite Contract. — Modification of a trust by making it irrevocable and donating the income for the life of the incompetent trustor to certain designated charities does not rewrite the contract so as to affect the rights of the ultimate beneficiaries, but merely authorizes the trustees to do those things which the trustor, if competent, would probably have done. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

§ 35A-1351. Prerequisites to approval of gift.

The judge shall not approve the gift unless it appears to his satisfaction that:

(1) It is improbable that the incompetent will recover competency during his or her lifetime;

(2) The estate of the incompetent, after making the gift and after payment of any gift taxes which may be incurred by reason of the declaration of irrevocability, will be sufficient to provide reasonable and adequate income for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and such dependents in the manner to which the incompetent and such dependents are accustomed and in keeping with their station in life (and in no event less than twice the average, for the five calendar years preceding the calendar year of such gift, of expenditures for the incompetent's support, maintenance, comfort and welfare);

(3) Each donee of any part of the life interest is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability;

(4) Each donee of any part of the life interest is a donee qualified to receive tax deductible gifts under federal and State income tax laws.

(5) Either:

a. 1. The incompetent, prior to being declared incompetent, executed a paper-writing, with the formalities required by the laws of North Carolina for the execution of a valid will;

2. Specific legacies, bequests or devises of specific amounts of money, income or property included in such paper-writing, will not be jeopardized by making such gifts;

3. All residuary legatees and devisees designated in such paper-writing, who would take under the paper-writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts, and such paper-writing was probated as the incompetent's will and the spouse, if any, of such incompetent have been given at least 10 days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of superior court, of the county in which the guardian or trustee was appointed, within the 10-day period; or

b.1. That so far as is known the incompetent has not prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent; and

2. All persons who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least 10 days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian or trustee was appointed, within the 10-day period. (1963, c. 113, s. 2; 1987, c. 550, s. 6.)

CASE NOTES

Editor's Note. — *The case cited below was decided under G.S. 35-29.12, which was recodified as this section by Session Laws 1987, c. 550, s. 6.*

The proceeding under former Article 5C of Chapter 35 was in personam. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

The incompetent and her guardian are the only necessary parties. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

Section Requires Notice to Those Who May Benefit on Incompetent's Death. — Former G.S. 35-29.12 makes a condition precedent to the judge's approval "at least 10 days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian or trustee was appointed," to those named as legatees or devisees, if incompetent has executed a will, or to those who would be heirs and distributees if the incompetent died intestate contemporaneously with the filing of the petition. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

And They Are Given Opportunity to Present Facts to Court. — Former G.S. 35-29.12 recognizes the contingent or potential interest of those who would probably benefit financially by the death of an incompetent; and, because of their interest, notice must be given to them. Those who must have notice are given an opportunity to present to the court facts which will assist the court in determining whether the action proposed by the trustee is detrimental to the estate of the incompetent, or whether the incompetent, if then competent, would probably not act as the trustee proposes to act. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

But They Are Not Parties to Trustee's Proceeding. — Those named as beneficiaries in an incompetent's will have no interest in her properties so long as she lives. They take at her death only such properties as she then owns. They are not parties, and former G.S. 35-29.12 does not purport to make them parties, to a proceeding initiated by the trustee. In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

Personal Service of Notice outside State. — See In re Trusteeship of Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

§ 35A-1352. Who deemed specific and residuary legatees and devisees of incompetent under § 35A-1351.

For purposes of G.S. 35A-1351(5)a of this Article, if such paper-writing provides for the residuary estate to be placed in trust for a term of years, with stated amounts of income payable to designated beneficiaries during the term and stated amounts payable to designated beneficiaries upon termination of the trust, such designated beneficiaries shall be deemed to be specific legatees and devisees and those taking the remaining income of the trust and, at the end of the term, the remaining principal shall be deemed to be residuary legatees or devisees who would take under the paper-writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts. In no case shall any prospective executor or trustee be considered either a specific or residuary legatee or devisee. (1963, c. 113, s. 3; 1987, c. 550, s. 6.)

§ 35A-1353. Notice to minors and incompetents under § 35A-1351.

If any person, to whom notice must be given under the provisions of G.S. 35A-1351(5) of this Article, is a minor or is incompetent, then the notice shall be given to his duly appointed guardian or other duly appointed representative: Provided, that if a minor or incompetent has no such guardian or representative, then a guardian ad litem shall be appointed by the judge and such guardian ad litem shall be given the notice herein required. (1963, c. 113, s. 4; 1987, c. 550, s. 6.)

CASE NOTES

Applied in State v. Young, 140 N.C. App. 1, 535 S.E.2d 380, 2000 N.C. App. LEXIS 1042 (2000), cert. denied, 353 N.C. 397, 547 S.E.2d 429 (2001), appeal dismissed, 353 N.C. 397, 547 S.E.2d 429 (2001).

§ 35A-1354. Objections to proposed declaration and gift; fact that incompetent had not previously made similar gifts.

If any objection is filed by one to whom notice has been given under the terms of this Article, the clerk shall bring it to the attention of the judge, who shall hear the same, and determine the validity and materiality of such objection and make his order accordingly. If no such objection is filed, the judge shall include a finding to that effect in such order as he may make. The judge shall not withhold his approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type. (1963, c. 113, s. 5; 1987, c. 550, s. 6.)

§ 35A-1355. Validity of declaration and gift.

Such declaration and gift, when made with the approval of the judge and under the provisions of this Article, shall be deemed to be the declaration and gift of the incompetent and shall be as valid in all respects as if made by a competent person. (1963, c. 113, s. 6; 1987, c. 550, s. 6.)

CASE NOTES

Editor's Note. *— The case cited below was decided under G.S. 35-29.16, which was recodified as this section by Session Laws 1987, c. 550, s. 6.*

Income or Corpus of Incompetent's Estate Cannot Be Taken Except for His Support or Debts. — A court of equity may not, either in the exercise of its inherent jurisdiction or with legislative sanction granted by former G.S. 35-29.1, 35-29.4, 35-29.5, 35-29.10, 35-29.11 and 35-29.16, authorize the taking of income or corpus of the estate of an incompetent for a purpose other than the incompetent's own support and the discharge of the incompetent's legal obligations. In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

§§ 35A-1356 through 35A-1359: Reserved for future codification purposes.

Article 20.

Guardians' Deeds Validated When Seal Omitted.

§ 35A-1360. Deeds by guardians omitting seal, prior to January 1, 1944, validated.

All deeds executed prior to the first day of January, 1944, by any guardian, acting under authority obtained by him from the superior court as required by law, in which the guardian has omitted to affix his seal after his signature and/or has omitted to affix the seal after the signature of his ward shall be good and valid, and shall pass the title to the land which the guardian was authorized to convey: Provided, however, this section shall not apply to any pending litigation. (1947, c. 531; 1987, c. 550, s. 9.)

Editor's Note. — This Article is former Article 4A of Chapter 33, as recodified by Session Laws 1987, c. 550, s. 9.

§ 35A-1361. Certain private sales validated.

All private sales of real and personal property made by a guardian under Article 4 of this Chapter before June 1, 1985, that, under G.S. 1-339.36, should have been conducted as public sales because an upset bid was submitted, are validated to the same extent as if the guardian had complied with the procedures for a public sale. (1985, c. 654, s. 1(2)); 1987, c. 550, s. 9.)

§§ 35A-1362 through 35A-1369: Reserved for future codification purposes.

SUBCHAPTER IV. STANDBY GUARDIANS FOR MINOR CHILDREN.

Article 21.

Standby Guardianship.

§ 35A-1370. Definitions.

For purposes of this Article:

(1) "Alternate standby guardian" means a person identified in either a petition or designation to become the guardian of the person or, when appropriate, the general guardian of a minor child, pursuant to G.S. 35A-1373 or to G.S. 35A-1374, when the person identified as the standby guardian and the designator or petitioner has identified an alternate standby guardian.

(2) "Attending physician" means the physician who has primary responsibility for the treatment and care of the parent or legal guardian. When more than one physician shares this responsibility, or when a physician is acting on the primary physician's behalf, any such

physician may act as the attending physician pursuant to this section. When no physician has this responsibility, a physician who is familiar with the petitioner's medical condition may act as the attending physician pursuant to this Article.

(3) "Debilitation" means a chronic and substantial inability, as a result of a physically debilitating illness, disease, or injury, to care for one's minor child.

(4) "Designation" means a written document voluntarily executed by the designator pursuant to this Article.

(5) "Designator" means a person who suffers from a progressive chronic illness or an irreversible fatal illness and who is the biological or adoptive parent, the guardian of the person, or the general guardian of a minor child. A designation under this Article may be made on behalf of a designator by the guardian of the person or the general guardian of the designator.

(6) "Determination of debilitation" means a written determination made by the attending physician which contains the physician's opinion to a reasonable degree of medical certainty regarding the nature, cause, extent, and probable duration of the debilitation of the petitioner or designator.

(7) "Determination of incapacity" means a written determination made by the attending physician which contains the physician's opinion to a reasonable degree of medical certainty regarding the nature, cause, extent, and probable duration of the incapacity of the petitioner or designator.

(8) "Incapacity" means a chronic and substantial inability, as a result of mental or organic impairment, to understand the nature and consequences of decisions concerning the care of one's minor child, and a consequent inability to make these decisions.

(9) "Minor child" means an unemancipated child or children under the age of 18 years.

(10) "Petitioner" means a person who suffers from a progressive chronic illness or an irreversible fatal illness and who is the biological parent, the adoptive parent, the guardian of the person, or the general guardian of a minor child. A proceeding under this Article may be initiated and pursued on behalf of a petitioner by the guardian of the person, the general guardian of the petitioner, or by a person appointed by the clerk of superior court pursuant to Rule 17 of the Rules of Civil Procedure as guardian ad litem for the purpose of initiating and pursuing a proceeding under this Article on behalf of a petitioner.

(11) "Standby guardian" means a person appointed pursuant to G.S. 35A-1373 or designated pursuant to G.S. 35A-1374 to become the guardian of the person or, when appropriate, the general guardian of a minor child upon the death of a petitioner or designator, upon a determination of debilitation or incapacity of a petitioner or designator, or with the consent of a petitioner or designator.

(12) "Triggering event" means an event stated in the designation executed or order entered under this Article which empowers the standby guardian, or the alternate standby guardian, if one is identified and the standby guardian is unwilling or unable to serve, to assume the duties of the office, which event may be the death of a petitioner or designator, incapacity of a petitioner or designator, debilitation of a petitioner or designator with the petitioner's or designator's consent, or the consent of the petitioner or designator, whichever occurs first. (1995, c. 313, s. 1.)

Editor's Note. — The sections in this Article have been renumbered at the direction of the Revisor of Statutes, the section numbers in the enacting act having been G.S. 35A-1370 to 35A-1381.

The Rules of Civil Procedure, referred to above, may be found at G.S. 1A-1.

§ 35A-1371. Jurisdiction; limits.

Notwithstanding the provisions of Subchapter II of this Chapter, the clerk of superior court shall have original jurisdiction for the appointment of a standby guardian for a minor child under this Article. Provided that the clerk shall have no jurisdiction, no standby guardian may be appointed under this Article, and no designation may become effective under this Article when a district court has assumed jurisdiction over the minor child in an action under Chapter 50 of the General Statutes or in an abuse, neglect, or dependency proceeding under Subchapter I of Chapter 7B of the General Statutes, or when a court in another state has assumed such jurisdiction under a comparable statute. (1995, c. 313, s. 1; 1998-202, s. 13(g).)

§ 35A-1372. Standby guardianship; applicability.

This Article provides two methods for appointing a standby guardian: by petition pursuant to G.S. 35A-1373 or by designation pursuant to G.S. 35A-1374. If a standby guardian is unwilling or unable to serve as a standby guardian and the designator or petitioner has identified an alternate standby guardian, then the alternate standby guardian shall become the standby guardian, upon the same conditions as set forth in this Article. (1995, c. 313, s. 1.)

§ 35A-1373. Appointment by petition of standby guardian; petition, notice, hearing, order.

(a) A petitioner shall commence a proceeding under this Article for the appointment of a standby guardian of a minor child by filing a petition with the clerk of superior court of the county in which the minor child resides or is domiciled at the time of filing. A petition filed by a guardian of the person or a general guardian of the minor child who was appointed under this Chapter shall be treated as a motion in the cause in the original guardianship, but the provisions of this section shall otherwise apply.

(b) A petition for the judicial appointment of a standby guardian of a minor child shall:

(1) Identify the petitioner, the minor child, the person designated to be the standby guardian, and the person designated to be the alternate standby guardian, if any;

(2) State that the authority of the standby guardian is to become effective upon the death of the petitioner, upon the incapacity of the petitioner, upon the debilitation of the petitioner with the consent of the petitioner, or upon the petitioner's signing of a written consent stating that the standby guardian's authority is in effect, whichever occurs first;

(3) State that the petitioner suffers from a progressively chronic illness or an irreversible fatal illness, and the basis for such a statement, such as the date and source of a medical diagnosis, without requiring the identification of the illness in question;

(4) State whether there are any lawsuits, in this or any other jurisdiction, involving the minor child and, if so, identify the parties, the case numbers, and the states and counties where filed; and

(5) Be verified by the petitioner in front of a notary public or another person authorized to administer oaths.

(c) A copy of the petition and written notice of the time, date, and place set for a hearing shall be served upon any biological or adoptive parent of the minor child who is not a petitioner, and on any other person the clerk may direct, including the minor child. Service shall be made pursuant to Rule 4 of the Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by the sheriff, the sheriff shall make such service without demanding his fees in advance. Parties may waive their right to notice of the hearing and the clerk may proceed to consider the petition upon determining that all necessary parties are before the court and agree to have the petition considered.

(d) If at or before the hearing any parent entitled to notice under subsection (c) of this section presents to the clerk a written claim for custody of the minor child, the clerk shall stay further proceedings under this Article pending the filing of a complaint for custody of the minor child under Chapter 50 of the General Statutes and, upon the filing of such a complaint, shall dismiss the petition. If no such complaint is filed within 30 days after the claim is presented, the clerk shall conduct a hearing and enter an order as provided for in this section.

(e) The petitioner's appearance at the hearing shall not be required if the petitioner is medically unable to appear, unless the clerk determines that the petitioner is able with reasonable accommodation to appear and that the interests of justice require that the petitioner be present at the hearing.

(f) At the hearing, the clerk shall receive evidence necessary to determine whether the requirements of this Article for the appointment of a standby guardian have been satisfied. If the clerk finds that the petitioner suffers from a progressive chronic illness or an irreversible fatal illness, that the best interests of the minor child will be promoted by the appointment of a standby guardian of the person or general guardian, and that the standby guardian and the alternate standby guardian, if any, are fit to serve as guardian of the person or general guardian of the minor child, the clerk shall enter an order appointing the standby guardian named in the petition as standby guardian of the person or standby general guardian of the minor child and shall issue letters of appointment to the standby guardian. The order may also appoint the alternate standby guardian named in the petition as the alternate standby guardian of the person or alternate general guardian of the minor child in the event that the person named as standby guardian is unwilling or unable to serve as standby guardian and shall provide that, upon a showing of that unwillingness or inability, letters of appointment will be issued to the alternate standby guardian.

(g) Letters of appointment issued pursuant to this section shall state that the authority of the standby guardian or alternate standby guardian of the person or the standby guardian or alternate standby general guardian is effective upon the receipt by the guardian of a determination of the death of the petitioner, upon receipt of a determination of the incapacity of the petitioner, upon receipt of a determination of the debilitation of the petitioner and the petitioner's consent, whichever occurs first, and shall also provide that the authority of the standby guardian may earlier become effective upon written consent of the petitioner pursuant to subsection (*l*) of this section.

(h) If at any time prior to the commencement of the authority of the standby guardian the clerk, upon motion of the petitioner or any person entitled to notice under subsection (c) of this section and after hearing, finds that the requirements of subsection (f) of this section are no longer satisfied, the clerk shall rescind the order.

(i) Where the order provides that the authority of the standby guardian is effective upon receipt of a determination of the death of the petitioner, the standby guardian's authority shall commence upon the standby guardian's receipt of proof of death of the petitioner such as a copy of a death certificate or a funeral home receipt. The standby guardian shall file the proof of death in the office of the clerk who entered the order within 90 days of the date of the petitioner's death or the standby guardian's authority may be rescinded by the clerk.

(j) Where the order provides that the authority of the standby guardian is effective upon receipt of a determination of the incapacity of the petitioner, the standby guardian's authority shall commence upon the standby guardian's receipt of a copy of the determination of incapacity made pursuant to G.S. 35A-1375. The standby guardian shall file a copy of the determination of incapacity in the office of the clerk who entered the order within 90 days of the date of the receipt of such determination, or the standby guardian's authority may be rescinded by the clerk.

(k) Where the order provides that the authority of the standby guardian is effective upon receipt of a determination of the debilitation of the petitioner, the standby guardian's authority shall commence upon the standby guardian's receipt of a copy of the determination of debilitation made pursuant to G.S. 35A-1375, as well as a written consent signed by the petitioner. The standby guardian shall file a copy of the determination of debilitation and the written consent in the office of the clerk who entered the order within 90 days of the date of the receipt of such determination, or the standby guardian's authority may be rescinded by the clerk.

(*l*) Notwithstanding subsections (i), (j), and (k) of this section, a standby guardian's authority shall commence upon the standby guardian's receipt of the petitioner's written consent to such commencement, signed by the petitioner in the presence of two witnesses who are at least 18 years of age, other than the standby guardian or the alternate standby guardian, who shall also sign the writing. Another person may sign the written consent on the petitioner's behalf and at the petitioner's direction if the petitioner is physically unable to do so, provided such consent is signed in the presence of the petitioner and the two witnesses. The standby guardian shall file the written consent in the office of the clerk who entered the order within 90 days of the date of such written consent, or the standby guardian's authority may be rescinded by the clerk.

(m) The petitioner may revoke a standby guardianship created under this section by executing a written revocation, filing it in the office of the clerk who entered the order, and promptly providing the standby guardian with a copy of the revocation.

(n) A person appointed standby guardian pursuant to this section may at any time before the commencement of the person's authority renounce the appointment by executing a written renunciation and filing it with the clerk who entered the order and promptly providing the petitioner with a copy of the renunciation. Upon the filing of a renunciation, the clerk shall issue letters of appointment to the alternate standby guardian, if any. (1995, c. 313, s. 1.)

Editor's Note. — The Rules of Civil Procedure, referred to above, may be found at G.S. 1A-1.

§ 35A-1374. Appointment by written designation; form.

(a) A designator may designate a standby guardian by means of a written designation, signed by the designator in the presence of two witnesses at least 18 years of age, other than the standby guardian or alternate standby guardian, who shall also sign the writing. Another person may sign the written designation on the behalf of and at the direction of the designator if the designator is physically unable to do so, provided that the designation is signed in the presence of the designator and the two witnesses.

(b) A designation of a standby guardian shall identify the designator, the minor child, the person designated to be the standby guardian, and the person designated to be the alternate standby guardian, if any, and shall indicate that the designator intends for the standby guardian or the alternate standby guardian to become the minor child's guardian in the event that the designator either:

(1) Becomes incapacitated;
(2) Becomes debilitated and consents to the commencement of the standby guardian's authority;
(3) Dies prior to the commencement of a judicial proceeding to appoint a guardian of the person or general guardian of a minor child; or
(4) Consents to the commencement of the standby guardian's authority.

(c) The authority of the standby guardian under a designation shall commence upon the same conditions as set forth in G.S. 35A- 1373(i) through (*l*).

(d) The standby guardian or, if the standby guardian is unable or unwilling to serve, the alternate standby guardian shall commence a proceeding under this Article to be appointed guardian of the person or general guardian of the minor child by filing a petition with the clerk of superior court of the county in which the minor child resides or is domiciled at the time of filing. The petition shall be filed after receipt of either:

(1) A copy of a determination of incapacity made pursuant to G.S. 35A-1375;
(2) A copy of a determination of debilitation made pursuant to G.S. 35A-1375 and a copy of the designator's written consent to such commencement;
(3) A copy of the designator's written consent to such commencement, made pursuant to G.S. 35A-1373(*l*); or
(4) Proof of death of the designator, such as a copy of a death certificate or a funeral home receipt.

(e) The standby guardian shall file a petition pursuant to subsection (d) of this section within 90 days of the date of the commencement of the standby guardian's authority under this section, or the standby guardian's authority shall lapse after the expiration of those 90 days, to recommence only upon filing of the petition.

(f) A petition filed pursuant to subsection (d) of this section shall:

(1) Append the written designation of such person as standby guardian; and
(2) Append a copy of either (i) the determination of incapacity of the designator; (ii) the determination of debilitation of the designator and the written consent of the designator; (iii) the designator's consent; or (iv) proof of death of the designator, such as a copy of a death certificate or a funeral home receipt; and
(3) If the petition is by a person designated as an alternate standby guardian, state that the person designated as the standby guardian is unwilling or unable to act as standby guardian, and the basis for that statement; and
(4) State whether there are any lawsuits, in this State or any other jurisdiction, involving the minor child and, if so, identify the parties, the case numbers, and the states and counties where filed; and
(5) Be verified by the standby guardian or alternate standby guardian in front of a notary public or another person authorized to administer oaths.

(g) A copy of the petition and written notice of the time, date, and place set for a hearing shall be served upon any biological or adoptive parent of the minor child who is not a designator, and on any other person the clerk may direct, including the minor child. Service shall be made pursuant to Rule 4 of the Rules of Civil Procedure, unless the clerk directs otherwise. When service is made by the sheriff, the sheriff shall make such service without demanding his fees in advance. Parties may waive their right to notice of the hearing and the clerk may proceed to consider the petition upon determining that all necessary parties are before the court and agree to have the petition considered.

(h) If at or before the hearing any parent entitled to notice under subsection (c) of this section presents to the clerk a written claim for custody of the minor child, the clerk shall stay further proceedings under this Article pending the filing of a complaint for custody of the minor child under Chapter 50 of the General Statutes and, upon the filing of such a complaint, shall dismiss the petition. If no such complaint is filed within 30 days after the claim is presented, the clerk shall conduct a hearing and enter an order as provided for in this section.

(i) At the hearing, the clerk shall receive evidence necessary to determine whether the requirements of this section have been satisfied. The clerk shall enter an order appointing the standby guardian or alternate standby guardian as guardian of the person or general guardian of the minor child if the clerk finds that:

(1) The person was duly designated as a standby guardian or alternate standby guardian;

(2) That (i) there has been a determination of incapacity; (ii) there has been a determination of debilitation and the designator has consented to the commencement of the standby guardian's authority; (iii) the designator has consented to that commencement; or (iv) the designator has died, such information coming from a document, such as a copy of a death certificate or a funeral home receipt;

(3) That the best interests of the minor child will be promoted by the appointment of the person designated as standby guardian or alternate standby guardian as guardian of the person or general guardian of the minor child;

(4) That the standby guardian or alternate standby guardian is fit to serve as guardian of the person or general guardian of the minor child; and

(5) That, if the petition is by a person designated as an alternate standby guardian, the person designated as standby guardian is unwilling or unable to serve as standby guardian.

(j) The designator may revoke a standby guardianship created under this section by:

(1) Notifying the standby guardian in writing of the intent to revoke the standby guardianship prior to the filing of the petition under this section; or

(2) Where the petition has already been filed, by executing a written revocation, filing it in the office of the clerk with whom the petition was filed, and promptly providing the standby guardian with a copy of the written revocation. (1995, c. 313, s. 1.)

Editor's Note. — The Rules of Civil Procedure, referred to above, may be found at G.S. 1A-1.

§ 35A-1375. Determination of incapacity or debilitation.

(a) If requested by the petitioner, designator, or standby guardian, an attending physician shall make a determination regarding the incapacity or debilitation of the petitioner or designator for purposes of this Article.

(b) A determination of incapacity or debilitation shall:

(1) Be made by the attending physician to a reasonable degree of medical certainty;

(2) Be in writing; and

(3) Contain the attending physician's opinion regarding the cause and nature of the incapacity or debilitation, as well as its extent and probable duration.

(c) The attending physician shall provide a copy of the determination of incapacity or debilitation to the standby guardian, if the standby guardian's identity is known to the physician.

(d) The standby guardian shall ensure that the petitioner or designator is informed of the commencement of the standby guardian's authority as a result of a determination of incapacity or debilitation and of the possibility of a future suspension of the standby guardian's authority pursuant to G.S. 35A-1376. (1995, c. 313, s. 1.)

§ 35A-1376. Restoration of capacity or ability; suspension of guardianship.

In the event that the authority of the standby guardian becomes effective upon the receipt of a determination of incapacity or debilitation and the petitioner or designator is subsequently restored to capacity or ability to care for the child, the authority of the standby guardian based on that incapacity or debilitation shall be suspended. The attending physician shall provide a copy of the determination of restored capacity or ability to the standby guardian, if the identity of the standby guardian is known to the attending physician. If an order appointing the standby guardian as guardian of the person or general guardian of the minor child has been entered, the standby guardian shall, and the petitioner or designator may, file a copy of the determination of restored capacity or ability in the office of the clerk who entered the order. A determination of restored capacity or ability shall:

(1) Be made by the attending physician to a reasonable degree of medical certainty;

(2) Be in writing; and

(3) Contain the attending physician's opinion regarding the cause and nature of the parent's or legal guardian's restoration to capacity or ability.

Any order appointing the standby guardian as guardian of the person or general guardian of the minor child shall remain in full force and effect, and the authority of the standby guardian shall recommence upon the standby guardian's receipt of a subsequent determination of the petitioner's or designator's incapacity, pursuant to G.S. 35A-1373(j), or upon the standby guardian's receipt of a subsequent determination of debilitation pursuant to G.S. 35A-1373(k), or upon the receipt of proof of death of the petitioner or designator, or upon the written consent of the petitioner or designator, pursuant to G.S. 35A-1373(*l*). (1995, c. 313, s. 1.)

§ 35A-1377. Authority concurrent to parental rights.

The commencement of the standby guardian's authority pursuant to a determination of incapacity, determination of debilitation, or written consent shall not itself divest the petitioner or designator of any parental or guardianship rights, but shall confer upon the standby guardian concurrent authority with respect to the minor child. (1995, c. 313, s. 1.)

§ 35A-1378. Powers and duties.

A standby guardian designated pursuant to G.S. 35A-1374 and a guardian of the person or general guardian appointed pursuant to this Article have all of the powers, authority, duties, and responsibilities of a guardian appointed pursuant to Subchapter II of this Chapter. (1995, c. 313, s. 1.)

§ 35A-1379. Appointment of guardian ad litem.

(a) The clerk may appoint a volunteer guardian ad litem, if available, to represent the best interests of the minor child and, where appropriate, express the wishes of the minor child.

(b) The duties of the guardian ad litem, when appointed, shall be to make an investigation to determine the facts, the needs of the minor child and the available resources within the family to meet those needs, and to protect and promote the best interests of the minor child until formally relieved of the responsibility by the clerk.

(c) The court may order the guardian ad litem to conduct an investigation to determine the fitness of the intended standby guardian and alternate standby guardian, if any, to perform the duties of standby guardian. (1995, c. 313, s. 1.)

§ 35A-1380. Bond.

The bond requirements of Article 7 of this Chapter shall apply to a guardian of the person or general guardian appointed pursuant to G.S. 35A-1373 or G.S. 35A-1374, provided that: (i) the clerk need not require a bond if the bond requirement is waived in writing by the petitioner or designator; and (ii) a general guardian appointed pursuant to G.S. 35A-1373 shall not be required to furnish a bond until a triggering event has occurred. (1995, c. 313, s. 1.)

§ 35A-1381. Accounting.

The accounting requirements of Article 10 of this Chapter apply to a general guardian appointed pursuant to this Article. (1995, c. 313, s. 1.)

§ 35A-1382. Termination.

Any standby guardianship created under this Article shall continue until the child reaches 18 years of age unless sooner terminated by order of the clerk who entered the order appointing the standby guardian, by revocation pursuant to this Article, or by renunciation pursuant to this Article. A standby guardianship shall terminate, and the authority of the standby guardian designated pursuant to G.S. 35A-1374 or of a guardian of the person or general guardian appointed pursuant to this Article shall cease, upon the entry of an order of the district court granting custody of the minor child to any other person. (1995, c. 313, s. 1.)

Chapter 36.

Trusts and Trustees.

§§ 36-1 through 36-67: Repealed by Session Laws 1977, c. 502, s. 1.

Cross References. — For present provisions as to trusts and trustees, see Chapter 36A.

Chapter 36A.

Trusts and Trustees.

Article 1.

Investment and Deposit of Trust Funds.

Sec.
36A-1 through 36A-7. [Recodified.]

Article 2.

Removal of Fiduciary Funds.

36A-13 through 36A-16. [Repealed.]

Article 3.

Trust Administration.

36A-22 through 36A-41. [Repealed.]

Article 4.

Charitable Trusts.

36A-47 through 36A-54. [Repealed.]

Article 4A.

Charitable Remainder Trusts Administration Act.

36A-59.1 through 36A-59.7. [Repealed.]

Article 4B.

North Carolina Community Trust Act.

36A-59.10 through 36A-59.21. [Repealed.]

Article 5.

Uniform Trusts Act.

36A-60 through 36A-62. [Repealed.]
36A-63. [Recodified.]
36A-64 through 36A-66. [Repealed.]
36A-66.1. [Recodified.]
36A-66.2 through 36A-84. [Repealed.]

Article 6.

Uniform Common Trust Fund Act.

36A-90 through 36A-94. [Recodified.]

Article 7.

Trusts of Death Benefits.

36A-100, 36A-101. [Repealed.]

Article 8.

Testamentary Trustees.

Sec.
36A-107, 36A-108. [Repealed.]

Article 9.

Alienability of Beneficial Interest; Spendthrift Trust.

36A-115. [Repealed.]

Article 10.

Trust Accounts in Financial Institutions.

36A-120. [Repealed.]

Article 11.

Termination of Small Trusts.

36A-125. [Repealed.]

Article 11A.

Modification And Termination Of Irrevocable Trusts.

36A-125.1 through 36A-125.12. [Repealed.]

Article 12.

Marital Deduction Trusts.

36A-130. [Repealed.]

Article 13.

Powers of Trustees.

36A-135 through 36A-141. [Repealed.]

Article 14.

Honorary Trusts; Trusts for Pets; Trusts for Cemetery Lots.

36A-145 through 36A-148. [Repealed.]

Article 15.

North Carolina Uniform Prudent Investor Act.

36A-161 through 36A-173. [Repealed.]

ARTICLE 1.

Investment and Deposit of Trust Funds.

§§ 36A-1 through 36A-7: Recodified as §§ 32-70 through 32-76 by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. — Prior to recodification of this Article, G.S. 36A-8 through 36A-12 had been set out as reserved for future codification purposes.

ARTICLE 2.

Removal of Fiduciary Funds.

§§ 36A-13 through 36A-16: Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Cross References. — For current provisions, see the Uniform Trust Code, G.S. 36C-1-101 et seq.

Editor's Note. — Prior to repeal of this Article, G.S. 36A-17 through 36A-21 had been set out as reserved for future codification purposes.

ARTICLE 3.

Trust Administration.

§§ 36A-22 through 36A-41: Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. — Former G.S. 36A-22, 36A-23, 36A-24, 36A-25, 36A-26, 36A-30, 36A-34, 36A-35, 36A-38, and 36A-41, were repealed by Session Laws 2001-413, s. 1, effective January 1, 2002, and applicable to all trustees covered by the provisions of Chapter 36A of the General Statutes, whether administering trust established before, on, or after that date.

Former G.S. 36A-28 was repealed by Session Laws 1999-216, s. 2, effective January 1, 2000.

Prior to repeal of this Article, G.S. 36A-42 through 36A-46 had been set out as reserved for future codification purposes.

ARTICLE 4.

Charitable Trusts.

§§ 36A-47 through 36A-54: Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. — Prior to repeal of this Article, G.S. 36A-55 through 36A-59 had been set out as reserved for future codification purposes.

ARTICLE 4A.

Charitable Remainder Trusts Administration Act.

§§ 36A-59.1 through 36A-59.7: Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. — Prior to repeal of this Article, former G.S. 36A-59.8 and 36A-59.9 had been set out as reserved for future codification purposes.

ARTICLE 4B.

North Carolina Community Trust Act.

§§ **36A-59.10 through 36A-59.21:** Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Cross References. — For current provisions of North Carolina Community Trust Act, see G.S. 36D-1 et seq.

Editor's Note. — Former G.S. 36A-59.21 was repealed by Session Laws 1991 (Regular Session, 1992), c. 1044, s. 48(a).

ARTICLE 5.

Uniform Trusts Act.

§§ **36A-60 through 36A-62:** Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

§ **36A-63:** Recodified as § 53-163.1 by Session Laws 2005-192, s. 1, effective January 1, 2006.

§§ **36A-64 through 36A-66:** Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

§ **36A-66.1:** Recodified as § 53-163.2 by Session Laws 2005-192, s. 1, effective January 1, 2006.

§§ **36A-66.2 through 36A-84:** Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

ARTICLE 6.

Uniform Common Trust Fund Act.

§§ **36A-90 through 36A-94:** Recodified as §§ 53-163.5 through 53-163.9 by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. — Prior to recodification of this Article, G.S. 36A-95 through 36A-99 had been set out as reserved for future codification purposes.

ARTICLE 7.

Trusts of Death Benefits.

§§ **36A-100, 36A-101:** Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. — Prior to repeal of this Article, G.S. 36A-102 through 36A-106 had been set out as reserved for future codification purposes.

ARTICLE 8.

Testamentary Trustees.

§§ 36A-107, 36A-108: Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. — Prior to repeal of this Article, G.S. 36A-109 through G.S. 36A-114 had been set out as reserved for future codification purposes.

ARTICLE 9.

Alienability of Beneficial Interest; Spendthrift Trust.

§ 36A-115: Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. —
Prior to repeal of this Article, G.S. 36A-116 through 36A-119 had been set out as reserved for future codification purposes.

ARTICLE 10.

Trust Accounts in Financial Institutions.

§ 36A-120: Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. — Prior to repeal of this Article, G.S. 36A-121 through 36A-124 had been set out as reserved for future codification.

ARTICLE 11.

Termination of Small Trusts.

§ 36A-125: Repealed by Session Laws 1999-266, s. 1, effective January 1, 2000.

Cross References. — As to current provisions on modification and termination of irrevocable trusts, see G.S. 36A-125.1 et seq.

Editor's Note. — Prior to its repeal, this section had been amended by Session Laws 1999-337, s. 8, effective July 22, 1999, which had inserted "estate or" in subsection (a).

Session Laws 1999-266, s. 3, made this act effective January 1, 2000 and provides in part that Session Laws 1999-266, s. 1, is applicable to all trusts created before or after that date.

ARTICLE 11A.

Modification And Termination Of Irrevocable Trusts.

§§ 36A-125.1 through 36A-125.12: Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. — Prior to repeal of this Article, G.S. 36A-126 through 36A-129 had been set out as reserved for future codification purposes.

ARTICLE 12.

Marital Deduction Trusts.

§ 36A-130: Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. — Prior to repeal of this Chapter, G.S. 36A-131 through 36A-134 had been set out as recodified for future codification purposes.

ARTICLE 13.

Powers of Trustees.

§§ 36A-135 through 36A-141: Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. — Prior to repeal of this Chapter, G.S. 36A-142 through 36A-144 had been set out as reserved for future codification purposes.

ARTICLE 14.

Honorary Trusts; Trusts for Pets; Trusts for Cemetery Lots.

§§ 36A-145 through 36A-148: Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. — Prior to repeal of this Chapter, G.S. 36A-149 through 36A-160 had been set out as reserved for future codification purposes.

ARTICLE 15.

North Carolina Uniform Prudent Investor Act.

§§ 36A-161 through 36A-173: Repealed by Session Laws 2005-192, s. 1, effective January 1, 2006.

Editor's Note. — Prior to repeal of this Chapter, G.S. 36A-174 through 36A-178 had been set out as reserved for future codification purposes.

TABLES OF COMPARABLE SECTIONS FOR CHAPTER 36A

Former to Present

Editor's Note. — The following table shows G.S. sections from Chapter 36A as effective until January 1, 2006 and their comparable section numbers in Chapter 36C, and various other locations as effective January 1, 2006. Where there is no comparable new section number, the term "Repealed" has been inserted.

Present Section	Former Section
36A-1 — 36A-12	Ch. 32, Art. 7
36A-13 — 36A-21	Repealed
36A-22.1	Repealed
36A-23.1	Repealed
36A-24.1	36C-2-204(a)-(c)
36A-25.1	36C-2-203(d)
36A-26.1	Repealed
36A-26.2	36C-2-207
36A-26.3	Repealed
36A-27	36C-2-203(e)
36A-29	36C-2-208(a), (b)
36A-31	36C-7-702
36A-32	36C-7-704(f)
36A-33	Repealed
36A-36	Repealed
36A-37	Repealed
36A-39	Repealed
36A-40	Repealed
36A-47	Repealed
36A-48	Repealed
36A-49	Repealed
36A-50	Repealed
36A-51	Repealed
36A-52	Repealed
36A-53	Repealed
36A-54	Ch. 36C, Art. 4A
36A-59.1 — 36A-59.7	36C-4B-1 — 36C-4B-6
36A-59.10 — 36A-59.20	Chapter 36D
36A-60	Repealed
36A-61	Repealed
36A-62	Repealed
36A-63	Ch. 53, Art. 14
36A-64	Repealed
36A-65	Repealed
36A-66	Repealed
36A-66.1	Ch. 53, Art. 14
36A-66.2	Repealed
36A-67	Repealed
36A-68	Repealed
36A-69	Repealed
36A-70	Repealed
36A-71	Repealed
36A-72	Repealed
36A-73	Repealed
36A-74	Repealed
36A-75	Repealed
36A-76	Repealed
36A-77	Repealed
36A-78	Repealed
36A-79	Repealed
36A-80	Repealed
36A-81	Repealed
36A-82	Repealed
36A-83	Repealed
36A-84	Repealed
36A-90 — 36A-94	Ch. 53, Art. 14
36A-100	36C-4-401A
36A-101	Repealed
36A-107	36C-2-209(a), (b)
36A-108	36C-2-209(c)
36A-115	Repealed
36A-120	Repealed
36A-125.1	Repealed
36A-125.2	Repealed
36A-125.3	Repealed
36A-125.4	Repealed
36A-125.5	Repealed
36A-125.6	Repealed
36A-125.7	Repealed
36A-125.8	Repealed
36A-125.9	Repealed
36A-125.10	36C-4-418
36A-125.11	Repealed
36A-125.12	Repealed
36A-130(a)	36C-8-814(e)
36A-130(b)	Repealed
36A-135	Repealed
36A-136	Repealed
36A-137	Repealed
36A-138	Repealed
36A-139	Repealed
36A-140	Repealed
36A-141	Repealed
36A-145	Repealed
36A-146	36C-4-409(d)
36A-147	36C-4-408
36A-148	Repealed
36A-161	36C-9-901
36A-162	36C-9-902
36A-163	36C-9-903
36A-164	36C-9-904
36A-165	Repealed
36A-166	Repealed
36A-167	Repealed

Present Section	Former Section	Present Section	Former Section
36A-168	36C-9-905	36A-171	Repealed
36A-169	Repealed	36A-172	36C-9-907
36A-170	36C-9-906	36A-173	Repealed

Chapter 36B.

Uniform Management of Institutional Funds Act.

Sec.
36B-1. Definitions.
36B-2. Appropriation of appreciation.
36B-3. Rule of construction.
36B-4. Investment authority.
36B-5. Delegation of investment management.
36B-6. Standard of conduct.
Sec.
36B-7. Release of restrictions on use or investment.
36B-8. Conflict with other law.
36B-9. Uniformity of application and construction.
36B-10. Short title.

COMMENTARY

This commentary contains the official comments of the National Conference of Commissioners on Uniform State Laws, the comments of the General Statutes Commission, and reflects amendments made during legislative consideration of the Uniform Management of Institutional Funds Act. Neither the General Statutes Commission nor any legislative official has reviewed and approved this commentary on a line-by-line basis.

§ 36B-1. Definitions.

As used in this Chapter, the following terms have the meanings specified:

(1) "Institution" means an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other eleemosynary purposes, or a governmental organization to the extent that it holds funds exclusively for any of these purposes;

(2) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes, but does not include (i) a fund held for an institution by a trustee that is not an institution, unless the fund is held exclusively for the benefit of either a community foundation or community trust, deemed to be "publicly supported" under the Code, as defined in G.S. 105-134.1(*l*), and held by:
   a. A bank;
   b. A trust company; or
   c. Another fiduciary

   that is a trustee of the community foundation or community trust or (ii) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund or (iii) funds other than endowment funds held by a governmental organization;

(3) "Endowment fund" means an institutional fund, or any part thereof, not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument;

(4) "Governing board" means the body responsible for the management of an institution or of an institutional fund;

(5) "Historic dollar value" means the aggregate fair value in dollars of (i) an endowment fund at the time it became an endowment fund, (ii) each subsequent donation to the fund at the time it is made, and (iii) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund. The determination of historic dollar value made in good faith by the institution is conclusive.

(6) "Gift instrument" means a will, deed, trust, grant, conveyance, agreement, memorandum, writing, or other governing document (including

the terms of any institutional solicitations from which an institutional fund resulted) under which property is transferred to or held by an institution as an institutional fund. (1985, c. 98, s. 1; 1991, c. 39, s. 1.)

COMMENTARY

This section is identical to Section 1 of the Uniform Management of Institutional Funds Act except that § 36B-1(2)(iii) was added by the General Statutes Commission to limit the application of the Act to governmental funds that are endowment funds and, thus, eliminate from the scope of the Act any regulation of the management or investment of funds that are not derived from a charitable gift that is not completely expendable.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"[Subdivision (1)] The Uniform Act applies generally to colleges, universities, hospitals, religious organizations and other institutions of an eleemosynary nature. It applies to a governmental organization to the extent that the organization holds funds for the listed purposes, e.g., a public school which has an endowment fund.

A non-governmental institution which is not 'charitable' in the classic sense is not within the Act, even though it may hold funds for such purpose. If the fund is separate and distinct from the noncharitable organization, the fund itself may be an institution to which the Act applies.

[Subdivision (2)] An institutional fund is any fund held by an institution which it may invest for a long or short term. Excluded from the Act is any fund held by a trustee which is not an institution as defined in this Act, e.g., a bank or trust company, for the benefit of an institution even though the institution is the sole beneficiary.

A fund held by an institution for the benefit of any noninstitutional beneficiary is also excluded. The exclusion would apply to any fund with an individual beneficiary such as an annuity trust or a unitrust. When the interest of a noninstitutional beneficiary is terminated, the fund may then become an institutional fund.

The 'use, benefit, or purposes' of an institution broadly encompasses all of the activities permitted by its charter or other source of authority. A fund to provide scholarships for students or medical care for indigent patients is held by the school or hospital for the institution's purposes. Such a fund is not deemed to be held for the benefit of a particular student or patient as distinct from the use, benefit, or purposes of the institution, nor does the student or patient have an interest in the fund as a 'beneficiary which is not an institution.'

The particular recipient of the aid of a charitable organization is not a 'beneficiary' in the sense of a beneficiary of a private trust; only the Attorney General or similar public authority may enforce a charitable trust. 4 Scott, Law of Trusts § 348 pp. 2768-9 (3d ed. 1967); Bogert, The Law of Trusts and Trustees § 411-15 pp. 317-348 (2d ed. 1962).

[Subdivision (3)] An endowment fund is an institutional fund, or any part thereof, which is held in perpetuity or for a term and which is not wholly expendable by the institution. Implicit in the definition is the continued maintenance of all or a specified portion of the original gift. 'Endowment fund' is specially defined because it is subject to the appropriation rules of Section 2.

A restriction on use that makes a fund an endowment fund arises only from the applicable gift instrument. If a governing board has the power to spend all of a fund but, in its discretion, decides to invest the fund and spend only the yield or appreciation therefrom, the fund does not become an endowment fund under this definition, but it may be described as a 'quasi-endowment fund' or 'fund functioning as endowment.'

A fund which is not an institutional fund originally and therefore not an endowment fund may become an endowment fund at a later time. For example, a fund given to an institution to pay the grantor's widow a life income, with the remainder to the institution, would become an institutional fund on the widow's death, and, if the fund were not then wholly expendable, it would become an endowment fund at that time.

If a gift instrument provided that the institution could use the income from the fund for ten years and thereafter spend the entire principal, the fund would be an endowment fund for the ten-year period and would cease to be an endowment fund at the time it became wholly expendable.

[Subdivision (4)] The definition is meant to designate the policy making or management group which has the responsibility for the affairs of the institution or the fund.

[Subdivision (5)] 'Historic dollar value' is simply the value of the fund expressed in dollars at the time of the original contribution to the fund plus the dollar value of any subsequent gifts to the fund. Accounting entries recording realization of gains or losses to the fund have no effect upon historic dollar value. No increase or decrease in historic dollar value of the fund results from the sale of an asset held by the fund and the reinvestment of the proceeds in another asset.

If the gift instrument directs accumulation, the historic dollar value will increase with each accumulation. For example, if a donor gives an institution $300,000 and directs that the fund is to be accumulated until its value reaches $500,000, the historic dollar value will be the aggregate value of $500,000 at the time the fund becomes available for use by the institution.

If under the terms of the gift instrument a portion of an endowment fund, after passage of time or upon the happening of some event, becomes currently wholly expendable, such portion should be treated as a separate fund and the historic dollar value of the remaining endowment fund should be reduced proportionately.

[Subdivision (6)] A gift instrument establishes the terms of the gift. It may be a writing of any form, or it may result from the institution's solicitation activities, or the bylaws, or other rules of an existing fund."

Editor's Note. — Session Laws 1985, c. 98, s. 2, provided: "The Revisor of Statutes shall cause the commentary to each section of Chapter 36B to be printed in the General Statutes. The commentary shall contain the comments of the National Conference of Commissioners on Uniform State Laws, the comments of the General Statutes Commission, and shall reflect amendments made during legislative consideration of this act."

§ 36B-2. Appropriation of appreciation.

The governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the net appreciation, realized and unrealized, in the fair value of the assets of an endowment fund over the historic dollar value of the fund as is prudent under the standard established by G.S. 36B-6. This section does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 2 of the Uniform Management of Institutional Funds Act.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"This section authorizes a governing board to expend for the purposes of the fund the increase in value of an endowment fund over the fund's historic dollar value, within the limitations of Section 6 [G.S. 36B-6] which establishes a standard of business care and prudence.

The section does not apply to funds which are wholly expendable by the institution such as so-called 'quasi-endowment funds' or 'funds functioning as endowment,' nor does the section limit or reduce any spending power granted by a gift instrument or otherwise held by the institution.

Unrealized gains and losses must be combined with realized gains and losses to insure that the historic dollar value is not impaired."

§ 36B-3. Rule of construction.

G.S. 36B-2 does not apply if the applicable gift instrument indicates the donor's intention that net appreciation shall not be expended. A restriction upon the expenditure of net appreciation may not be implied from a designation of a gift as an endowment, or from a direction or authorization in the applicable gift instrument to use only "income," "interest," "dividends," or "rents, issues or profits," or "to preserve the principal intact," or a direction which contains other words of similar import. This rule of construction applies to gift instruments executed or in effect before or after July 1, 1985. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 3 of the Uniform Management of Institutional Funds Act.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"If a gift instrument expresses or otherwise indicates the donor's intention that the governing board may not appropriate the appreciation in the value of the fund, his wishes will govern.

The rule of construction of this section is based upon the assumption that a grantor who makes an outright gift to an educational, religious, charitable or other eleemosynary institution seldom makes a full statement of his intentions and that his unstated intention is usually quite different from the intention of a grantor who makes a gift to a trust for private beneficiaries. The assumption is that the grantor of a gift to an institution: (1) means to devote to the institution any return or benefit that the institution can obtain from the gift, (2) acknowledges the responsibility of the institutional management to determine the prudent use of the return or benefit over time and (3) usually regards the 'amount' of the gift as the dollars given or the dollar value of the property transferred to the institution at the time of the gift. Thus, in the case of a gift instrument which states no clear intention or merely echoes the rubrics of a private trust, the statutory rule of interpretation should apply.

Some advisers to institutions, aware of the body of private trust law, have interpreted references to 'income' or 'principal' in a gift instrument to evidence a grantor's intent that the private trust rules developed to insure equity between an income beneficiary and a remainderman should be applied to an outright gift to an institutional donee. Neither the facts of donor's intentions nor the law of trusts support such an interpretation of the meaning of gift instruments where an institution is the sole beneficiary.

This section does not purport to change existing law or rights; it simply codifies a rule of construction or interpretation or administration by articulating the presumed intent of a donor in the absence of a statement of the donor's actual intent."

§ 36B-4. Investment authority.

In addition to an investment otherwise authorized by law or by the applicable gift instrument, and without restriction to investments a fiduciary may make, the governing board, subject to any specific limitations set forth in the applicable gift instrument or in the applicable law other than law relating to investments by a fiduciary, may, subject to § 36B-6:

(1) Invest and reinvest an institutional fund in any real or personal property deemed advisable by the governing board, whether or not it produces a current return, including mortgages, stocks, bonds, debentures, and other securities of profit or nonprofit corporations, shares in or obligations of associations, partnerships, or secured obligation of individuals, and obligations of any government or subdivision or instrumentality thereof;

(2) Retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable;

(3) Include all or any part of an institutional fund in any pooled or common fund maintained by the institution; and

(4) Invest all or any part of an institutional fund in any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, investment partnerships, real estate investment trusts, or similar organizations in which funds are commingled and investment determinations are made by persons other than the governing board. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 4 of the Uniform Management of Institutional Funds Act except that the General Statutes Commission added the words "subject to G.S. 36B-6" at the end of the introductory paragraph to eliminate any question that the section might be construed to abrogate liability.

The General Assembly amended this section by adding the words "secured obligation of" before the word "individuals" in subdivision (1). The amendment limits the obligations of individuals in which the governing board may invest to secured obligations.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"Institutional investment managers suggest that a general grant of investment powers will clarify the authority of a governing board to select investments. Subsection (1) provides broad powers of investment and states that a governing board is not restricted to investments authorized to trustees.

Two other matters of investment policy have been troublesome to boards because of the absence of specific authority. Subsections (2) and (3) provide authority to hold property given by a donor even though it may not be the best investment (ordinarily in the hope of obtaining additional contributions) and to invest in common or pooled investment funds such as the Common Fund for Non-Profit Organizations. See 4 Scott, Law of Trusts § 389 pp. 2997-3000 (3d ed. 1967).

The absence of specific reference to investment for return by an institution in its own facilities does not limit the power of a governing board to make such investments under the general clause of Section 4(1), or other law or the gift instrument.

Section 6 [G.S. 36B-6] establishes the standard of care and prudence under which the investment authority is exercised."

§ 36B-5. Delegation of investment management.

Except as otherwise provided by the applicable gift instrument or by applicable law relating to governmental institutions or funds, the governing board may:

(1) Delegate to its committees, officers or employees of the institution or the fund, or agents, including investment counsel, the authority to act in place of the board in investment and reinvestment of institutional funds;

(2) Contract with independent investment advisors, investment counsel or managers, banks, or trust companies, so to act; and

(3) Authorize the payment of reasonable compensation for investment advisory or management services. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 5 of the Uniform Management of Institutional Funds Act except that the General Assembly added the word "reasonable" before the word "compensation" in subdivision (3). The amendment limits the payment of compensation by the governing board for investment advisory or management services to reasonable compensation.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"Questions have arisen about the power of a governing board to delegate investment decisions. In the absence of authority, some boards have tried to follow the nondelegation principles applicable to trustees. Governing boards do, in fact, delegate investment authority, sometimes with rather cumbersome procedures to produce a record of apparent decisions by the boards.

This section clarifies the authority to delegate investment management and to purchase investment advisory and management services. Responsibility for investment policy and selection of competent agents remains with the board under the Section 6 standard of business care and prudence."

§ 36B-6. Standard of conduct.

In the administration of the powers to appropriate net appreciation, to make and retain investments, and to delegate investment management of institutional funds, members of a governing board shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision. In so doing they shall consider long- and short-term needs of the institution in carrying out its educational, religious, charitable, or other eleemosynary purposes, its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 6 of the Uniform Management of Institutional Funds Act except that the General Assembly added the word "net" before the word "appreciation" in the first sentence of the section. The amendment changes the reference to appropriation of appreciation to appropriation of net appreciation in the statement of the required standard of conduct.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"The section establishes a standard of care and prudence for a member of a governing board. The standard is generally comparable to that of a director of a business corporation rather than that of a private trustee, but it is cast in terms of the duties and responsibilities of a manager of a nonprofit institution.

Officers of a corporation owe a duty of care and loyalty to the corporation, and the more intimate the knowledge of the affairs of the corporation the higher the standard of care. Directors are obligated to act in the utmost good faith and to exercise ordinary business care and prudence in all matters affecting the management of the corporation. This is a proper standard for the managers of a nonprofit institution, whether or not it is incorporated.

The standard of Section 6 was derived in part from Proposed Treasury Regulations § 53.4944-1(a)(2) dealing with the investment responsibility of managers of private foundations.

The standard requires a member of a governing board to weigh the needs of today against those of the future."

§ 36B-7. Release of restrictions on use or investment.

(a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(b) If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the Superior Court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The Attorney General shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund.

(c) A release under this section may not allow a fund to be used for purposes other than the educational, religious, charitable, or other eleemosynary purposes of the institution affected.

(d) This section does not limit the application of G.S. 36A-53 or of the doctrine of cy pres. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 7 of the Uniform Management of Institutional Funds Act except that the General Statutes Commission added the words "of G.S. 36A-53 or" in subsection (d) to make it clear that the Act does not purport to limit the application of the Charitable Trusts Administration Act.

The Official Comment of the National Conference of Commissioners on Uniform State Laws states:

"One of the difficulty problems of fund management involves gifts restricted to uses which cannot be feasibly administered or to investments which are no longer available or productive. There should be an expeditious way to make necessary adjustments when the restrictions no longer serve the original purpose. Cy pres has not been a satisfactory answer and is reluctantly applied in some states. See Restatement of Trusts (2d), § 381, 399; 4 Scott, Law of Trusts § 399 p. 3084, § 399.4 pp. 3119 et seq. (3d ed. 1967).

This section permits a release of limitations that imperil efficient administration of a fund or prevent sound investment management if the governing board can secure the approval of the donor or the appropriate court.

Although the donor has no property interest in a fund after the gift, nonetheless if it is the donor's limitation that controls the governing board and he or she agrees that the restriction need not apply, the board should be free of the burden. See Restatement of Trusts (2d) § 367. Scott suggests that in minor matters, the consent of the settlor may be effective to remove restrictions upon the trustees in the administration of a charitable trust. 4 Scott, § 367.3 p. 2846 (3d ed. 1967).

If the donor is unable to consent or cannot be identified, the appropriate court may upon application of a governing board release a limitation which is shown to be obsolete, inappropriate or impracticable.

This section authorizes only a release of a limitation. Thus, if a fund were established to provide scholarships for students named Brown from Brown County, Iowa, a donor might acquiesce in a reduction of the limitation to enable the institution to offer scholarships to students from Brown County who are not named Brown, or to students from other counties in Iowa or to students from other states, or he could acquiesce in the release of the restriction to scholarships so that the fund could be used for the general educational purposes of the school.

Subsection (d) makes it clear that the Act does not purport to limit the established doctrine of cy pres. A liberalization of, addition to, or substitute for cy pres is not without respectable support. Professor Kenneth Karst in 'The Efficiency of the Charitable Dollar: An Unfilled State Responsibility,' 73 Harv. L. Rev. 433 (1960) suggested that the doctrine of cy pres be expanded to permit the courts to redirect charitable grants if the purpose had become 'obsolete, or useless, or prejudicial to the public welfare, or are insignificant in comparison with the magnitude of the endowment ...' quoting from the Nathan Report (of the British Committee on the Law and Practice Relating to Charitable Trusts, Cmd. 8710, 1952) quoting the Scotland Education Act 1946, 9-10 Geo. 6, ch. 72 § 119(b). The Uniform Act provision is far less broad; it applies only to the release of restrictions on the gift under limited circumstances.

New England courts apply a rather strict doctrine of separation of powers to deny legislative encroachment on judicial cy pres. The Act is compatible with the New England cases because the final decision is in the courts. See City of Hartford v. Larrabee Fund Association, 161 Conn. 312, 288 A. 2d 71 (1971); Opinion of Justices, 101 N. H. 531, 133 A. 2d 792 (1957).

No federal tax problems for the donor are anticipated by permitting release of a restriction. The donor has no right to enforce the restriction, no interest in the fund and no power to change the eleemosynary beneficiary of the fund. He may only acquiesce in a lessening of a restriction already in effect."

§ 36B-8. Conflict with other law.

To the extent that the provisions of this Chapter are inconsistent with the provisions of either Chapter 36C or Chapter 55A, the provisions of this Chapter shall control. The provisions of this Chapter shall not apply to the University of North Carolina. (1985, c. 98, s. 1; 2007-106, s. 1.3.)

COMMENTARY

This section was added by the General Statutes Commission to establish that the Uniform Management of Institutional Funds Act controls in situations where either Chapter 36A, Trusts and Trustees, or Chapter 55A, Nonprofit Corporation Act, overlaps with its provisions. This section also provides that the Act does not apply to The University of North Carolina because the endowment fund of the University is governed by the provisions of G.S. 116-36.

Editor's Note. — Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 1.3, effective October 1, 2007, substituted "36C" for "36A" in the first sentence of the section. See Editor's note for applicability.

§ 36B-9. Uniformity of application and construction.

This Chapter shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this Chapter among those states which enact it. (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 9 of the Uniform Management of Institutional Funds Act.

§ 36B-10. Short title.

This Chapter may be cited as the "Uniform Management of Institutional Funds Act." (1985, c. 98, s. 1.)

COMMENTARY

This section is identical to Section 10 of the Uniform Management of Institutional Funds Act.

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ARTICLE 1.

General Provisions and Definitions.

GENERAL COMMENT

The Uniform Trust Code is primarily a default statute. Most of the Code's provisions can be overridden in the terms of the trust. The provisions not subject to override are scheduled in Section 105(b). These include the duty of a trustee to act in good faith and with regard to the purposes of the trust, public policy exceptions to enforcement of spendthrift provisions, the requirements for creating a trust, and the authority of the court to modify or terminate a trust on specified grounds.

The remainder of the article specifies the scope of the Code (Section 102), provides definitions (Section 103), and collects provisions of importance not amenable to codification elsewhere in the Uniform Trust Code. Sections 106 and 107 focus on the sources of law that will govern a trust. Section 106 clarifies that despite the Code's comprehensive scope, not all aspects of the law of trusts have been codified. The Uniform Trust Code is supplemented by the common law of trusts and principles of equity. Section 107 addresses selection of the jurisdiction or jurisdictions whose laws will govern the trust. A settlor, absent overriding public policy concerns, is free to select the law that will determine the meaning and effect of a trust's terms.

Changing a trust's principal place of administration is sometimes desirable, particularly to lower a trust's state income tax. Such transfers are authorized in Section 108. The trustee, following notice to the "qualified beneficiaries," defined in Section 103(12), may without approval of court transfer the principal place of administration to another State or country if a qualified beneficiary does not object.... The settlor, if minimum contacts are present, may also designate the trust's principal place of administration.

Sections 104 and 109 through 111 address procedural issues. Section 104 specifies when persons, particularly persons who work in organizations, are deemed to have acquired knowledge of a fact. Section 109 specifies the methods for giving notice and excludes from the Code's notice requirements persons whose identity or location is unknown and not reasonably ascertainable. ...

Section 111 ratifies the use of nonjudicial settlement agreements. While the judicial settlement procedures may be used in all court proceedings relating to the trust, the nonjudicial settlement procedures will not always be available. The terms of the trust may direct that the procedures not be used, or settlors may negate or modify them by specifying their own methods for obtaining consents. Also, a nonjudicial settlement may include only terms and conditions a court could properly approve.

The Uniform Trust Code does not prescribe the rules of construction to be applied to trusts created under the Code. The Code instead recognizes that enacting jurisdictions are likely to take a diversity of approaches, just as they have with respect to the rules of construction applicable to wills. Section 112 accommodates this variation by providing that the State's specific rules on construction of wills, whatever they may be, also apply to the construction of trusts.

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§ 36C-1-101. Short title.

This Chapter may be cited as the North Carolina Uniform Trust Code. (2005-192, s. 2.)

Editor's Note. — Where appropriate, the historical citations to sections in repealed Chapter 36A, covering the same subject matter as this Chapter, have been added to corresponding sections in this Chapter 36C.

Session Laws 2005-192, which enacted Chapter 36C, in s. 6, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Effective Date and Applicability. — Session Laws 2005-192, which enacted Chapter 36C, in s. 7(a) provides: "Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

"Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded."

Official Comment on Effective Date and Applicability. — The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code Section 8 101.

North Carolina Comment on Effective Date and Applicability. — The drafters modified the provisions of the Uniform Trust Code relating to its application to trust instruments executed before its effective date by adding the phrase "or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary" to the end of the first sentence of the second paragraph. Although this Chapter is intended to have broad application, the drafters concluded that a rule of construction or presumption provided in this Chapter should not be applied to a trust instrument executed before the effective date of this Chapter if the application of such rule or presumption would impair the substantial rights of a beneficiary of a trust established under such a trust instrument.

§ 36C-1-102. Scope.

This Chapter applies to any express trust, private or charitable, with additions to the trust, wherever and however created. The term "express trust" includes both testamentary and inter vivos trusts, regardless of whether the trustee is required to account to the clerk of superior court. This Chapter also applies to any trust created for or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. This Chapter does not apply to constructive trusts, resulting trusts, conservatorships, estates, trust accounts as defined in G.S. 53-146.2, 54-109.57, 54B-130, and 54C-166, trust funds subject to G.S. 90-210.61, custodial arrangements under Chapter 33A of the General Statutes and Chapter 33B of the General Statutes, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, or any arrangement under which a person is nominee or escrowee for another. (2005-192, s. 2.)

OFFICIAL COMMENT

The Uniform Trust Code, while comprehensive, applies only to express trusts. Excluded from the Code's coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law. For the requirements for creating an express trust and the methods by which express trusts are created, see Sections 401-402. The Code does not attempt to distinguish express trusts from other legal relationships with respect to property, such as agencies and contracts for the benefit of third parties. For the distinctions, see Restatement (Third) of Trusts Sections 2, 5 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 2, 5-16C (1959).

The Uniform Trust Code is directed primarily at trusts that arise in an estate planning or other donative context, but express trusts can arise in other contexts. For example, a trust created pursuant to a divorce action would be included, even though such a trust is not donative but is created pursuant to a bargained-for exchange. Commercial trusts come in numerous forms, including trusts created pursuant to a state business trust act and trusts created to administer specified funds, such as to pay a pension or to manage pooled investments. Commercial trusts are often subject to special-purpose legislation and case law, which in some respects displace the usual rules stated in this Code. *See* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165 (1997).

Express trusts also may be created by means of court judgment or decree. Examples include trusts created to hold the proceeds of personal injury recoveries and trusts created to hold the assets of a protected person in a conservatorship proceeding. *See, e.g.*, Uniform Probate Code Section 5-411(a)(4).

NORTH CAROLINA COMMENT

This section modifies the Uniform Trust Code, which provides that the Code applies to "express trusts," by bringing forward the provisions of former G.S. 36A-22.1(5) of the Trust Administration Act which give specific examples of what is and is not included within the term "express trusts". The Uniform Trust Code did not list any such examples.

§ 36C-1-103. Definitions.

The following definitions apply in this Chapter:

(1) Action. — When applicable to an act of a trustee, includes a failure to act.

(2) Ascertainable standard. — A standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.

(3) Beneficiary. — A person who:

  - a. Has a present or future beneficial interest in a trust, vested or contingent, including the owner of an interest by assignment or transfer; or
  - b. In a capacity other than that of trustee, holds a power of appointment over trust property.
- (4) Charitable trust. — A trust, including a split-interest trust as described in section 4947 of the Internal Revenue Code, created for a charitable purpose described in G.S. 36C-4-405(a).
- (5) Environmental law. — A federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.
- (6) General guardian. — As defined in G.S. 35A-1202(7).
- (7) Guardian of the estate. — As defined in G.S. 35A-1202(9).
- (8) Guardian of the person. — As defined in G.S. 35A-1202(10).
- (9) Interests of the beneficiaries. — The beneficial interests provided in the terms of the trust.
- (10) Internal Revenue Code. — The Internal Revenue Code of 1986, as amended from time to time. Each reference to a provision of the Internal Revenue Code shall include any successor to that provision.
- (11) Jurisdiction. — When applicable to a geographic area, includes a state or country.
- (12) Person. — An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.
- (13) Power of withdrawal. — A presently exercisable general power of appointment other than a power:
  - a. Exercisable by a trustee and limited by an ascertainable standard; or
  - b. Exercisable by another person only upon consent of the trustee or a person holding an adverse interest.
- (13a) Principal place of administration. — The trustee's usual place of business where the records pertaining to the trust are kept or the trustee's residence if the trustee has no usual place of business. In the case of cotrustees, the principal place of administration is one of the following:
  - a. The usual place of business of the corporate trustee if there is a corporate cotrustee.
  - b. The usual place of business or residence of any of the cotrustees if there is no corporate cotrustee.
- (14) Property. — Anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein.
- (15) Qualified beneficiary. — A living beneficiary to whom, on the date the beneficiary's qualification is determined, any of the following apply:
  - a. Is a distributee or permissible distributee of trust income or principal.
  - b. Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in sub-subdivision a. of this subdivision terminated on that date without causing the trust to terminate.
  - c. Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.
- (16) Revocable. — When applicable to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.
- (17) Settlor. — A person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes

property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

(18) Spendthrift provision. — A term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.

(19) State. — A state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(20) Terms of a trust. — The manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or established in a judicial proceeding.

(21) Trust instrument. — An instrument executed by the settlor that contains terms of the trust, including any amendments to the instrument, and any modifications permitted by court order.

(22) Trustee. — Includes an original, additional, and successor trustee, and a cotrustee, whether or not appointed or confirmed by a court. The term does not include trustees in mortgages and deeds of trusts. (2001-413, s. 1; 2005-192, s. 2; 2007-106, s. 2.)

OFFICIAL COMMENT

A definition of "action" (paragraph (1)) is included for drafting convenience, to avoid having to clarify in the numerous places in the Uniform Trust Code where reference is made to an "action" by the trustee that the term includes a failure to act.

The definition of "ascertainable standard" (paragraph (2)) was added to the Code by a 2004 amendment. The term was previously used only in and defined in Section 814. Other 2004 amendments add the term to Sections 103(11) and 504, necessitating the need to move the definition to the list of defined terms in Section 103 and make it applicable to the entire Code.

"Beneficiary" . . . refers only to a beneficiary of a trust as defined in the Uniform Trust Code. In addition to living and ascertained individuals, beneficiaries may be unborn or unascertained. Pursuant to Section 402(b), a trust is valid only if a beneficiary can be ascertained now or in the future. The term "beneficiary" includes not only beneficiaries who received their interests under the terms of the trust but also beneficiaries who received their interests by other means, including by assignment, exercise of a power of appointment, resulting trust upon the failure of an interest, gap in a disposition, operation of an antilapse statute upon the predecease of a named beneficiary, or upon termination of the trust. The fact that a person incidentally benefits from the trust does not mean that the person is a beneficiary. For example, neither a trustee nor persons hired by the trustee become beneficiaries merely because they receive compensation from the trust. *See* Restatement (Third) of Trusts Section 48 cmt. c (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 126 cmt. c (1959).

While the holder of a power of appointment is not considered a trust beneficiary under the common law of trusts, holders of powers are classified as beneficiaries under the Uniform Trust Code. Holders of powers are included on the assumption that their interests are significant enough that they should be afforded the rights of beneficiaries. A power of appointment as used in state trust law and this Code is as defined in state property law and not federal tax law although there is considerable overlap between the two definitions.

A power of appointment is authority to designate the recipients of beneficial interests in property. *See* Restatement (Second) of Property: Donative Transfers Section 11.1 (1986). A power is either general or nongeneral and either presently exercisable or not presently exercisable. A general power of appointment is a power exercisable in favor of the holder of the power, the power holder's creditors, the power holder's estate, or the creditors of the power holder's estate. *See* Restatement (Second) of Property: Donative Transfers Section 11.4 (1986). All other powers are nongeneral. A power is presently exercisable if the power holder can currently create an interest, present or future, in an object of the power. A power of appointment is not presently exercisable if exercisable only by the power holder's will or if its exercise is not effective for a specified period of time or until occurrence of some event. *See* Restatement (Second) of Property: Donative

Transfers Section 11.5 (1986). Powers of appointment may be held in either a fiduciary or nonfiduciary capacity. The definition of "beneficiary" excludes powers held by a trustee but not powers held by others in a fiduciary capacity.

While all categories of powers of appointment are included within the definition of "beneficiary," the Uniform Trust Code elsewhere makes distinctions among types of powers. Under Section 302, the holder of a testamentary general power of appointment may represent and bind persons whose interests are subject to the power. A "power of withdrawal" ... is defined as a presently exercisable general power of appointment other than a power exercisable by a trustee and limited by an ascertainable standard, or a power which is exercisable by another person only upon consent of the trustee or a person holding an adverse interest. The exception for a power exercisable by a trustee that is limited by an ascertainable standard was added in 2004. For a discussion of this amendment, see the comment on the 2004 Amendment to Section 504, which made a related change.

The definition of "beneficiary" includes only those who hold beneficial interests in the trust. Because a charitable trust is not created to benefit ascertainable beneficiaries but to benefit the community at large (*see* Section 405(a)), persons receiving distributions from a charitable trust are not beneficiaries as that term is defined in this Code. However, pursuant to Section 110 ..., also granted rights of a qualified beneficiary under the Code are charitable organizations expressly designated to receive distributions under the terms of a charitable trust but only if their beneficial interests are sufficient to satisfy the definition of qualified beneficiary for a noncharitable trust.

The Uniform Trust Code leaves certain issues concerning beneficiaries to the common law. Any person with capacity to take and hold legal title to intended trust property has capacity to be a beneficiary. *See* Restatement (Third) of Trusts Section 43 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 116-119 (1959). Except as limited by public policy, the extent of a beneficiary's interest is determined solely by the settlor's intent. *See* Restatement (Third) of Trusts Section 49 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 127-128 (1959). While most beneficial interests terminate upon a beneficiary's death, the interest of a beneficiary may devolve by will or intestate succession the same as a corresponding legal interest. *See* Restatement (Third) of Trusts Section 55(1) (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 140, 142 (1959).

...The great majority of the Code's provisions apply to both charitable and noncharitable trusts without distinction. The distinctions between the two types of trusts are found in the requirements relating to trust creation and modification. Pursuant to Sections 405 and 413, a charitable trust must have a charitable purpose and charitable trusts may be modified or terminated under the doctrine of cy pres. Also, Section 411 allows a noncharitable trust to in certain instances be terminated by its beneficiaries while charitable trusts do not have beneficiaries in the usual sense...

...

To encourage trustees to accept and administer trusts containing real property, the Uniform Trust Code contains several provisions designed to limit exposure to possible liability for violation of "environmental law" ... Section 701(c)(2) authorizes a nominated trustee to investigate trust property to determine potential liability for violation of environmental law or other law without accepting the trusteeship. Section 816(13) grants a trustee comprehensive and detailed powers to deal with property involving environmental risks. Section 1010(b) immunizes a trustee from personal liability for violation of environmental law arising from the ownership and control of trust property.

...

The phrase "interests of the beneficiaries" ... is used with some frequency in the Uniform Trust Code. The definition clarifies that the interests are as provided in the terms of the trust and not as determined by the beneficiaries. ... Section 706(b) conditions certain of the grounds for removing a trustee on the court's finding that removal of the trustee will best serve the interests of the beneficiaries. Section 801 requires the trustee to administer the trust in the interests of the beneficiaries, and Section 802 makes clear that a trustee may not place its own interests above those of the beneficiaries. Section 808(d) requires the holder of a power to direct who is subject to a fiduciary obligation to act with regard to the interests of the beneficiaries. Section 1002(b) may impose greater liability on a cotrustee who commits a breach of trust with reckless indifference to the interests of the beneficiaries. Section 1008 invalidates an exculpatory term to the extent it relieves a trustee of liability for breach of trust committed with reckless indifference to the interests of the beneficiaries.

"Jurisdiction" ..., when used with reference to a geographic area, includes a state or country but is not necessarily so limited. Its precise scope will depend on the context in which it is used. "Jurisdiction" is used in Sections 107 and 403 to refer to the place whose law will govern the trust. The term is used in Section 108 to refer to the trust's principal place of administration. The term is used in Section 816 to refer to the place where the trustee may appoint an ancillary trustee and to the place in whose courts the trustee can bring and defend legal proceedings.

The definition of "property" ... is intended to be as expansive as possible and to encompass anything that may be the subject of ownership. Included are choses in action, claims, and interests created by beneficiary designations under policies of insurance, financial instruments, and deferred compensation and other retirement arrangements, whether revocable or irrevocable. Any such property interest is sufficient to support creation of a trust. *See* Section 401 comment.

Due to the difficulty of identifying beneficiaries whose interests are remote and contingent, and because such beneficiaries are not likely to have much interest in the day-to-day affairs of the trust, the Uniform Trust Code uses the concept of "qualified beneficiary" ... to limit the class of beneficiaries to whom certain notices must be given or consents received. The definition of qualified beneficiaries is used in Section 705 to define the class to whom notice must be given of a trustee resignation. The term is used in Section 813 to define the class to be kept informed of the trust's administration. Section 417 requires that notice be given to the qualified beneficiaries before a trust may be combined or divided. Actions which may be accomplished by the consent of the qualified beneficiaries include the appointment of a successor trustee as provided in Section 704. Prior to transferring a trust's principal place of administration, Section 108 ... requires that the trustee give at least 60 days notice to the qualified beneficiaries.

The qualified beneficiaries consist of the beneficiaries currently eligible to receive a distribution from the trust together with those who might be termed the first-line remaindermen. These are the beneficiaries who would become eligible to receive distributions were the event triggering the termination of a beneficiary's interest or of the trust itself to occur on the date in question. Such a terminating event will typically be the death or deaths of the beneficiaries currently eligible to receive the income. Should a qualified beneficiary be a minor, incapacitated, or unknown, or a beneficiary whose identity or location is not reasonably ascertainable, the representation and virtual representation principles of Article 3 may be employed, including the possible appointment by the court of a representative to represent the beneficiary's interest.

The qualified beneficiaries who take upon termination of the beneficiary's interest or of the trust can include takers in default of the exercise of a power of appointment. The term can also include the persons entitled to receive the trust property pursuant to the exercise of a power of appointment. Because the exercise of a testamentary power of appointment is not effective until the testator's death and probate of the will, the qualified beneficiaries do not include appointees under the will of a living person. Nor would the term include the objects of an unexercised inter vivos power.

Charitable trusts and trusts for a valid noncharitable purpose do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. Section 110 expands the definition of qualified beneficiaries to encompass this wider group. Section 110 ... grants the rights of qualified beneficiaries to charitable organizations expressly designated under the terms of a charitable trust and whose ... interests are sufficient to satisfy the definition of qualified beneficiary for a noncharitable trust. Section 110(c) also grants the rights of qualified beneficiaries to a person appointed by the terms of the trust or by the court to enforce a trust created for an animal or other noncharitable purpose. Section 110 ... grants the rights of qualified beneficiaries to a person appointed by the terms of the trust or by the court to enforce a trust created for an animal or other noncharitable purpose...

The definition of "revocable" ... clarifies that revocable trusts include only trusts whose revocation is substantially within the settlor's control. The fact that the settlor becomes incapacitated does not convert a revocable trust into an irrevocable trust. The trust remains revocable until the settlor's death or the power of revocation is released. The consequences of classifying a trust as revocable are many. The Uniform Trust Code contains provisions relating to liability of a revocable trust for payment of the settlor's debts (Section 505), the standard of capacity for creating a revocable trust (Section 601), the procedure for revocation (Section 602), the subjecting of the beneficiaries' rights to the settlor's control (Section 603), the period for contesting a revocable trust (Section 604), the power of the settlor of a revocable trust to direct the actions of a trustee (Section 808(a)), ... and the liability of a trustee of a revocable trust for the obligations of a partnership of which the trustee is a general partner (Section 1011...).

... [T]he definition of "power of withdrawal" ..., and "revocable" ... are similar. Both exclude individuals who can exercise their power only with the consent of the trustee or person having an adverse interest although the definition of "power of withdrawal" excludes powers subject to an ascertainable standard, a limitation which is not present in the definition of "revocable."

The definition of "settlor" ... refers to the person who creates, or contributes property to, a trust, whether by will, self-declaration, transfer of property to another person as trustee, or exercise of a power of appointment. For the requirements for creating a trust, see Section 401. Determining the identity of the "settlor" is usually not an issue. The same person will both sign the trust instrument and fund the trust. Ascertaining the identity of the settlor becomes more difficult when more than one person signs the trust instrument or funds the trust. The fact that a person is designated as the "settlor" by the terms of the trust is not necessarily determinative. For example, the person who executes the trust instrument may be acting as the agent for the person who will be funding the trust. In that case, the person funding the trust, and not the person signing the trust instrument, will be the settlor. Should more than one person contribute to a trust, all of the contributors will ordinarily be treated as settlors in proportion to their respective contributions, regardless of which one signed the trust instrument. *See* Section 602(b).

In the case of a revocable trust employed as a will substitute, gifts to the trust's creator are sometimes made by placing the gifted property directly into the trust. To recognize that such a donor is not intended to be treated as a settlor, the definition of "settlor" excludes a contributor to a trust that is revocable by another person or over which another person has a power of withdrawal. Thus, a parent who contributes to a child's revocable trust would not be treated as one of the trust's settlors. The definition of settlor would treat the child as the sole settlor of the trust to the extent of the child's proportionate contribution...

Ascertaining the identity of the settlor is important for a variety of reasons. It is important for determining rights in revocable trusts. *See* Sections 505(a)(1), (3) (creditor claims against settlor of revocable trust), 602 (revocation or modification of revocable trust), and 604 (limitation on contest of revocable trust). It is also important for determining rights of creditors in irrevocable trusts. *See* Section 505(a)(2) (creditors of settlor can reach maximum amount trustee can distribute to settlor). While the settlor of an irrevocable trust traditionally has no continuing rights over the trust except for the right under Section 411 to terminate the trust with the beneficiaries' consent, the Uniform Trust Code also authorizes the settlor of an irrevocable trust to petition for removal of the trustee and to enforce or modify a charitable trust. *See* Sections ... 413 (doctrine of cy pres)... and 706 (removal of trustee).

"Spendthrift provision" ... means a term of a trust which restrains the transfer of a beneficiary's interest, whether by a voluntary act of the beneficiary or by an action of a beneficiary's creditor or assignee, which at least as far as the beneficiary is concerned, would be involuntary. A spendthrift provision is valid under the Uniform Trust Code only if it restrains both voluntary and involuntary transfer. For a discussion of this requirement and the effect of a spendthrift provision in general, see Section 502. The insertion of a spendthrift provision in the terms of the trust may also constitute a material purpose sufficient to prevent termination of the trust by agreement of the beneficiaries under Section 411, although the Code does not presume this result.

"Terms of a trust" ... is a defined term used frequently in the Uniform Trust Code. While the wording of a written trust instrument is almost always the most important determinant of a trust's terms, the definition is not so limited. Oral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is to be administered, and, to the extent the settlor was otherwise silent, rules of construction, all may have a bearing on determining a trust's meaning. *See* Restatement (Third) of Trusts Section 4 cmt. a (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 4 cmt. a (1959). If a trust established by order of court is to be administered as an express trust, the terms of the trust are determined from the court order as interpreted in light of the general rules governing interpretation of judgments. *See* Restatement (Third) of Trusts Section 4 cmt. f (Tentative Draft No. 1, approved 1996).

...

... Section 403 provides that a trust is validly created if created in compliance with the law of the place where the trust instrument was executed. Pursuant to Section 604(a)(2), the contest period for a revocable trust can be shortened by providing the potential contestant with a copy of the trust instrument plus other information... To allow a trustee to administer a trust with some dispatch without concern about liability if the terms of a trust instrument are contradicted by evidence outside of the instrument, Section 1006 protects a trustee from liability to the extent a breach of trust resulted from reasonable reliance on those terms. Section 1013 allows a trustee to substitute a certification of trust in lieu of providing a third person with a copy of the trust instrument. Section 1106(a)(4) provides that unless there is a clear indication of a contrary intent, rules of construction and presumptions provided in the Uniform Trust Code apply to trust instruments executed before the effective date of the Code.

The definition of "trustee" ... includes not only the original trustee but also an additional and successor trustee as well as a cotrustee. Because the definition of trustee includes trustees of all types, any trustee, whether original or succeeding, single or cotrustee, has the powers of a trustee and is subject to the duties imposed on trustees under the Uniform Trust Code. Any natural person, including a settlor or beneficiary, has capacity to act as trustee if the person has capacity to hold title to property free of trust. *See* Restatement (Third) of Trusts Section 32 (Tentative Draft No. 2, approved 1999);

Restatement (Second) of Trusts Section 89 (1959). State banking statutes normally impose additional requirements before a corporation can act as trustee.

2004 Amendment. Section 103(2) adds a definition of "ascertainable standard." The term was formerly used only in Section 814. Other 2004 amendments add the term to Sections 103 ... and 504. The amendment moves into this section the definition previously found in Section 814, thereby making it apply generally throughout the Code...

... [T]he definition of "power of withdrawal." is amended to exclude a possible inference that the term includes a discretionary power in a trustee to make distributions for the trustee's own benefit which is limited by an ascertainable standard. For an explanation of the reason for this amendment, see the comment to the 2004 amendment to Section 504, which addresses a related issue.

Clarifying language is added to Section 103 ..., the definition of "qualified beneficiary," to make clear that the second category in the definition refers to termination of an interest not associated with termination of the trust.

NORTH CAROLINA COMMENT

The definitions provided in this section of the Uniform Trust Code were modified in the following respects:

(i) In paragraph (3) the words "including the owner of an interest by assignment or transferor" was added to the end of subparagraph a. to conform the definition of "beneficiary" to that contained in former G.S. 36A-22.1(1)(i).

(ii) In paragraph (4) the definition of a "charitable trust" was modified to substitute for the words "or portion of a trust" the words "including a split-interest trust as described in Section 4947 of the Internal Revenue Code". As revised a charitable trust is intended to include only wholly charitable trusts and split-interest trusts, such as charitable remainder trusts and charitable lead trusts.

(iii) The provisions of the Uniform Trust Code defining "conservator" and "guardian" were omitted. In their place paragraph (6) defining "general guardian," paragraph (7) defining "guardian of the estate," and paragraph (8) defining "guardian of the person" were added to the section and given the same definitions that they have in Chapter 35A of the General Statutes. In the North Carolina context, references in the Official Comments to "conservator" should be read to apply to a general guardian or guardian of the estate, and references to "guardian" should be read to apply to a guardian of the person.

(iv) Paragraph (10) adds the definition of "Internal Revenue Code" to this section.

(v) In paragraph (20) the definition of "terms of a trust" was modified in order to exclude from the definition such manifestation of the settlor's intent as may be established "by other evidence that would be admissible" in a judicial proceeding. As revised the phrase "terms of a trust" includes only actual provisions of the trust agreement and any provisions established in a judicial proceeding. Although the drafters agreed with the statement in the Official Comment that "[o]ral statements, the situation of the beneficiaries, the purposes of the trust, the circumstances under which the trust is being administered ... all may have a bearing in determining the trust's meaning", the drafters concluded that such indications of the trust's meaning should not result in changes or additions to the terms of the trust until the court so ruled in a judicial proceeding.

(vi) In paragraph (21) the words "and any modifications permitted by court order" were added to the definition of "trust instrument" in order to clarify that any language added to or deleted from the trust instrument, or otherwise modified pursuant to court order, becomes part of the trust instrument.

(vii) In paragraph (22) the definition of "trustee" was modified to clarify that cotrustees are included whether or not appointed or confirmed by a court and to bring forward the language of former G.S. 36A-22.1(6) regarding the exclusion of trustees in mortgages and deeds of trust.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section is amended to add paragraph (13a) defining "principal place of administration". That definition was brought forward from former G.S. 36C-2-204(3) relating to venue to make it applicable to other references to "principal place of administration" in Chapter 36C.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing

explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 2, effective October 1, 2007, made minor stylistic and punctuation changes throughout the section; added "The following definitions apply" in the introductory paragraph; and added subdivision (13a). See Editor's note for applicability.

CASE NOTES

Cited in In re Testamentary Trust of Charnock, 158 N.C. App. 35, 579 S.E.2d 887, 2003 N.C. App. LEXIS 938 (2003), aff'd, 358 N.C. 523, 597 S.E.2d 706 (2004).

§ 36C-1-104. Knowledge.

(a) Subject to subsection (b) of this section, a person has knowledge of a fact if the person:

(1) Has actual knowledge of it;

(2) Has received notice or notification of it; or

(3) From all the facts and circumstances known to the person at the time in question, has reason to know it.

(b) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time the information was received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the employee's regular duties or the employee knows a matter involving the trust would be materially affected by the information. (2005-192, s. 2.)

OFFICIAL COMMENT

This section specifies when a person is deemed to know a fact. Subsection (a) states the general rule. Subsection (b) provides a special rule dealing with notice to organizations. Pursuant to subsection (a), a fact is known to a person if the person had actual knowledge of the fact, received notification of it, or had reason to know of the fact's existence based on all of the circumstances and other facts known to the person at the time. Under subsection (b), notice to an organization is not necessarily achieved by giving notice to a branch office. Nor does the organization necessarily acquire knowledge at the moment the notice arrives in the organization's mailroom. Rather, the organization has notice or knowledge of a fact only when the information is received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention had the organization exercised reasonable diligence.

"Know" is used in its defined sense in Sections 109 (methods and waiver of notice), 305 (appointment of representative), 604(b) (limitation on contest of revocable trust), 812 (collecting trust property), 1009 (nonliability of trustee upon beneficiary's consent, release, or ratification), and 1012 (protection of person dealing with trustee). But as to certain actions, a person is charged with knowledge of facts the person would have discovered upon reasonable inquiry. *See* Section 1005 (limitation of action against trustee following report of trustee).

This section is based on Uniform Commercial Code Section 1-202 (2000 Annual Meeting Draft).

§ 36C-1-105. Default and mandatory rules.

(a) Except as otherwise provided in the terms of the trust, this Chapter governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(b) The terms of a trust prevail over any provision of this Chapter except:

(1) The requirements for creating a trust;

(2) The duty of a trustee to act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries;

(3) The requirement that a trust and its terms be for the benefit of its beneficiaries, and that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;

(4) The power of the court to modify or terminate a trust under G.S. 36C-4-410 through G.S. 36C-4-416;

(5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5 of this Chapter;

(6) The effect of an exculpatory term under G.S. 36C-10-1008;

(7) The rights under G.S. 36C-10-1010 through G.S. 36C-10-1013 of a person other than a trustee or beneficiary;

(8) Periods of limitation for commencing a judicial proceeding;

(9) The power of the court to take any action and exercise any jurisdiction as may be necessary in the interests of justice;

(10) The subject-matter jurisdiction of the court and venue for commencing a proceeding as provided in G.S. 36C-2-203 and G.S. 36C-2-204; and

(11) The requirement that the exercise of the powers described in G.S. 36C-6-602.1(a) shall not alter the designation of beneficiaries to receive property on the settlor's death under that settlor's existing estate plan. (2005-192, s. 2; 2007-106, s. 3.)

OFFICIAL COMMENT

Subsection (a) emphasizes that the Uniform Trust Code is primarily a default statute. While this Code provides numerous procedural rules on which a settlor may wish to rely, the settlor is generally free to override these rules and to prescribe the conditions under which the trust is to be administered. With only limited exceptions, the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary are as specified in the terms of the trust.

Subsection (b) lists the items not subject to override in the terms of the trust. Because subsection (b) refers specifically to other sections of the Code, enacting jurisdictions modifying these other sections may also need to modify subsection (b).

Subsection (b)(1) confirms that the requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. For the requirements for creating a trust, see Sections 401-409. Subsection (b) ... makes clear that the settlor may not reduce any otherwise applicable period of limitations for commencing a judicial proceeding. *See* Sections 604 (period of limitations for contesting validity of revocable trust), and 1005 (period of limitation on action for breach of trust). Similarly, a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity. Subsection (b)(2) provides that the terms may not eliminate a trustee's duty to act in good faith and in accordance with the purposes of the trust and the interests of the beneficiaries. Subsection (b)(3) provides that the terms may not eliminate the requirement that a trust and its terms must be for the benefit of the beneficiaries. Subsection (b)(3) also provides that the terms may not eliminate the requirement that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve. Subsections (b)(2)-(3) are echoed in Sections 404 (trust and its terms must be for benefit of beneficiaries; trust must have a purpose that is lawful, not contrary to public policy, and possible to achieve), 801 (trustee must administer trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries), 802(a) (trustee must administer trust solely in interests of the beneficiaries), 814 (trustee must exercise discretionary power ... in accordance with its terms and purposes and the interests of the beneficiaries), and 1008 (exculpatory term unenforceable to extent it relieves trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust and the interests of the beneficiaries).

The terms of a trust may not deny a court authority to take such action as necessary in the interests of justice. ... Additionally, should the jurisdiction adopting this Code enact the optional provisions on subject-matter jurisdiction and venue, subsection (b) ... similarly provides that such provisions cannot be altered in the terms of the trust. The power of the court to modify or terminate a trust under Sections 410 through 416 is not subject to variation in the terms of the trust. Subsection (b)(4). However, all of these Code sections involve situations which the settlor could have addressed had the settlor had sufficient foresight. These include situations where the purpose of the trust has been achieved, a mistake was made in the trust's creation, or circumstances have arisen that were not anticipated by the settlor.

...

Waiver by a settlor of the trustee's duty to keep the beneficiaries informed of the trust's administration does not otherwise affect the trustee's duties. The trustee remains accountable to the beneficiaries for the trustee's actions.

...

In conformity with traditional doctrine, the Uniform Trust Code limits the ability of a settlor to exculpate a trustee from liability for breach of trust. The limits are specified in Section 1008. Subsection (b) ... of this section provides a cross-reference...

Finally, subsection (b) ... clarifies that a settlor is not free to limit the rights of third persons, such as purchasers of trust property. Subsection (b)(5) clarifies that a settlor may not restrict the rights of a beneficiary's creditors except to the extent a ... restriction is allowed as provided in Article 5.

2001 Amendment. By amendment in 2001, subsection ...(b)(3) [was]... revised. The language in subsection (b)(3) "that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve" is new. This addition clarifies that the settlor may not waive this common law requirement, which is codified in the Code at Section 404.

...

2005 Amendment. Subsection (b)(2) is revised to make the language consistent with the corresponding duties in [Section] 801 ..., which require[s] that a trustee act in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries. Previously, subsection (b)(2) provided that the settlor could not waive the duty of a trustee to act in good faith and in accordance with the purposes of the trust. The amendment adds that also cannot waive the obligation to act in accordance with the terms of the trust and the interests of the beneficiaries.

The purpose of the amendment is to make the language consistent, not to change the substance of the section. Absent some other restriction, a settlor is always free to specify the trust's terms to which the trustee must comply. Also, "interests of the beneficiaries" is a defined term in Section 103... meaning the beneficial interests as provided in the terms of the trust, which the settlor is also free to specify.

NORTH CAROLINA COMMENT

The drafters substantially modified subsection (b) of the Uniform Trust Code by omitting the following four paragraphs of the fourteen listed in subsection (b) which describes matters known as "mandatory rules" that a settlor may not override in the terms of the trust:

(i) Paragraph (6) regarding the power of the court to require, dispense with, or modify or terminate a bond. The drafters omitted this paragraph to be consistent with the provision in G.S. 36C-7-702(a), which brings forward the provision in former G.S. 36A-31(b), that in no event shall the court require a bond where the terms of the trust direct otherwise. A beneficiary who has complaints about a trustee's administration of the trust could bring an action to remove the trustee rather than to seek to have the trustee provide bond.

(ii) Paragraph (7) regarding the power of the court to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high. This paragraph was omitted to be consistent with the omission in G.S. 36C-7-708(b) of the provisions in Section 708(b) of the Uniform Trust Code authorizing the court to adjust trustee compensation set by the terms of the trust. The drafters concluded that the settlor should have the right to compensate a trustee in whatever amount the settlor chooses regardless of whether a court would find such compensation to be unreasonably high or low.

(iii) Paragraph (8) regarding the trustee's duty under Section 813(b)(2) and (3) of the Uniform Trust Code to notify qualified beneficiaries who have reached age 25 of the existence of the trust and other matters, and paragraph (9) regarding the trustee's duty under Section 813(a) of the Uniform Trust Code to respond to the request of a qualified beneficiary for reports and other information. The drafters substantially modified Section 813(a) and (b) of the Uniform Trust Code, but the modified provisions still impose a duty on the trustee to give the beneficiary specified information upon request, a duty that can be discharged for matters disclosed in a report given to the beneficiary. *See* G.S. 36C-8-813(a) and (b) and the North Carolina Comments to that section. Whether and to what extent the settlor by the terms of the trust could prevent a beneficiary from receiving trust information was one of the more debatable issues of the Uniform Trust Code. The drafters concluded that in North Carolina the settlor should have the right to override any duty to furnish information imposed by G.S. 36C-8-813(a) and (b). Accordingly, the drafters decided not to impose a mandatory rule with respect to these provisions. This is consistent with the statement in *Taylor v. NationsBank,* 125 N.C. App. 515, 521, 481 S.E.2d 358, 362 (1997) where the court said that "trust beneficiaries are entitled to view the trust instrument from which their interest is derived" so long as that right is not waived by the settlor through "an explicit provision in the trust to the contrary".

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (b) is amended to add paragraph (11) providing that the terms of the trust may not override the rule in G.S. 36C-6-602.1(a) that the powers described in that subsection authorizing an agent under a power of attorney to exercise the settlor's powers with respect to a revocable trust cannot be exercised to alter the designation of beneficiaries to receive property on the settlor's death under that settlor's existing estate plan.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 3, effective October 1, 2007, in subsection (b), made minor stylistic and punctuation changes in subdivisions (9) and (10), and added subdivision (11). See Editor's note for applicability.

§ 36C-1-106. Common law of trusts; principles of equity.

The common law of trusts and principles of equity supplement this Chapter, except to the extent modified by this Chapter or another statute of this State. (2005-192, s. 2.)

OFFICIAL COMMENT

The Uniform Trust Code codifies those portions of the law of express trusts that are most amenable to codification. The Code is supplemented by the common law of trusts, including principles of equity. To determine the common law and principles of equity in a particular state, a court should look first to prior case law in the state and then to more general sources, such as in the Restatement of Trusts, Restatement (Third) of Property: Wills and Other Donative Transfers, and the Restatement of Restitution. The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts.

The statutory text of the Uniform Trust Code is also supplemented by these Comments, which, like the Comments to any Uniform Act, may be relied on as a guide for interpretation. *See Acierno v. Worthy Bros. Pipeline Corp.,* 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code); *Yale University v. Blumenthal,* 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act); 2 Norman Singer, Statutory Construction Section 52.05 (6th ed. 2000); Jack Davies, Legislative Law and Process in a Nutshell Section 55-4 (2d ed. 1986).

§ 36C-1-107. Governing law.

(a) The meaning and effect of the terms of a trust are determined by any of the following:

(1) The law of the jurisdiction designated in the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue.

(2) In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue.

(b) Notwithstanding subsection (a) of this section, the rights of a person other than a trustee or beneficiary are governed by G.S. 36C-10-1010 through G.S. 36C-10-1013. (2005-192, s. 2; 2007-106, s. 4.)

OFFICIAL COMMENT

This section provides rules for determining the law that will govern the meaning and effect of particular trust terms. The law to apply to determine whether a trust has been validly created is determined under Section 403.

Paragraph (1) allows a settlor to select the law that will govern the meaning and effect of the terms of the trust. The jurisdiction selected need not have any other connection to the trust. The settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime. This section does not attempt to specify the strong public policies sufficient to invalidate a settlor's choice of governing law. These public policies will vary depending upon the locale and may change over time.

Paragraph (2) provides a rule for trusts without governing law provisions - the meaning and effect of the trust's terms are to be determined by the law of the jurisdiction having the most significant relationship to the matter at issue. Factors to consider in determining the governing law include the place of the trust's creation, the location of the trust property, and the domicile of the settlor, the trustee, and the beneficiaries. *See* Restatement (Second) of Conflict of Laws Sections 270 cmt. c and 272 cmt. d (1971). Other more general factors that may be pertinent in particular cases include the relevant policies of the forum, the relevant policies of other interested jurisdictions and degree of their interest, the protection of justified expectations and certainty, and predictability and uniformity of result. *See* Restatement (Second) of Conflict of Laws Section 6 (1971). Usually, the law of the trust's principal place of administration will govern administrative matters and the law of the place having the most significant relationship to the trust's creation will govern the dispositive provisions.

This section is consistent with and was partially patterned on the Hague Convention on the Law Applicable to Trusts and on their Recognition, signed on July 1, 1985. Like this section, the Hague Convention allows the settlor to designate the governing law. Hague Convention art. 6. Absent a designation, the Convention provides that the trust is to be governed by the law of the place having the closest connection to the trust. Hague Convention art. 7. The Convention also lists particular public policies for which the forum may decide to override the choice of law that would otherwise apply. These policies are protection of minors and incapable parties, personal and proprietary effects of marriage, succession rights, transfer of title and security interests in property, protection of creditors in matters of insolvency, and, more generally, protection of third parties acting in good faith. Hague Convention art. 15.

For the authority of a settlor to designate a trust's principal place of administration, see Section 108(a).

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section is amended to add subsection (b) clarifying that even if the meaning and effect of a trust are determined by the law of another jurisdiction, the rights of a person, other than the trustee or beneficiary of the trust, who deals with the trust are governed by the provisions of Chapter 36C specified in the subsection.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 4, effective October 1, 2007, designated the former undesignated introductory paragraph as present subsection (a); added "any of the following" at the end of subsection (a); made a minor punctuation change in subdivision (a)(1); and added subsection (b). See Editor's note for applicability.

§ 36C-1-108. Principal place of administration.

(a) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, terms of a trust designating the principal place of administration are valid and controlling if:

(1) A trustee's principal place of business is located in, or a trustee is a resident of, the designated jurisdiction; or

(2) All or part of the administration occurs in the designated jurisdiction.

(b) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee may transfer the trust's principal place of administration to another jurisdiction in accordance with this subsection:

(1) If the trustee is transferring the trust's principal place of administration to another state, the trustee must provide written notice of the proposed transfer to the qualified beneficiaries of the trust not less than 60 days before initiating the transfer. If no qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice, the trustee may make the transfer. If a qualified beneficiary notifies the trustee of an objection to the proposed transfer on or before the date specified in the notice, the authority of the trustee to transfer the trust's principal place of administration in accordance with this section terminates.

(2) If the trustee is transferring the trust's principal place of administration to a jurisdiction outside of the United States, the trustee must provide written notice of the proposed transfer to the qualified beneficiaries of the trust, and the transfer cannot be made until the written consent of all the qualified beneficiaries is obtained.

(c) Anytime a trustee is required to provide a qualified beneficiary with written notice of a proposed transfer of a trust's principal place of administration, the notice of proposed transfer must include:

(1) The name of the jurisdiction to which the principal place of administration is to be transferred;

(2) The address and telephone number at the new location at which the trustee can be contacted;

(3) An explanation of the reasons for the proposed transfer;

(4) The date on which the proposed transfer is anticipated to occur; and

(5) If the proposed transfer is to another state, the date, not less than 60 days after the giving of the notice, by which the qualified beneficiary must notify the trustee of an objection to the proposed transfer.

(d) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed under G.S. 36C-7-704. (2005-192, s. 2.)

OFFICIAL COMMENT

This section prescribes rules relating to a trust's principal place of administration. Locating a trust's principal place of administration will ordinarily determine which court has primary if not exclusive jurisdiction over the trust. It may also be important for other matters, such as payment of state income tax or determining the jurisdiction whose laws will govern the trust. *See* Section 107 comment.

Because of the difficult and variable situations sometimes involved, the Uniform Trust Code does not attempt to further define principal place of administration. A trust's principal place of administration ordinarily will be the place where the trustee is located. Determining the principal place of administration becomes more difficult, however, when cotrustees are located in different states or when a single institutional trustee has trust operations in more than one state. In such cases, other factors may become relevant, including the place where the trust records are kept or trust assets held, or in the case of an institutional trustee, the place where the trust officer responsible for supervising the account is located.

A concept akin to principal place of administration is used by the Office of the Comptroller of the Currency. Reserves that national banks are required to deposit with state authorities is based on the location of the office where trust assets are primarily administered. *See* 12 C.F.R. Section 9.14(b).

Under the Uniform Trust Code, the fixing of a trust's principal place of administration will determine where the trustee and beneficiaries have consented to suit (Section 202), and the rules for locating venue within a particular state (Section 204). It may also be considered by a court in another jurisdiction in determining whether it has jurisdiction, and if so, whether it is a convenient forum.

A settlor expecting to name a trustee or cotrustees with significant contacts in more than one state may eliminate possible uncertainty about the location of the trust's principal place of administration by specifying the jurisdiction in the terms of the trust. Under subsection (a), a designation in the terms of the trust is controlling if (1) a trustee is a resident of or has its principal place of business in the designated jurisdiction, or (2) all or part of the administration occurs in the designated jurisdiction. Designating the principal place of administration should be distinguished from designating the law to determine the meaning and effect of the trust's terms, as authorized by Section 107. A settlor is free to designate one jurisdiction as the principal place of administration and another to govern the meaning and effect of the trust's provisions.

. . .

Subsections (c)-(f) provide a procedure for changing the principal place of administration to another state or country. Such changes are often beneficial. A change may be desirable to secure a lower state income tax rate, or because of relocation of the trustee or beneficiaries, the appointment of a new trustee, or a change in the location of the trust investments. The procedure for transfer specified in this section applies only in the absence of a contrary provision in the terms of the trust. *See* Section 105. To facilitate transfer in the typical case, where all concur that a transfer is either desirable or is at least not harmful, a transfer can be accomplished without court approval unless a qualified beneficiary objects. To allow the qualified beneficiaries sufficient time to review a proposed transfer, the trustee must give the qualified beneficiaries at least 60 days prior notice of the transfer. Notice must be given not only to qualified beneficiaries as defined in Section 103 ... but also to those granted the rights of qualified beneficiaries under Section 110. To assure that those receiving notice have sufficient information upon which to make a decision, minimum contents of the notice are specified. If a qualified beneficiary objects, a trustee wishing to proceed with the transfer must seek court approval.

In connection with a transfer of the principal place of administration, the trustee may transfer some or all of the trust property to a new trustee located outside of the state. The appointment of a new trustee may also be essential if the current trustee is ineligible to administer the trust in the new place. Subsection (f) clarifies that the appointment of the new trustee must comply with the provisions on appointment of successor trustees as provided in the terms of the trust or under Section 704. Absent an order of succession in the terms of the trust, Section 704(c) provides the procedure for appointment of a successor trustee of a noncharitable trust, and Section 704(d) the procedure for appointment of a successor trustee of a charitable trust.

While transfer of the principal place of administration will normally change the governing law with respect to administrative matters, a transfer does not normally alter the controlling law with respect to the validity of the trust and the construction of its dispositive provisions. *See* 5A Austin W. Scott & William F. Fratcher, The Law of Trusts Section 615 (4th ed. 1989).

NORTH CAROLINA COMMENT

Subsection (b) of the Uniform Trust Code, which provided that a trustee is under a continuing duty to administer the trust at a place appropriate to its purpose, its administration and the interest of the beneficiaries, was omitted because it would have imposed an affirmative duty on a trustee to continually monitor the place of the administration of a trust. Such a duty has not been previously recognized in North Carolina. The drafters concluded that the burden of complying with such a duty outweighed any advantage in imposing it.

Subsection (b) incorporates the provisions of subsection (c) of the Uniform Trust Code but modifies them as follows:

(i) Under subdivision (b)(1) the authority of the trustee to transfer the principal place of administration without court approval so long as no qualified beneficiary objects applies only to transfers within the jurisdiction of the United States. Subsection (c) of the Uniform Trust Code allows a trustee to transfer a trust's principal place of administration if no beneficiary objects to any jurisdiction whether within or without the United States. Subdivision (b)(1) incorporates the provisions of subsection (e) of the Uniform Trust Code to the effect that if a qualified beneficiary objects to the transfer, the authority of the trustee to transfer the trust terminates.

(ii) Under subdivision (b)(2) a trustee may transfer the principal place of administration to a jurisdiction outside of the United States without court approval only with the written consent of all of the qualified beneficiaries. Subsection (c) of the Uniform Trust Code does not make such consent a requirement - it allows such a transfer to take place if no qualified beneficiary objects to the transfer.

Subsection (b) makes an important change in North Carolina law by replacing former G.S. 36A-13 and former G.S. 36A-14 which allowed a trustee to transfer fiduciary funds out of state only after obtaining judicial consent to the transfer both in the State in which the trust is currently administered and the State in which the trust is to be subsequently administered. Judicial approval of a transfer of the place of administration is no longer required where no qualified beneficiary objects to a transfer within the United States or where all qualified beneficiaries consent to a transfer outside the United States.

The reference in the Official Comment to "Subsections (c)-(f)" should be understood to refer to "Subsections (b)-(d)" of this section, and the reference to subsection (f) should be understood to refer to subsection (d) of this section.

§ 36C-1-109. Methods and waiver of notice.

(a) Subject to subsection (d) of this section, notice to a person under this Chapter or the sending of a document to a person under this Chapter must be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document.

(1) Permissible methods of notice or methods for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed electronic message.

(2) Notice shall be deemed to be given upon the occurrence of any of the following:

a. When personally delivered by hand to the person.

b. When transmitted by facsimile.

c. When placed in the hands of a nationally recognized courier service for delivery.

d. When received by the person if sent by registered or certified United States mail, return receipt requested.

e. Three days after depositing the notice in a regularly maintained receptacle for the deposit of United States mail if sent by regular United States mail.

(3) Notice by any means other than those described in subdivision (2) of this subsection shall be deemed to be given for all purposes upon the date of actual receipt.

(b) Notice otherwise required under this Chapter, or a document otherwise required to be sent under this Chapter, need not be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(c) The person to be notified or to be sent a document may waive notice under this Chapter.

(d) Notice of a judicial proceeding must be given as provided in Article 2 of this Chapter. (2005-192, s. 2; 2007-106, s. 5.)

OFFICIAL COMMENT

Subsection (a) clarifies that notices under the Uniform Trust Code may be given by any method likely to result in its receipt by the person to be notified. The specific methods listed in the subsection are illustrative, not exhaustive. Subsection (b) relieves a trustee of responsibility for what would otherwise be an impossible task, the giving of notice to a person whose identity or location is unknown and not reasonably ascertainable by the trustee. The section does not define when a notice is deemed to have been sent or delivered or person deemed to be unknown or not reasonably ascertainable, the drafters preferring to leave this issue to the enacting jurisdiction's rules of civil procedure.

Under the Uniform Trust Code, certain actions can be taken upon unanimous consent of the beneficiaries or qualified beneficiaries. *See* Sections 411 (termination of noncharitable irrevocable trust) and 704 (appointment of successor trustee). Subsection (b) of this section only authorizes waiver of notice. A consent required from a beneficiary in order to achieve unanimity is not waived because the beneficiary is missing. But the fact a beneficiary cannot be located may be a sufficient basis for a substitute consent to be given by another person on the beneficiary's behalf under the representation principles of Article 3.

To facilitate administration, subsection (c) allows waiver of notice by the person to be notified or sent the document. Among the notices and documents to which this subsection can be applied are notice of a proposed transfer of principal place of administration (Section 108(d)) or of a trustee's report (Section 813...). This subsection also applies to notice to qualified beneficiaries of a proposed trust combination or division (Section 417), of a temporary assumption of duties without accepting trusteeship (Section 701(c)(1)), and of a trustee's resignation (Section 705(a)(1)).

Notices under the Uniform Trust Code are nonjudicial. Pursuant to subsection (d), notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (a) is amended to bring forward in subdivisions (a) (2) and (3) the provisions in former G.S. 32-55(d) relating to when notice is deemed given to a beneficiary for purposes of the trustee compensation and make these provisions applicable to notices to beneficiaries with respect to all matters under Chapter 36C. In accordance with the drafters' intent to make provisions concerning notices to beneficiaries uniform in the General Statutes, G.S. 36C-1-109 is also applicable under G.S. 32-55(d), as amended effective October 1, 2007, to notices to beneficiaries for purposes of unitrust conversions and reconversions.

Editor's Note. — This section was amended by Session Laws 2007-106, s. 5, in the coded bill drafting format provided by G.S. 120-20.1. The subdivision designations have been set out above at the direction of the Revisor of Statutes.

Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 5, effective October 1, 2007, divided former subsection (a) into present (a) and (a)(1); added "Subject to subsection (d) of this section" at the beginning of subsection (a); added "methods" in subdivision (a)(1); and added subdivisions (a)(2) and (3). See Editor's note for applicability.

§ 36C-1-110. Others treated as qualified beneficiaries.

(a) A charitable organization expressly designated to receive distributions under the terms of a charitable trust has the rights of a qualified beneficiary under this Chapter if the charitable organization, on the date the charitable organization's qualification is being determined:

(1) Is a distributee or permissible distributee of trust income or principal;

(2) Would be a distributee or permissible distributee of trust income or principal upon the termination of the interest of other distributees or permissible distributees then receiving or eligible to receive distributions, but the termination of those interests would not cause the trust to terminate; or

(3) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(b) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in G.S. 36C-4-408 or G.S. 36C-4-409 has the rights of a qualified beneficiary under this Chapter. (2005-192, s. 2.)

OFFICIAL COMMENT

. . .

Charitable trusts do not have beneficiaries in the usual sense. However, certain persons, while not technically beneficiaries, do have an interest in seeing that the trust is enforced. In the case of a charitable trust, this includes the state's attorney general and charitable organizations expressly designated to receive distributions under the terms of the trust... [C]haritable organizations expressly designated in the terms of the trust to receive distributions and who would qualify as a qualified beneficiary were the trust noncharitable, are granted the rights of qualified beneficiaries under the Code. Because the charitable organization must be expressly named in the terms of the trust and must be designated to receive distributions, excluded are organizations that might receive distributions in the trustee's discretion but that are not named in the trust's terms. Requiring that the organization have an interest similar to that of a beneficiary of a private trust also denies the rights of a qualified beneficiary to organizations holding remote remainder interests. For further discussion of the definition of "qualified beneficiary," see Section 103 comment.

Subsection (c) similarly grants the rights of qualified beneficiaries to persons appointed by the terms of the trust or by the court to enforce a trust created for an animal or other trust with a valid purpose but no ascertainable beneficiary. For the requirements for creating such trusts, see Sections 408 and 409.

. . .

2001 Amendment. By amendment in 2001, "charitable organization expressly designated to receive distributions" was substituted for "charitable organization expressly entitled to receive benefits" ... The amendment conforms the language of this section to terminology used elsewhere in the Code.

. . .

NORTH CAROLINA COMMENT

Subsection (a) of the Uniform Trust Code was omitted. It provided that whenever notice is required to be given to qualified beneficiaries of the trust the trustee must also give a notice to any other beneficiary who has requested it. This subsection was omitted because the drafters did not think it was necessary to require the trustee to provide notice to any such beneficiary when only the qualified beneficiaries were authorized to take any action required by the notice.

Subsections (b) and (c) of the Uniform Trust Code were re-designated as subsections (a) and (b) of this section.

Subsection (d) of the Uniform Trust Code, which gave the Attorney General the rights of a qualified beneficiary with respect to charitable trusts, was omitted because G.S. 36C-4-413, North Carolina's cy pres statute, requires that notice be given to the Attorney General and that the Attorney General have an opportunity to be heard in any matter involving a charitable trust.

The reference in the Official Comment to "subsection (c)" should be understood to refer to subsection (b) of this section.

§ 36C-1-111. Nonjudicial settlement agreements.

(a) For purposes of this section, "interested persons" means persons whose consent would be required in order to achieve a binding settlement were the settlement to be approved by the court.

(b) Interested persons may enter into a binding nonjudicial settlement agreement with respect to any of the following matters involving a trust:

(1) The approval of a trustee's report or accounting;

(2) Direction to a trustee to perform or refrain from performing a particular administrative act or the grant to a trustee of any necessary or desirable administrative power, including a power granted under G.S. 36C-8-816;

(3) The resignation or appointment of a trustee and the determination of a trustee's compensation;

(4) Transfer of a trust's principal place of administration; and

(5) Liability of a trustee for any action taken under subdivisions (1) through (4) of this subsection.

(c) A nonjudicial settlement agreement is valid only to the extent it does not violate a material purpose of the trust and includes terms and conditions that could be properly approved by the court under this Chapter or other applicable law.

(d) Any interested person may request the court to approve a nonjudicial settlement agreement, to determine whether the representation as provided in Article 3 of this Chapter was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved. (2005-192, s. 2.)

OFFICIAL COMMENT

While the Uniform Trust Code recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law (see Section 201(a)), resolution of disputes by nonjudicial means is encouraged. This section facilitates the making of such agreements by giving them the same effect as if approved by the court. To achieve such certainty, however, subsection (c) requires that the nonjudicial settlement must contain terms and conditions that a court could properly approve...

Trusts ordinarily have beneficiaries who are minors, incapacitated, unborn or unascertained. Because such beneficiaries cannot signify their consent to an agreement, binding settlements can ordinarily be achieved only through the application of doctrines such as virtual representation or appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial settlements. The effect of this section and the Uniform Trust Code more generally is to allow for such binding representation even if the agreement is not submitted for approval to a court. For the rules on representation, including appointments of representatives by the court to approve particular settlements, see Article 3.

... The fact that the trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to Section 705 solely by giving notice to the qualified beneficiaries, a living settlor, and any cotrustees. But a nonjudicial settlement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation.

. . .

NORTH CAROLINA COMMENT

Subsection (b) makes significant changes in this section of the Uniform Trust Code. Whereas the Uniform Trust Code allows interested persons to enter into a binding nonjudicial settlement agreement with respect to any matter involving a trust, subsection (b) restricts the matters that may be resolved by a nonjudicial settlement agreement to the exclusive list set forth in subsection (b). Some of these matters appeared in the nonexclusive list in subsection (d) of the Uniform Trust Code which was omitted.

The drafters intended by this modification to allow interested persons to nonjudicially resolve only administrative matters relating to the trust and not substantive issues such as the construction of the terms of the trust, a modification of the terms of the trust or a termination of the trust. The drafters were concerned that allowing nonjudicial settlement of substantive issues may provide a basis for inappropriate changes in the terms of the trust or for termination of the trust contrary to the settlor's intent and the requirements otherwise imposed by statute. The modification of this section of the Uniform Trust Code was not intended to prevent parties from entering into binding settlement agreements as permitted under North Carolina law prior to the enactment of this Chapter.

§ 36C-1-112. Rules of construction.

The rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property. (2005-192, s. 2.)

OFFICIAL COMMENT

This section is patterned after Restatement (Third) of Trusts Section 25(2) and comment e (Tentative Draft No. 1, approved 1996), although this section, unlike the Restatement, also applies to irrevocable trusts. The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. Given this functional equivalence between the revocable trust and a will, the rules for interpreting the disposition of property at death should be the same whether the individual has chosen a will or revocable trust as the individual's primary estate planning instrument. Over the years, the legislatures of the States and the courts have developed a series of rules of construction reflecting the legislative or judicial understanding of how the average testator would wish to dispose of property in cases where the will is silent or insufficiently clear. Few legislatures have yet to extend these rules of construction to revocable trusts, and even fewer to irrevocable trusts, although a number of courts have done so as a matter of judicial construction. *See* Restatement (Third) of Trusts Section 25, Reporter's Notes to cmt. d and e (Tentative Draft No. 1, approved 1996).

Because of the wide variation among the States on the rules of construction applicable to wills, this Code does not attempt to prescribe the exact rules to be applied to trusts but instead adopts the philosophy of the Restatement that the rules applicable to trusts ought to be the same, whatever those rules might be.

Rules of construction are not the same as constructional preferences. A constructional preference is general in nature, providing general guidance for resolving a wide variety of ambiguities. An example is a preference for a construction that results in a complete disposition and avoid illegality. Rules of construction, on the other hand, are specific in nature, providing guidance for resolving specific situations or construing specific terms. Unlike a constructional preference, a rule of construction, when applicable, can lead to only one result. *See* Restatement (Third) of Property: Donative Transfers Section 11.3 and cmt. b (Tentative Draft No. 1, approved 1995).

Rules of construction attribute intention to individual donors based on assumptions of common intention. Rules of construction are found both in enacted statutes and in judicial decisions. Rules of construction can involve the meaning to be given to particular language in the document, such as the meaning to be given to "heirs" or "issue." Rules of construction also address situations the donor failed to anticipate. These include the failure to anticipate the predecease of a beneficiary or to specify the source from which expenses are to be paid. Rules of construction can also concern assumptions as to how a donor would have revised donative documents in light of certain events occurring after execution. These include rules dealing with the effect of a divorce and whether a specific devisee will receive a substitute gift if the subject matter of the devise is disposed of during the testator's lifetime.

Instead of enacting this section, a jurisdiction enacting this Code may wish to enact detailed rules on the construction of trusts, either in addition to its rules on the construction of wills or as part of one comprehensive statute applicable to both wills and trusts. For this reason and to encourage this alternative, the section has been made optional. For possible models, see Uniform Probate Code, Article 2, Parts 7 and 8, which was added to the UPC in 1990, and California Probate Code Sections 21101-21630, enacted in 1994.

Article 2.

Judicial Proceedings.

GENERAL COMMENT

This article addresses selected issues involving judicial proceedings concerning trusts, particularly trusts with contacts in more than one State or country. This article is not intended to provide comprehensive coverage of court jurisdiction or procedure with respect to trusts. These issues are better addressed elsewhere, for example in the State's rules of civil procedure or as provided by court rule.

Section 201 makes clear that the jurisdiction of the court is available as invoked by interested persons or as otherwise provided by law. Proceedings involving the administration of a trust normally will be brought in the court at the trust's principal place of administration. Section 202 provides that the trustee and beneficiaries are deemed to have consented to the jurisdiction of the court at the principal place of administration as to any matter relating to the trust. Sections 203 and 204 are optional, bracketed provisions relating to subject-matter jurisdiction and venue.

NORTH CAROLINA GENERAL COMMENT

Article 2 of this Chapter addresses court jurisdiction and procedure more comprehensively than Article 2 of the Uniform Trust Code which contemplates that this subject may be already addressed by other statutes and rules of a particular State. This Article incorporates much of the former Trust Administration Act, G.S. 36A-22.1 through G.S. 36A-40, with substantial modifications.

§ 36C-2-201. Role of court in administration of trust.

(a) The court may intervene in the administration of a trust to the extent its jurisdiction is invoked by a party or as provided by law.

(b) A trust is not subject to continuing judicial supervision, except as provided in G.S. 36C-2-208 and G.S. 36C-2-209, unless ordered by the court.

(c) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights. (2005-192, s. 2.)

OFFICIAL COMMENT

While the Uniform Trust Code encourages the resolution of disputes without resort to the courts by providing such options as the nonjudicial settlement authorized by Section 111, the court is always available to the extent its jurisdiction is invoked by interested persons. The jurisdiction of the court with respect to trust matters is inherent and historical and also includes the ability to act on its own initiative, to appoint a special master to investigate the facts of a case, and to provide a trustee with instructions even in the absence of an actual dispute.

Contrary to the trust statutes in some States, the Uniform Trust Code does not create a system of routine or mandatory court supervision. While subsection (b) authorizes a court to direct that a particular trust be subject to continuing court supervision, the court's intervention will normally be confined to the particular matter brought before it.

Subsection (c) makes clear that the court's jurisdiction may be invoked even absent an actual dispute. Traditionally, courts in equity have heard petitions for instructions and have issued declaratory judgments if there is a reasonable doubt as to the extent of the trustee's powers or duties. The court will not ordinarily instruct trustees on how to exercise discretion, however. *See* Restatement (Second) of Trusts Section 187, 259 (1959). This section does not limit the court's equity jurisdiction. Beyond mentioning petitions for instructions and actions to declare rights, subsection (c) does not attempt to list the types of judicial proceedings involving trust administration that might be brought by a trustee or beneficiary. Such an effort is made in California Probate Code Section 17200. Excluding matters not germane to the Uniform Trust Code, the California statute lists the following as items relating to the 'internal affairs' of a trust: determining questions of construction; determining the existence or nonexistence of any immunity, power, privilege, duty, or right; determining the validity of a trust provision; ascertaining beneficiaries and determining to whom property will pass upon final or partial termination of the trust; settling accounts and passing upon the acts of a trustee, including the exercise of discretionary powers; instructing the trustee; compelling the trustee to report information about the trust or account to the beneficiary; granting powers to the trustee; fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of the compensation; appointing or removing a trustee; accepting the resignation of a trustee; compelling redress of a breach of trust by any available remedy; approving or directing the modification or termination of a trust; approving or directing the combination or division of trusts; and authorizing or directing transfer of a trust or trust property to or from another jurisdiction.

NORTH CAROLINA COMMENT

In subsection (a) the word "party" was substituted for the words "an interested person". *See* the North Carolina Comment to G.S. 36C-2-205.

In subsection (b) the words "except as provided in G.S. 36C-2-208 and G.S. 36C-2-209" were added after the word "supervision" to acknowledge that the trustee may be required to account to the clerk of superior court if required by those sections.

Editor's Note. — Session Laws 2005-192, which enacted Chapter 36C, in s. 6, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Official Comments, copyright © 2005, are reprinted in this Chapter with the permission of the National Conference of Commissioners on Uniform State Laws. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

Effective Date and Applicability. — Session Laws 2005-192, which enacted Chapter 36C, in s. 7(a) provides: "Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

"Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded."

Official Comment on Effective Date and Applicability. — The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code Section 8 101.

North Carolina Comment on Effective Date and Applicability. — The drafters modified the provisions of the Uniform Trust Code relating to its application to trust instruments executed before its effective date by adding the phrase "or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary" to the end of the first sentence of the second paragraph. Although this Chapter is intended to have broad application, the drafters concluded that a rule of construction or presumption provided in this Chapter should not be applied to a trust instrument executed before the effective date of this Chapter if the application of such rule or presumption would impair the substantial rights of a beneficiary of a trust established under such a trust instrument.

§ 36C-2-202. Jurisdiction over trustee and beneficiary.

(a) By accepting the trusteeship of a trust having its principal place of administration in this State, or by moving the principal place of administration to this State, the trustee submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(b) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this State are subject to the jurisdiction of the courts of this State regarding any matter involving the trust. By accepting a distribution from such a trust, the recipient submits personally to the jurisdiction of the courts of this State regarding any matter involving the trust.

(c) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust. (2005-192, s. 2.)

OFFICIAL COMMENT

This section clarifies that the courts of the principal place of administration have jurisdiction to enter orders relating to the trust that will be binding on both the trustee and beneficiaries. Consent to jurisdiction does not dispense with any required notice, however. With respect to jurisdiction over a beneficiary, the Comment to Uniform Probate Code Section 7-103, upon which portions of this section are based, is instructive:

> It also seems reasonable to require beneficiaries to go to the seat of the trust when litigation has been instituted there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by its selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered.

The jurisdiction conferred over the trustee and beneficiaries by this section does not preclude jurisdiction by courts elsewhere on some other basis. Furthermore, the fact that the courts in a new State acquire jurisdiction under this section following a change in a trust's principal place of administration does not necessarily mean that the courts of the former principal place of administration lose jurisdiction, particularly as to matters involving events occurring prior to the transfer.

The jurisdiction conferred by this section is limited. Pursuant to subsection (b), until a distribution is made, jurisdiction over a beneficiary is limited to the beneficiary's interests in the trust. Personal jurisdiction over a beneficiary is conferred only upon the making of a distribution. Subsection (b) also gives the court jurisdiction over other recipients of distributions. This would include individuals who receive distributions in the mistaken belief they are beneficiaries.

For a discussion of jurisdictional issues concerning trusts, see 5A Austin W. Scott & William F. Fratcher, The Law of Trusts Sections 556-573 (4th ed. 1989).

§ 36C-2-203. Subject matter jurisdiction.

(a) The clerks of superior court of this State have original jurisdiction over all proceedings concerning the internal affairs of trusts. Except as provided in subdivision (9) of this subsection, the clerk of superior court's jurisdiction is exclusive. Proceedings concerning the internal affairs of the trust are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument. These include proceedings:

(1) To appoint or remove a trustee, including the appointment and removal of a trustee pursuant to G.S. 36C-4-414(b).

(2) To approve the resignation of a trustee.

(3) To review trustees' fees under Article 6 of Chapter 32 of the General Statutes and review and settle interim or final accounts.

(4) To (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust as provided in G.S. 37A-1-104.3.

(5) To transfer a trust's principal place of administration.

(6) To require a trustee to provide bond and determine the amount of the bond, excuse a requirement of bond, reduce the amount of bond, release the surety, or permit the substitution of another bond with the same or different sureties.

(7) To make orders with respect to a trust for the care of animals as provided in G.S. 36C-4-408.

(8) To make orders with respect to a noncharitable trust without an ascertainable beneficiary as provided in G.S. 36C-4-409.

(9) To ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments, and to determine the existence or nonexistence of trusts created other than by will and the existence or nonexistence of any immunity, power, privilege, duty, or right. Any party may file a notice of transfer of a proceeding pursuant to this subdivision to the superior court division of the General Court of Justice as provided in G.S. 36C-2-205(g1). In the absence of a transfer to Superior Court, Article 26 of Chapter 1 of the General Statutes shall apply to a trust proceeding pending before the clerk of superior court to the extent consistent with this Article.

(b) Nothing in this section shall be construed (i) to confer upon the clerk of superior court any authority to regulate or supervise the actions of a trustee except to the extent that the trustee's actions are inconsistent with the governing instrument or of State law; or (ii) to confer upon any party any additional right, remedy, or cause of action not otherwise conferred by law.

(c) Nothing in this section affects the right of a person to file an action in the superior court division of the General Court of Justice for declaratory relief under Article 26 of Chapter 1 of the General Statutes.

(d) The clerk of superior court shall not, over the objection of a party, entertain proceedings under this section involving a trust having its principal place of administration in another state, except:

(1) When all appropriate parties could not be bound by litigation in the courts of the state in which the trust had its principal place of administration; or

(2) When the interests of justice otherwise would be seriously impaired.

The clerk of superior court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust has its principal place of administration, or the clerk of superior court may grant a continuance or enter any other appropriate order.

(e) Any party to a proceeding before the clerk of superior court may appeal from the decision of the clerk to a superior court judge as provided for estate matters in G.S. 1-301.3.

(f) Without otherwise limiting the jurisdiction of the superior court division of the General Court of Justice, proceedings concerning the internal affairs of trusts shall not include, and, therefore, the clerk of superior court shall not have jurisdiction under subsection (a) of this section of the following:

(1) Actions to reform, terminate, or modify a trust as provided by G.S. 36C-4-410 through G.S. 36C-4-416;

(2) Actions by or against creditors or debtors of a trust;

(3) Actions involving claims for monetary damages, including claims for breach of fiduciary duty, fraud, and negligence;

(4) Actions to enforce a charitable trust under G.S. 36C-4-405.1; and

(5) Actions to amend or reform a charitable trust under G.S. 36C-4A-1. (1911, c. 39, s. 4; C.S. s. 4027; 1977, c. 502, s. 2; 1999-216, s. 8; 2001-413, s. 1; 2005-192, s. 2; 2007-106, ss. 6, 7.)

OFFICIAL COMMENT

This section provides a means for distinguishing the jurisdiction of the court having primary jurisdiction for trust matters, whether denominated the probate court, chancery court, or by some other name, from other courts in a State that may on occasion resolve disputes concerning trusts. The section has been placed in brackets because the enacting jurisdiction may already address subject-matter jurisdiction by other statute or court rule. The topic also need not be addressed in States having unified court systems...

NORTH CAROLINA COMMENT

Subsection (a) brings forward in place of subsection (a) of the Uniform Trust Code the provisions of former G.S. 36A-23.1 (a) regarding the jurisdiction of the clerk of superior court in trust proceedings. In addition to some minor modifications to former G.S. 36A-23.1, paragraphs (4) through (8) were added as additional examples of proceedings included in the exclusive jurisdiction of the clerk.

Subsection (b) brings forward the second sentence of former G.S. 36A-23.1(b). The first sentence providing that trust matters should proceed expeditiously consistent with the terms of the trust without judicial intervention was not brought forward in this subsection because that subject is addressed in G.S. 36C-2-201(b).

Subsection (c) brings forward in the first sentence the provisions of former G.S. 36A-23.1(c) regarding the right to file a declaratory judgment action under Article 26 of Chapter 1. The remaining provisions were added to clarify that if a party requests declaratory relief, the other party may move for a transfer of the proceeding to the superior court as provided in Article 21 of Chapter 7A and that, if not so removed, the provisions of Article 26 of Chapter 1 will apply to a trust proceeding to the extent not inconsistent with this Article.

Subsection (d) recodifies the provisions of former G.S. 36A-25.1 regarding dismissal of matters relating to foreign trusts.

Subsection (e) recodifies the provisions of former G.S. 36A-27 regarding the appeal of decisions of the clerk.

Subsection (f) is consistent with former G.S. 36A-23.1(a) in excluding from the jurisdiction of the clerk actions to modify or terminate trusts but also designates other matters excluded from the clerk's jurisdiction under case or statutory law. *See State ex rel. v. Pilard v.*

Berniger, 154 N.C. App. 45, 571 S.E.2d 836 (2002), *disc. review denied,* 156 N.C. 694, 579 S.E.2d 100 (2003) where the court said: "Claims such as breach of fiduciary duty, fraud, and negligence are 'justiciable matters of a civil nature' jurisdiction over which is vested in the trial division".

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section is amended to make clear that the clerk of court and the superior court division of the General Court of Justice have concurrent jurisdiction over any matters involving the internal affairs of a trust which fall under subdivision (a)(9) of this section. If a subdivision (a)(9) matter is brought before the clerk of court, any party to the matter may have the matter transferred to superior court. However, if all parties desire to have the matter heard by the clerk of court, the clerk of court cannot, upon the clerk's own motion, have the matter transferred to superior court. In addition, the amendment to this section makes clear that Article 26 of Chapter 1 of the General Statutes, North Carolina's Declaratory Judgment Act, shall apply to a trust proceeding pending before the clerk of superior court to the extent consistent with Article 2 of Chapter 36C.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, ss. 6 and 7, effective October 1, 2007, in subsection (a), inserted "including the appointment and removal of a trustee pursuant to G.S. 36C-4-414(b)" in subdivision (1), rewrote subdivision (2), rewrote the former last sentence and added the current last sentence in subdivision (9) and made related changes; and in subsection (c), inserted "in the Superior Court Division of the General Court of Justice" in the first sentence, and deleted the former last two sentences which provided for the transfer of the trust proceeding to the superior court division of the General Court of Justice under certain circumstances. See Editor's note for applicability.

CASE NOTES

Editor's Note. — *The cases below were decided under prior law.*

Jurisdiction of Clerk Is Statutory. — The equitable jurisdiction of the superior courts does not extend to the clerks of court unless expressly given by statute, and this and following sections giving clerks of court a limited power to appoint trustees in certain instances will not be extended to give them jurisdiction of any proceeding unless clearly within the provisions of the statutes. In re Smith, 200 N.C. 272, 156 S.E. 494 (1931).

When trust beneficiaries filed a petition under former G.S. 36A-125.4(a) to modify a trust to provide that it would be administered by the settlor's grand-niece and a bank, instead of the trustee appointed by the trust instrument, the proceeding was actually one to remove the trustee, over which the clerk of superior court had exclusive jurisdiction, and the superior court had no jurisdiction to hear their petition. In re Charnock, 358 N.C. 523, 597 S.E.2d 706, 2004 N.C. LEXIS 657 (2004).

Modification of a trust. — Under both the pre-and post-amendment versions of G.S. 36A-23.1, the clerk of superior court lacks original jurisdiction over proceedings to "modify or terminate" a trust, so an action that is characterized as a modification must be brought before the superior court, and the nature of an action determines whether jurisdiction over the action lies with the clerk of superior court or with the superior court. In re Charnock, 358 N.C. 523, 597 S.E.2d 706, 2004 N.C. LEXIS 657 (2004).

Special Proceeding to Resign. — A proceeding by a trustee for the purpose of resigning his trust is denominated a special proceeding. Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

Order Accepting Resignation Is Interlocutory. — The order of the clerk of the superior court accepting the resignation of a trustee in a special proceeding is an interlocutory order regardless of whether an appeal is taken therefrom or not, since even in the absence of an appeal former G.S. 36-12 required that such order be approved by the judge of the superior court before it becomes effective. Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

The clerk has power to set aside his prior order accepting the resignation of a trustee and appointing a successor when no appeal has been taken and the order has not been approved by the judge of the superior court. Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

Subsequent Valid Order Affirmed on Appeal. — Where the clerk of the court in the exercise of his valid discretionary power, has set aside his order accepting the resignation of a trustee, his subsequent valid order entered in proceedings consonant with statutory requirements and approved by the judge of the superior court in the exercise of judgment and discretion, will be affirmed on appeal. Russ v. Woodard, 232 N.C. 36, 59 S.E.2d 351 (1950).

Appointment by Clerk. — Where a charitable trust is created by a written instrument the court may appoint a trustee, in the exercise of its equitable jurisdiction, to execute the trust when the instrument fails to designate one, or the one designated fails or refuses to act, or one may be appointed under the provisions of this section. Ladies Benevolent Soc'y v. Orrell, 195 N.C. 405, 142 S.E. 493 (1928).

Relation to Other Statutes. — Action filed by a trust beneficiary and a settlor's siblings, pursuant to former G.S. 36A-125.4, seeking an order modifying a trust was really an action seeking replacement of the trustee for exercising discretion in managing the trust, and the trial court's judgment dismissing the action for lack of subject matter jurisdiction was upheld. In re Testamentary Trust of Charnock, 158 N.C. App. 35, 579 S.E.2d 887, 2003 N.C. App. LEXIS 938 (2003), aff'd, 358 N.C. 523, 597 S.E.2d 706 (2004).

Where the trustee appointed by will to administer an active trust dies, the clerk of the superior court is without authority to appoint a successor, since the clerk has no authority to administer an equity unless empowered to do so by statute, and this section authorizes the clerk to appoint a successor trustee only when the former trustee resigns. Cheshire v. First Presbyterian Church, 221 N.C. 205, 19 S.E.2d 855 (1942).

Loss of Unrecorded Order. — A finding by the court that, upon due consideration of the evidence and the available records in the office of the clerk, the order appointing a successor trustee had been approved by the court was sufficient to meet the requirements of this section though the order of approval had been lost without being recorded. State Trust Co. v. Toms, 244 N.C. 645, 94 S.E.2d 806 (1956).

§ 36C-2-204. Venue.

In any trust proceeding, whether brought before the clerk of superior court or the superior court division of the General Court of Justice, the following rules apply notwithstanding any other applicable Rule of Civil Procedure or provision of Chapter 1 of the General Statutes:

(1) If the trustee is required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is the place where the accountings are filed.

(2) If the trustee is not required to account to the clerk of superior court, then unless the terms of the governing instrument provide otherwise, venue for proceedings under G.S. 36C-2-203 involving trusts is either of the following:

  a. In the case of an inter vivos trust, in any county of this State in which the trust has its principal place of administration or where any beneficiary resides.

  b. In the case of a testamentary trust, in any county of this State in which the trust has its principal place of administration, where any beneficiary resides, or in which the testator's estate was administered.

(3) Repealed by Session Laws 2007-106, s. 8, effective October 1, 2007.

(4) If a trust has no trustee, venue for a judicial proceeding for the appointment of a trustee is in any county of this State in which a beneficiary resides, in any county in which trust property is located, in

the county of this State specified in the trust instrument, if any county is so specified, or in the case of a testamentary trust, in the county in which the decedent's estate was or is being administered. (2001-413, s. 1; 2003-261, s. 2; 2005-192, s. 2; 2007-106, s. 8.)

OFFICIAL COMMENT

This optional, bracketed section is made available for jurisdictions that conclude that venue for a judicial proceeding involving a trust is not adequately addressed in local rules of civil procedure. For jurisdictions enacting this section, general rules governing venue continue to apply in cases not covered by this section. This includes most proceedings where jurisdiction over a trust, trust property, or parties to a trust is based on a factor other than the trust's principal place of administration. The general rules governing venue also apply when the principal place of administration of a trust is in another locale, but jurisdiction is proper in the enacting State.

NORTH CAROLINA COMMENT

The drafters omitted the provisions of subsection (a) of the Uniform Trust Code regarding venue and brought forward in their place with minor modifications the venue provisions of former G.S. 36A-24.1. However, whereas former G.S. 36A-24.1 applied only to trust proceedings before the clerk, this section changes prior law by providing that the venue provisions apply to actions before the superior court, as well as to trust proceedings before the clerk, notwithstanding any other applicable Rules of Civil Procedure or provision of Chapter 1.

Paragraph (4) incorporates the provisions of subsection (b) of the Code but modifies them to add that where a trust has no trustee, venue to appoint one may be "in the county of this State specified in the trust instrument, if any county is so specified".

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section is amended (i) to delete the words "or action" in the first sentence to make the language consistent with the statutory definition of "proceeding" which includes an action and (ii) to delete paragraph (3) of this section which contained the definition of "principal place of administration." That definition is brought forward in G.S. 36C-1-103(13a) to make it applicable to other references to "principal place of administration" in Chapter 36C.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 8, effective October 1, 2007, deleted "or action" following "proceeding" near the beginning of the introductory paragraph; added "either of the following" at the end of subdivision (2); made a minor punctuation change in subdivision (2)a.; deleted former subdivision (3), relating to the principal place of administration of the trust; and substituted "in the case of a testamentary trust" for "if the trust is created by will" near the end of subdivision (4). See Editor's note for applicability.

§ 36C-2-205. Commencement of proceedings, pleadings, consolidation, and joinder.

(a) Contested Proceedings. — Trust proceedings before the clerk of superior court brought against adverse parties shall be commenced as is prescribed for civil actions. Upon the filing of the petition or complaint, the clerk of superior court shall docket the cause as an estate matter. All parties not joined as petitioners shall be joined as respondents. The clerk of superior court shall issue the summons for the respondents. The clerk of superior court may order that additional persons be joined as respondents and shall issue the summons for the additional persons. The summons shall notify the respondents to appear and answer the petition within 10 days after its service upon the respondents. The summons shall comply with the requirements set forth in G.S. 1-394 for a special proceeding summons except that the clerk of superior court shall indicate on the summons by appropriate words that the summons is issued in an estate matter and not in a special proceeding or in a civil action and shall be served upon the respondents in accordance with Rule 4 of the Rules of Civil Procedure. After the time for responding to the petition or complaint has expired, any party or the clerk of superior court may give notice to all parties of a hearing.

(b) Uncontested Proceedings. — Trust proceedings before the clerk of superior court in which all the parties join in the proceeding shall be commenced by the filing of a petition, setting forth the facts entitling the petitioners to relief and the nature of the relief demanded. In these proceedings, the clerk of superior court may hear and decide the petition summarily.

(c) Pleadings. — The petition or complaint filed in a trust proceeding before the clerk of superior court shall contain a short and plain statement of the claim which is sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions, intended to be proved showing that the pleaders entitled to relief, and a demand for judgment for the relief to which the pleader is entitled. Each averment of a pleading should be simple, concise, and direct. No technical forms of pleadings or motions are required. A party may set forth two or more statements of a claim or defense alternatively or hypothetically. The signature of an attorney or party constitutes a certificate by that attorney or party that (i) the attorney or party has read the pleading, motion, or other paper; (ii) to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. All pleadings shall be so construed as to do substantial justice.

(d) Extensions of Time. — The clerk of superior court, for cause shown at any time in the clerk's discretion, with or without motion or notice, may enter an order enlarging the period of time within which an act is required or permitted by this Article, by any applicable Rules of Civil Procedure or by order of the court, if the request is made before the expiration of the period originally prescribed, but not to exceed 10 days, nor more than once. Upon motion made after the expiration of the specified period, the clerk of superior court may permit the act where the failure to act was the result of excusable neglect. Notwithstanding any other provision of this subsection, the parties to a proceeding may enter into binding stipulations, without approval of the clerk of superior court, enlarging the time within which an act is required or permitted by this Article, by any applicable Rules of Civil Procedure or by order of the court, not to exceed 30 days.

(e) Rules of Civil Procedure. — Unless the clerk of superior court otherwise directs, Rules 5, 6(a), 6(d), 6(e), 18, 19, 20, 21, 24, and 45 of the Rules of Civil

Procedure shall apply to trust proceedings. Upon motion of a party or the clerk of superior court, the clerk may further direct that the following Rules of Civil Procedure shall apply: Rules 15, 16, 17, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37; however, nothing in Rule 17 requires the appointment of a guardian ad litem for a party represented except as provided under G.S. 36C-3-305. In applying these Rules to a trust proceeding pending before the clerk of superior court, the term "judge" shall be construed as "clerk of superior court."

(f) Consolidation. — When a trust proceeding pending before the clerk of superior court and a civil action pending before the superior court division of the General Court of Justice involve a common question of law or fact, upon the court's motion or motion of a party to either the trust proceeding or the civil action, a superior court judge may order a consolidation of the trust proceeding and civil action, and the judge may make orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. Upon the entry of an order consolidating a trust proceeding and civil action, the jurisdiction for all matters pending in both the trust proceeding and the civil action shall be vested in the superior court.

(g) Joinder. — In any civil action pending before a superior court division of the General Court of Justice, a party asserting a claim for relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as that party has against an opposing party notwithstanding the fact that the claims may otherwise be within the exclusive jurisdiction of the clerk of superior court.

(g1) Notice of Transfer. — A notice to transfer a trust proceeding brought pursuant to G.S. 36C-2-203(a)(9) must be served within 30 days after the moving party is served with a copy of the pleading requesting relief pursuant to G.S. 36C-2-203(a)(9). Failure to timely serve a notice of transfer of a trust proceeding is a waiver of any objection to the clerk of superior court's exercise of jurisdiction over the trust proceeding then pending before the clerk. When a notice of transfer is duly served and filed, the clerk shall transfer the proceeding to the appropriate court. The proceeding after the transfer is subject to the provisions of the General Statutes and to the rules that apply to actions initially filed in the court to which the proceeding was transferred.

(h) Orders Upon Consolidation/Joinder/Transfer. — Upon the consolidation of a trust proceeding and a civil action, joinder of claims under subsection (f) or (g) of this section, or transfer to the Superior Court Division of the General Court of Justice pursuant to subsection (g1) of this section, the clerk of superior court or the judge may make appropriate orders to protect the interests of the parties and to avoid unnecessary costs or delay. Notwithstanding the consolidation, joinder of claims under subsection (f) or (g) of this section, or transfer to the Superior Court Division of the General Court of Justice under subsection (g1) of this section, the clerk of superior court's exclusive jurisdiction as set forth in G.S. 36C-2-203(a)(1) through (8) shall not be stayed unless so ordered by the court.

(i) Notice to Attorney General. — In every trust proceeding with respect to a charitable trust, the Attorney General shall be notified and given an opportunity to be heard. (2005-192, s. 2; 2007-106, ss. 9, 9.1, 10.)

NORTH CAROLINA COMMENT

Subsection (a) is substantially the same as former G.S. 36A-26.1. Former G.S. 36A-26.1 referred to joining "interested persons" as defined in former G.S. 36A-22.1(3). The drafters did not include the reference to "interested persons" and the definition of "interested persons" because existing case law defining necessary and proper parties is clear, and the definition of "interested persons" in prior law did not assist a pleader in determining what parties must be joined in a trust proceeding and what parties can be joined. *See Pittman v. Barker,* 117 N.C. App. 580, 452 S.E.2d 326 (1995) (defining necessary and proper parties).

Subsection (b) regarding uncontested proceedings has no counterpart in the Trust Administration Act.

Subsection (c) is generally consistent with former G.S. 36A-26.3(1) of the Trust Administration Act in not requiring the formality in pleadings in proceedings before the clerk that is required under the Rules of Civil Procedure. The drafters added the provision to the effect that the signature of an attorney or party constitutes a certificate that the pleading is well-grounded in fact and law and not interposed for an improper purpose. In keeping with the informal nature of proceedings before the clerk, the drafters did not incorporate as a part of this section or Article Rule 11 which provides procedures for the court to award sanctions for meritless pleadings.

Subsection (d) has no equivalent in the Trust Administration Act in providing the procedure for the court to grant extensions of time in trust proceedings and in allowing parties to a trust proceeding to enter into binding stipulations, without approval of the court, to enlarge the time within which an act is required or permitted as currently allowed in Rule 6(b) of the Rules of Civil Procedure.

Subsection (e) clarifies the application of the Rules of Civil Procedure in trust proceedings before the clerk. The former Trust Administration Act did not specifically refer to the Rules of Civil Procedure, and it was not clear what rules, if any, applied. Discovery is only permitted if ordered by the clerk upon motion of a party or the clerk. Additionally, Rule 45, which provides the procedure for issuing and objecting to subpoenas, now applies to trust proceedings pending before the clerk.

Subsection (f) has no counterpart in the Trust Administration Act in authorizing a trust proceeding before the clerk, such as the removal of a trustee, to be consolidated with a civil action in the superior court, such as an action against the trustee for breach of trust, with jurisdiction for all matters vested in the superior court.

Subsection (g) is also new to North Carolina law in providing that in cases in which the superior court trial division had original jurisdiction, a party may join any related claims that could otherwise only be asserted in a proceeding before the clerk.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section is amended to add a new subsection (g1) which sets forth the rules governing how and when a party may transfer a trust proceeding brought pursuant to G.S. 36C-2-203(a)(9) to superior court. In addition, effective October 1, 2007, this section is amended to add a new subsection (i) which makes clear that in any trust proceeding involving a charitable trust, the Attorney General must receive notice and an opportunity to be heard.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, ss. 9, 9.1 and 10, effective October 1, 2007, added subsections (g1) and (i) and rewrote subsection (h), respectively. See Editor's note for applicability.

§ 36C-2-206. Representation of parties.

(a) Notwithstanding any other applicable rule of the Rules of Civil Procedure or provision of Chapter 1 of the General Statutes, in any trust proceeding, whether brought before the clerk of superior court or in the superior court division of the General Court of Justice, the parties shall be represented as provided in Article 3 of this Chapter.

(b) In the case of any party represented by another as provided in subsection (a) of this section, service of process shall be made by serving such representative. (2005-192, s. 2; 2006-259, s. 13(a).)

NORTH CAROLINA COMMENT

This section makes a significant change in North Carolina law by authorizing parties to be represented by others as provided in Article 3 of this Chapter in actions involving trusts in the superior court trial division. Under former G.S. 36A-26.3, which was generally consistent with Article 3, a party could be represented by others in trust proceedings before the clerk but these rules were not applicable to actions involving trusts in superior court. This section applies the rules of representation of Article 3 to both trust proceedings before the clerk and actions involving trusts before the superior court.

Editor's Note. — Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(a), effective October 1, 2006, rewrote the section. See Editor's note for applicability.

§ 36C-2-207. Waiver of notice.

A party, or the representative of the party as provided in G.S. 36C-2-206, may waive notice by a writing signed by the party, the representative, or the attorney of the party or the representative, and filed in the proceeding. (2001-413, s. 1; 2005-192, s. 2.)

NORTH CAROLINA COMMENT

This section brings forward the provisions of former G.S. 36A-26.2. Since there is no counterpart for waivers of notice in the Rules of Civil Procedure, this section makes a change in prior law with respect to waivers of notices in actions in the superior court trial division. Under prior law these provisions applied only to trust proceedings before the clerk.

§ 36C-2-208. Accounting to clerk.

(a) No trustee, including a trustee appointed by the clerk of superior court, is required to account to the clerk of superior court unless the trust instrument directs that the trustee is required to account to the clerk of superior court or unless the trustee is otherwise required by law to account to the clerk of superior court.

(b) If the trustee is required to account to the clerk of superior court, the trustee shall not be permitted to resign as trustee until a final account of the trust estate is filed with the clerk of superior court and until the court is satisfied that the account is true and correct, unless the terms of the trust instrument provide otherwise.

(c) Notwithstanding subsections (a) and (b) of this section, under a proceeding brought under G.S. 36C-4-405.1, the clerk of superior court may require a trustee of a charitable trust to account to the clerk of superior court. (1911, c.

39, s. 6; C.S., s. 4029; 1977, c. 502, s. 2; 2001-413, s. 1; 2003-261, s. 4; 2005-192, s. 2.)

NORTH CAROLINA COMMENT

Subsection (a) recodifies the provisions of subsection (a) of former G.S. 36A-29 with minor modifications concerning whether the trustee is required to account to the clerk.

Subsection (b) recodifies the provisions of subsection (b) of former G.S. 36A-29 regarding the filing of a final account by a trustee desiring to resign as trustee.

Subsection (c) is consistent with the provisions of former G.S. 36A-48 authorizing the clerk to require a trustee of a charitable trust to account to the clerk of superior court in proceedings to enforce a charitable trust.

§ 36C-2-209. Qualification and accounting of trustee of a testamentary trust.

(a) For any testamentary trust created under a will of a decedent executed before January 1, 2004, the trustee shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of superior court of the county where the will is probated inventories of the assets that come into the trustee's hands and annual and final accounts of the trust that are the same as required of executors and administrators. The power of the clerk of superior court to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts is the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. This subsection shall not apply to the extent that the will makes a different provision.

(b) For any testamentary trust created under a will of a decedent executed on or after January 1, 2004, that directs the trustee to account to the clerk of superior court, the trustee shall first qualify under the laws applicable to executors and shall file in the office of the clerk of superior court of the county where the will is probated inventories of the assets that come into the trustee's hands and annual and final accounts of the trust that are the same as are required of executors and administrators. The power of the clerk of superior court to enforce the filing and the clerk's duties to audit and approve the trustee's inventories and accounts is the same as the clerk's powers and duties with respect to the inventories and accounts of executors and administrators. No trustee, including a trustee appointed by the clerk of superior court, is required to account to the clerk of superior court unless the will directs that the trustee is required to account to the clerk of superior court or unless otherwise required by law.

(c) The Administrative Office of the Courts may adopt rules regulating the registration or indexing of testamentary trusts. (1907, c. 804; C.S., s. 51; 1961, c. 519; 1965, c. 1176, s. 1; 1973, c. 1329, s. 4; 1977, c. 502, s. 2; 1985, c. 377, s. 1, 2; 2003-261, s. 7.(j); 2005-192, s. 2.)

NORTH CAROLINA COMMENT

Subsection (a) recodifies former G.S. 36A-107(a) with respect to testamentary trusts created under a will executed before January 1, 2004.

Subsection (b) recodifies former G.S. 36A-107(b) with respect to testamentary trusts created under a will executed on or after January 1, 2004.

Subsection (c) recodifies the provisions of former G.S. 36A-108 with respect to the registration and indexing of testamentary trusts.

CASE NOTES

Editor's Note. *— The cases cited below were decided under prior law.*

The trustee's legal existence is derived from the instrument creating the trust, not from adminicular proceedings relating to qualification, posting bond, etc. The trustee takes his position by virtue of the donative acts of the grantor and not from the authority of the court. Lentz v. Lentz, 5 N.C. App. 309, 168 S.E.2d 437 (1969).

Valid Conveyance Is Not Made Void by Failure of Trustee to Qualify. — An otherwise valid conveyance by a testamentary trustee is not made void by reason of his failure to first qualify as now required by this section. Lentz v. Lentz, 5 N.C. App. 309, 168 S.E.2d 437 (1969).

There is no requirement that a life tenant must account to the court or to a remainderman. Godfrey v. Patrick, 8 N.C. App. 510, 174 S.E.2d 674 (1970).

Actions of Trustee Not Shown by Increase in Money. — The mere fact that trust made money is not sufficient to prove that defendant trustee acted openly, fairly and honestly. Estate of Smith ex rel. Smith v. Underwood, 127 N.C. App. 1, 487 S.E.2d 807 (1997), cert. denied, 347 N.C. 398, 494 S.E.2d 410 (1997).

Effect Must Be Given a Provision in a Will Which Exempts the Testamentary Trustee from Regular Accountings. — See opinion of Attorney General to Honorable C.G. Smith, 41 N.C.A.G. 757 (1952), issued under prior law.

ARTICLE 3.

Representation.

GENERAL COMMENT

This article deals with representation of beneficiaries, both representation by fiduciaries (personal representatives, trustees, guardians, and conservators), and what is known as virtual representation. Representation is a topic not adequately addressed under the trust law of most States. Representation is addressed in the Restatement (First) of Property Sections 180-186 (1936), but the coverage of this article is more complete.

Section 301 is the introductory section, laying out the scope of the article. The representation principles of this article have numerous applications under this Code. The representation principles of the article apply for purposes of settlement of disputes, whether by a court or nonjudicially. They apply for the giving of required notices. They apply for the giving of consents to certain actions.

Sections 302-305 cover the different types of representation. Section 302 deals with representation by the holder of a general testamentary power of appointment... Section 303 deals with representation by a fiduciary, whether of an estate, trust, conservatorship, or guardianship. The section also allows a parent without a conflict of interest to represent and bind a minor or unborn child. Section 304 is the virtual representation provision. It provides for representation of and the giving of a binding consent by another person having a substantially identical interest with respect to the particular issue. Section 305 authorizes the court to appoint a representative to represent the interests of unrepresented persons or persons for whom the court concludes the other available representation might be inadequate.

The provisions of this article are subject to modification in the terms of the trust. *See* Section 105. Settlors are free to specify their own methods for providing substituted notice and obtaining substituted consent.

NORTH CAROLINA GENERAL COMMENT

This Article is generally consistent with the provisions in former G.S. 36A-26.3 of the Trust Administration Act regarding representation of parties in trust proceedings before the clerk of superior court with variations to be noted in the North Carolina Comments to the sections of this Article. However, unlike prior law the representation principles of this Article apply not only to the trust proceedings before the clerk but also to such proceedings before the superior court division of the general court of justice, as well as to giving of required notices and consents under this Chapter.

§ 36C-3-301. Representation: basic effect.

(a) Notice to a person who may represent and bind another person under this Article has the same effect as if notice were given directly to the other person.

(b) The consent of a person who may represent and bind another person under this Article is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(c) Except as otherwise provided in G.S. 36C-4-411 and G.S. 36C-6-602, a person who under this Article may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(d) A settlor may not represent and bind a beneficiary under this Article with respect to the termination or modification of trust under G.S. 36C-4-411(a). (2005-192, s. 2.)

OFFICIAL COMMENT

This section is general and introductory, laying out the scope of the article.

Subsection (a) validates substitute notice to a person who may represent and bind another person as provided in the succeeding sections of this article. Notice to the substitute has the same effect as if given directly to the other person... Subsection (a) may be used to facilitate the giving of notice to the qualified beneficiaries of a proposed transfer of principal place of administration (Section 108(d)), of a proposed trust combination or division (Section 417), of a temporary assumption of duties without accepting trusteeship (Section 701(c)(1)), of a trustee's resignation (Section 705(a)(1)), and of a trustee's report (Section 813(c)).

Subsection (b) deals with the effect of a consent, whether by actual or virtual representation. Subsection (b) may be used to facilitate consent of the beneficiaries to modification or termination of a trust, with or without the consent of the settlor (Section 411), agreement of the qualified beneficiaries on appointment of a successor trustee of a noncharitable trust (Section 704(c)(2)), and a beneficiary's consent to or release or affirmance of the actions of a trustee (Section 1009). A consent by a representative bars a later objection by the person represented, but a consent is not binding if the person represented raises an objection prior to the date the consent would otherwise become effective. The possibility that a beneficiary might object to a consent given on the beneficiary's behalf will not be germane in many cases because the person represented will be unborn or unascertained. However, the representation principles of this article will sometimes apply to adult and competent beneficiaries. For example, while the trustee of a revocable trust entitled to a pourover devise has authority under Section 303 to approve the personal representative's account on behalf of the trust beneficiaries, such consent would not be binding on a trust beneficiary who registers an objection. Subsection (b) implements cases such as *Barber v. Barber,* 837 P.2d 714 (Alaska 1992), which held that the a refusal to allow an objection by an adult competent remainder beneficiary violated due process.

Subsection (c) implements the policy of Sections 411 and 602 requiring express authority in the power of attorney or approval of court before the settlor's agent, conservator or guardian may consent on behalf of the settlor to the termination or revocation of the settlor's revocable trust.

2004 Amendment. For an explanation of the new subsection (d) ..., see the comment to the amendment to Section 411.

NORTH CAROLINA COMMENT

This section has no equivalent in prior law with respect to the binding effect of nonjudicial notices to and consents by representatives.

Editor's Note. — Session Laws 2005-192, which enacted Chapter 36C, in s. 6, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Official Comments, copyright © 2005, are reprinted in this Chapter with the permission of the National Conference of Commissioners on Uniform State Laws. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

Effective Date and Applicability. — Session Laws 2005-192, which enacted Chapter 36C, in s. 7(a) provides: "Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

"Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded."

Official Comment on Effective Date and Applicability. — The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code Section 8 101.

North Carolina Comment on Effective Date and Applicability. — The drafters modified the provisions of the Uniform Trust Code relating to its application to trust instruments executed before its effective date by adding the phrase "or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary" to the end of the first sentence of the second paragraph. Although this Chapter is intended to have broad application, the drafters concluded that a rule of construction or presumption provided in this Chapter should not be applied to a trust instrument executed before the effective date of this Chapter if the application of such rule or presumption would impair the substantial rights of a beneficiary of a trust established under such a trust instrument.

§ 36C-3-302. Representation by holder of general testamentary power of appointment.

The sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, shall represent other persons to the extent that their interests, as permissible appointees, takers in default, or otherwise, are subject to the power. To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power. (2005-192, s. 2.)

OFFICIAL COMMENT

This section specifies the circumstances under which a holder of a general testamentary power of appointment may receive notices on behalf of and otherwise represent and bind persons whose interests are subject to the power, whether as permissible appointees, takers in default, or otherwise. Such representation is allowed except to the extent there is a conflict of interest with respect to the particular matter or dispute. Typically, the holder of a general testamentary power of appointment is also a life income beneficiary of the trust, oftentimes of a trust intended to qualify for the federal estate tax marital deduction. *See* I.R.C. Section 2056(b)(5). Without the exception for conflict of interest, the holder of the power could act in a way that could enhance the holder's income interests to the detriment of the appointees or takers in default, whoever they may be.

NORTH CAROLINA COMMENT

This section modifies the Uniform Trust Code to bring forward the provisions of former G.S. 36A-26.3(2)a. with respect to representation by a holder of a power of revocation or an intervivos general power of appointment. *See also* G.S. 36C-6-603(a) granting the settlor of a revocable trust all rights of the beneficiaries.

§ 36C-3-303. Representation by fiduciaries, parents, and other persons.

To the extent that there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute involving a trust:

(1) A general guardian or a guardian of the estate may represent and bind the estate that the guardian controls.

(2) Repealed by Session Laws 2007-106, s. 11, effective October 1, 2007.

(3) An agent under a power of attorney having authority to act with respect to the particular question or dispute may represent and bind the principal.

(4) A trustee may represent and bind the beneficiaries of the trust unless the question or dispute involves the internal affairs of the trust.

(5) A personal representative of a decedent's estate may represent and bind persons interested in the estate.

(6) A parent may represent and bind the parent's minor child if a general guardian or guardian of the estate for the child has not been appointed. If a disagreement arises between parents seeking to represent the same minor child, the parent who is a beneficiary of the trust that is the subject of the representation is entitled to represent the minor child or, if no parent is a beneficiary of the trust that is the subject of the representation, a parent who is a lineal descendant of the settlor is entitled to represent the minor child, or if no parent is a lineal descendant of the settlor, a guardian ad litem shall be appointed to represent the minor child.

(7) A person may represent and bind that person's unborn issue. (2005-192, s. 2; 2007-106, s. 11.)

OFFICIAL COMMENT

This section allows for representation of persons by their fiduciaries (conservators, guardians, agents, trustees, and personal representatives), a principle that has long been part of the law. Paragraph (6), which allows parents to represent their children, is more recent, having originated in 1969 upon approval of the Uniform Probate Code. This section is not limited to representation of beneficiaries. It also applies to representation of the settlor. Representation is not available if the fiduciary or parent is in a conflict position with respect to the particular matter or dispute, however. A typical conflict would be where the fiduciary or parent seeking to represent the beneficiary is either the trustee or holds an adverse beneficial interest.

Paragraph (2) authorizes a guardian to bind and represent a ward if a conservator of the ward's estate has not been appointed. Granting a guardian authority to represent the ward with respect to interests in the trust can avoid the need to seek appointment of a conservator. This grant of authority to act with respect to the ward's trust interest may broaden the authority of a guardian in some States although not in States that have adopted the Section 1-403 of the Uniform Probate Code, from which this section was derived. Under the Uniform Trust Code, a "conservator" is appointed by the court to manage the ward's property, a "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 103.

Paragraph (3) authorizes an agent to represent a principal only to the extent the agent has authority to act with respect to the particular question or dispute. Pursuant to Sections 411 and 602, an agent may represent a settlor with respect to the amendment, revocation or termination of the trust only to the extent this authority is expressly granted either in the trust or the power. Otherwise, depending on the particular question or dispute, a general grant of authority in the power may be sufficient to confer the necessary authority.

NORTH CAROLINA COMMENT

The representation provisions of the Uniform Trust Code reflected in this section are generally consistent with those in former G.S. 36A-26.3(2), but with the following differences:

(i) Paragraph (3), unlike former G.S. 36A-26.3(2)d., does not require court approval for an agent under a power of attorney to represent a principal.

(ii) Paragraph (4) permits a trustee to represent the beneficiaries of the trust without limitations whereas former G.S. 36A-26.3(2)b. allowed the trustee to do so only in specifically enumerated circumstances.

(iii) Paragraph (7) permits a parent to represent an unborn child which former G.S. 36A-26.3 did not allow.

This section modifies the Uniform Trust Code in three respects:

(i) In paragraphs (1), (2) and (6) the words "general guardian" and "guardian of the estate" were substituted for the word "conservator" and in paragraph (2) the words "guardian of person" were substituted for the word "guardian." In the North Carolina context, references in the Official Comments to "conservator" should be read to apply to a general guardian or a guardian of the estate, and references to a "guardian" should be read to apply to a guardian of the person.

(ii) Paragraph (6) was modified to omit the reference to a parent representing an "unborn" child in light of the addition of paragraph (7) to this section. Paragraph (6) was also modified to add the second sentence which is designed to eliminate conflicts regarding the proper parent to represent a minor child.

(iii) Paragraph (7) was added to provide that representation of unborn issue was not limited to a parent representing an unborn child as provided in the Uniform Trust Code but to any ancestor, such as a grandparent.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section is amended to make clear that (i) the representation rules set forth in the section apply only to matters involving the trust and (ii) the trustee may not bind a beneficiary in matters concerning a dispute with the trustee. In addition, subsection (2) of the section has been deleted because of the limited powers conferred upon a guardian of the person under Chapter 35A.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 11, effective October 1, 2007, added "involving a trust" at the end of the introductory paragraph; deleted subdivision (2) relating to wards; added "unless the question or dispute involves the internal affairs of the trust" at the end of subdivision (4); deleted "or guardian of the person" following "guardian of the estate" and made a related change in the first sentence in subdivision (6). See Editor's note for applicability.

§ 36C-3-304. Representation by person having substantially identical interest.

Unless otherwise represented under this Article, a minor, an incompetent or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent that there is no conflict of interest between the representative and the person represented with respect to the particular question or dispute. (2005-192, s. 2; 2007-106, s. 12.)

OFFICIAL COMMENT

This section authorizes a person with a substantially identically interest with respect to a particular question or dispute to represent and bind an otherwise unrepresented minor, incapacitated or unborn individual, or person whose location is unknown and not reasonably ascertainable. This section is derived from Section 1-403(2)(iii) of the Uniform Probate Code, but with several modifications. Unlike the UPC, this section does not expressly require that the representation be adequate, the drafters preferring to leave this issue to the courts. Furthermore, this section extends the doctrine of virtual representation to representation of minors and incapacitated individuals. Finally, this section does not apply to the extent there is a conflict of interest between the representative and the person represented.

Restatement (First) of Property Sections 181 and 185 (1936) provide that virtual representation is inapplicable if the interest represented was not sufficiently protected. Representation is deemed sufficiently protective as long as it does not appear that the representative acted in hostility to the interest of the person represented. Restatement (First) of Property Section 185 (1936). Evidence of inactivity or lack of skill is material only to the extent it establishes such hostility. Restatement (First) of Property Section 185 cmt. b (1936).

Typically, the interests of the representative and the person represented will be identical. A common example would be a trust providing for distribution to the settlor's children as a class, with an adult child being able to represent the interests of children who are either minors or unborn. Exact identity of interests is not required, only substantial identity with respect to the particular question or dispute. Whether such identity is present may depend on the nature of the interest. For example, a presumptive remaindermen may be able to represent alternative remaindermen with respect to approval of a trustee's report but not with respect to interpretation of the remainder provision or termination of the trust. Even if the beneficial interests of the representative and person represented are identical, representation is not allowed in the event of conflict of interest. The representative may have interests outside of the trust that are adverse to the interest of the person represented, such as a prior relationship with the trustee or other beneficiaries. *See* Restatement (First) of Property Section 185 cmt. d (1936).

NORTH CAROLINA COMMENT

This section is generally consistent with the virtual representation provisions in former G.S. 36A-26.3(2)c. but is broader in permitting a person with a substantially identical interest to represent not only unborn persons but also minors and incapacitated persons. Former section G.S. 36A-26.3(2)c. also allowed the representation of "unascertained persons" whereas this section permits representation of "a person whose identity or location is unknown and not reasonably ascertainable." Prior case law recognized the doctrine of virtual representation with respect to proceedings in superior court involving trusts. *See, e.g., Waddell v. United Cigar Stores of America,* 195 N.C. 434, 142 S.E. 585 (1928); *McPherson v. First & Citizens Nat'l Bank,* 240 N.C. 1, 81 S.E.2d 386 (1954).

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section is amended to substitute the word "incompetent" for the word "incapacitated" in order to be consistent with other references in Chapter 36C to that condition. In addition, the phrase "with respect to the particular question or dispute" was added at the end of the section to clarify that a conflict of interest precluding representation of a person must be with respect to the particular question or dispute involved.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 12, effective October 1, 2007, substituted "incompetent" for "incapacitated" near the beginning and added "with respect to the particular question or dispute" at the end of the paragraph. See Editor's note for applicability.

§ 36C-3-305. Appointment of representative; scope of representation.

(a) If the court determines that an interest is not represented under this Article, or that the otherwise available representation might be inadequate, the court may appoint a guardian ad litem to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, an incompetent or unborn individual, or a person whose identity or location is unknown. A guardian ad litem may be appointed to represent several persons or interests.

(b) Any representative under this Article may act on behalf of the individual represented with respect to any matter arising under this Chapter, whether or not a judicial proceeding concerning the trust is pending.

(c) In making decisions, a representative, including a guardian ad litem, may base a decision to consent to an action upon a finding that living members of the individual's family would generally benefit from that action. (2005-192, s. 2; 2007-106, s. 13.)

OFFICIAL COMMENT

This section is derived from Section 1-403(4) of the Uniform Probate Code. However, this section substitutes "representative" for "guardian ad litem" to signal that a representative under this Code serves a different role. Unlike a guardian ad litem, under this section a representative can be appointed to act with respect to a nonjudicial settlement or to receive a notice on a beneficiary's behalf. Furthermore, in making decisions, a representative may consider general benefit accruing to living members of the family. "Representative" is placed in brackets in case the enacting jurisdiction prefers a different term. The court may appoint a representative to act for a person even if the person could be represented under another section of this article.

NORTH CAROLINA COMMENT

Subsection (a) is generally consistent with former G.S. 36A-26.3 authorizing the court to appoint a guardian ad litem to represent a minor or an incapacitated or unborn individual, but differs in also allowing the appointment of a guardian ad litem to represent a person whose identity is known but who cannot be located.

Subsection (c) modifies the Uniform Trust Code in bringing forward the more specific language of former G.S. 36A-125.5(1) with respect to a guardian ad litem basing a consent upon a finding of benefit to the beneficiary's family. The provision applies to consent by a guardian ad litem in all matters involving trusts and not just to consent to modification or termination of trusts as provided in former G.S. 36A-125.5(1).

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (a) is amended to substitute the word "incompetent" for the word "incapacitated" in order to be consistent with other references in Chapter 36C to that condition.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 13, effective October 1, 2007, substituted "an incompetent" for "incapacitated" in subsection (a). See Editor's note for applicability.

ARTICLE 4.

Creation, Validity, Modification, and Termination of Trust.

GENERAL COMMENT

Sections 401 through 409, which specify the requirements for the creation of a trust, largely codify traditional doctrine. Section 401 specifies the methods by which trusts are created, that is, by transfer of property, self-declaration, or exercise of a power of appointment. Whatever method may have been employed, other requirements, including intention, capacity and, for certain types of trusts, an ascertainable beneficiary, also must be satisfied before a trust is created. These requirements are listed in Section 402. Section 403 addresses the validity in the enacting jurisdiction of trusts created in other jurisdictions. A trust not created by will is validly created if its creation complied with the law of specified jurisdictions in which the settlor or trustee had a significant contact. Section 404 forbids trusts for illegal or impossible purposes, and requires that a trust and its terms must be for the benefit of its beneficiaries. Section 405 recites the permitted purposes of a charitable trust. Section 406 lists some of the grounds for contesting a trust. Section 407 validates oral trusts. The remaining sections address what are often referred to as "honorary" trusts, although such trusts are valid and enforceable under this Code. Section 408 covers a trust for the care of an animal; Section 409 allows creation of a trust for another noncharitable purpose such as maintenance of a cemetery lot.

Sections 410 through 417 provide a series of interrelated rules on when a trust may be terminated or modified other than by its express terms. The overall objective of these sections is to enhance flexibility consistent with the principle that preserving the settlor's intent is paramount. Termination or modification may be allowed upon beneficiary consent if the court concludes that the trust or a particular provision no longer achieves a material purpose or if the settlor concurs (Section 411), by the court in response to unanticipated circumstances or due to ineffective administrative terms (Section 412), or by the court or trustee if continued administration under the trust's existing terms would be uneconomical (Section 414). A trust may be reformed to correct a mistake of law or fact (Section 415), or modified to achieve the settlor's tax objectives (Section 416). Trusts may be combined or divided (Section 417). A trustee or beneficiary has standing to petition the court with respect to a proposed termination or modification (Section 410).

Section 413 codifies and at the same time modifies the doctrine of cy pres, at least as applied in most states. The Uniform Trust Code authorizes the court to apply cy pres not only if the original means becomes impossible or unlawful but also if the means become impracticable or wasteful. Section 413 also creates a presumption of general charitable intent. Upon failure of the settlor's original plan, the court cannot divert the trust property to a noncharity unless the terms of the trust expressly so provide...

The requirements for a trust's creation, such as the necessary level of capacity and the requirement that a trust have a legal purpose, are controlled by statute and common law, not by the settlor. *See* Section 105(b)(1), (3). Nor may the settlor negate the court's ability to modify or terminate a trust as provided in Sections 410 through 416. *See*Section 105(b)(4). However, a settlor is free to restrict or modify the trustee's power to terminate an uneconomic trust as provided in Sections 414, and the trustee's power to combine and divide trusts as provided in Section 417.

§ 36C-4-401. Methods of creating trust.

A trust may be created by any of the following methods:

(1) Transfer of property by a settlor to a person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death including either of the following:
  a. The devise or bequest to the trustee of the trust as provided in G.S. 31-47.
  b. The designation of the trust as beneficiary of life insurance or other death benefits as provided in G.S. 36C-4-401.1.

(2) Declaration by the owner of property that the owner holds identifiable property as trustee unless the transfer of title of that property is otherwise required by law.

(3) Exercise of a power of appointment in favor of a trustee. (2005-192, s. 2; 2007-106, s. 14.)

OFFICIAL COMMENT

This section is based on Restatement (Third) of Trusts Section 10 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts Section 17 (1959). Under the methods specified for creating a trust in this section, a trust is not created until it receives property. For what constitutes an adequate property interest, see Restatement (Third) of Trusts Sections 40-41 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 74-86 (1959). The property interest necessary to fund and create a trust need not be substantial. A revocable designation of the trustee as beneficiary of a life insurance policy or employee benefit plan has long been understood to be a property interest sufficient to create a trust. *See* Section 103 ... ("property" defined). Furthermore, the property interest need not be transferred contemporaneously with the signing of the trust instrument. A trust instrument signed during the settlor's lifetime is not rendered invalid simply because the trust was not created until property was transferred to the trustee at a much later date, including by contract after the settlor's death. A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust. *See* Unif. Testamentary Additions to Trusts Act Section 1 (1991), *codified at* Uniform Probate Code Section 2-511 (pourover devise to trust valid regardless of existence, size, or character of trust corpus). *See also* Restatement (Third) of Trusts Section 19 (Tentative Draft No. 1, approved 1996).

While this section refers to transfer of property to a trustee, a trust can be created even though for a period of time no trustee is in office. *See* Restatement (Third) of Trusts Section 2 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 2 cmt. i (1959). A trust can also be created without notice to or acceptance by a trustee or beneficiary. See Restatement (Third) of Trusts Section 14 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 35-36 (1959).

The methods specified in this section are not exclusive. Section 102 recognizes that trusts can also be created by special statute or court order. *See also* Restatement (Third) of Trusts Section 1 cmt. a (Tentative Draft No. 1, approved 1996); Unif. Probate Code Section 2-212 (elective share of incapacitated surviving spouse to be held in trust on terms specified in statute); Unif. Probate Code Section 5-411(a)(4) (conservator may create trust with court approval); Restatement (Second) of Trusts Section 17 cmt. i (1959) (trusts created by statutory right to bring wrongful death action).

A trust can also be created by a promise that creates enforceable rights in a person who immediately or later holds these rights as trustee. *See* Restatement (Third) of Trusts Section 10(e) (Tentative Draft No. 1, approved 1996). A trust thus created is valid notwithstanding that the trustee may resign or die before the promise is fulfilled. Unless expressly made personal, the promise can be enforced by a successor trustee. For examples of trusts created by means of promises enforceable by the trustee, see Restatement (Third) of Trusts Section 10 cmt. g (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 14 cmt. h, 26 cmt. n (1959).

A trust created by self-declaration is best created by reregistering each of the assets that comprise the trust into the settlor's name as trustee...

While a trust created by will may come into existence immediately at the testator's death and not necessarily only upon the later transfer of title from the personal representative, Section 701 makes clear that the nominated trustee does not have a duty to act until there is an acceptance of the trusteeship, express or implied. To avoid an implied acceptance, a nominated testamentary trustee who is monitoring the actions of the personal representative but who has not yet made a final decision on acceptance should inform the beneficiaries that the nominated trustee has assumed only a limited role. The failure so to inform the beneficiaries could result in liability if misleading conduct by the nominated trustee causes harm to the trust beneficiaries. *See* Restatement (Third) of Trusts Section 35 cmt. b (Tentative Draft No. 2, approved 1999).

While this section confirms the familiar principle that a trust may be created by means of the exercise of a power of appointment (paragraph (3)), this Code does not legislate comprehensively on the subject of powers of appointment but addresses only selected issues. *See* Sections 302 (representation by holder of general ... power of appointment)... For the law on powers of appointment generally, see Restatement (Second) of Property: Donative Transfers Sections 11.1-24.4 (1986); Restatement (Third) of Property: Wills and Other Donative Transfers (in progress).

NORTH CAROLINA COMMENT

Paragraph (1) of this section is consistent with prior law which required a transfer of title to property by the settlor to a trustee to constitute a trust relationship. *See Wescott v. First & Citizens Nat. Bank,* 227 N.C. 39, 40 S.E.2d 461 (1946); *Baxter v. Jones,* 14 N.C. App. 296, 188 S.E.2d 622 (1972), *cert. denied,* 281 N.C. 621, 190 S.E.2d 465 (1972).

The Official Comment to this section states that "A trust signed during the settlor's lifetime is not rendered invalid because the trust was not created until property was transferred to the trustee at a much later date... A pourover devise to a previously unfunded trust is also valid and may constitute the property interest creating the trust." *But see* G.S. 31-47 which provides that a pourover devise in a will to the trustee of a trust is valid "if established in writing prior to the execution of such will."

Paragraph (1) modifies the Uniform Trust Code by adding the words "by the settlor" after the words "transfer of property" for clarification purposes.

Paragraph (2) differs from the Uniform Trust Code by adding the phrase "unless the transfer of title of such property is otherwise required by law." The Uniform Trust Code adopts the common law rule that a declaration of trust can be funded by declaring assets to be held in trust without executing separate documents of transfer. *See* the Official Comment to this section and authorities cited. North Carolina courts have not addressed this issue. The drafters concluded that the best practice is to require compliance with state law provisions governing the transfer of title in order to eliminate questions regarding ownership of property and provide better protection of the rights of third parties and trust beneficiaries.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, paragraph (1) of this section is amended to clarify that other dispositions taking effect upon the settlor's death include a devise or bequest to a trustee as provided in G.S. 31-47 and the designation of a trustee as beneficiary of death benefits as provided in G.S. 36-4-401.1.

Effective July 5, 2007, G.S. 31-47 is amended to provide that a pour-over devise to a trustee of a previously unfunded inter vivos trust is valid. This changes prior North Carolina law as set forth in former G.S. 31-47 which indicated that a pour-over devise to a trustee of an inter vivos trust was valid only if property was transferred to the trust prior to execution of the will. G.S. 31-47 also provides that a revocable trust funded initially by a pour-over devise is subject to Article 6 of Chapter 36C as of the date of execution of the trust.

Effective Date and Applicability. — Session Laws 2005-192, which enacted Chapter 36C, in s. 7(a) provides: "Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

"Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded."

Official Comment on Effective Date and Applicability. — The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code Section 8 101.

North Carolina Comment on Effective Date and Applicability. — The drafters modified the provisions of the Uniform Trust Code relating to its application to trust instruments executed before its effective date by adding the phrase "or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary" to the end of the first sentence of the second paragraph. Although this Chapter is intended to have broad application, the drafters concluded that a rule of construction or presumption provided in this Chapter should not be applied to a trust instrument executed before the effective date of this Chapter if the application of such rule or presumption would impair the substantial rights of a beneficiary of a trust established under such a trust instrument.

Editor's note. — Session Laws 2005-192, which enacted Chapter 36C, in s. 6, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Official Comments, copyright © 2005, are reprinted in this Chapter with the permission of the National Conference of Commissioners on Uniform State Laws. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

Session Laws 2007-106, s. 55, provides: "TheRevisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 14, effective October 1, 2007, added "by any of the following methods" at the end of the introductory paragraph; added "including either of the following:" at the end of subdivision (1); added subdivisions (1)a. and b.; and made minor stylistic and punctuation changes. See Editor's note for applicability.

§ 36C-4-401.1. Interest of trustee as beneficiary of life insurance or other death benefit sufficient to support inter vivos or testamentary trust.

(a) The interest of a trustee as the beneficiary of a life insurance policy is a sufficient property interest or res to support the creation of an inter vivos or testamentary trust notwithstanding the fact that the insured or any other person or persons reserves or has the right to exercise any one or more of the following rights or powers:

(1) To change the beneficiary;
(2) To surrender the policy and receive the cash surrender value;
(3) To borrow from the insurance company issuing the policy or elsewhere using the policy as collateral security;
(4) To assign the policy; or
(5) To exercise any other right in connection with the policy commonly known as an incident of ownership of that policy.

The term "life insurance policy" includes life, annuity, and endowment contracts, or any variation or combination of those contracts, and any agreement entered into by an insurance company in connection with life, annuity, or endowments contracts.

(b) The interest of a trustee as the beneficiary of a death benefit under an employee benefit plan or group life insurance policy is a sufficient property interest or res to support the creation of an inter vivos or testamentary trust notwithstanding the fact that the insured, employer, insurer or administrator of the plan reserves or has the right to revoke or otherwise defeat the designation or assignment or to exercise any one or more of the rights or powers incident to employee benefit plans or group life insurance policies.

The term "employee benefit plan" includes pension, retirement, death benefit, deferred compensation, employment, agency, retirement annuity, stock bonus, profit-sharing or employees' savings contracts, plans, systems or trusts; and trusts, securities or accounts established or held under the federal Self-Employed Individuals Tax Retirement Act of 1962, the federal Employee Retirement Income Security Act of 1974, or similar legislation. The term "group life insurance policy" includes group life, industrial life, accident, and health insurance policies having death benefits.

(c) A testator having the right to designate the beneficiary under a life insurance policy, employee benefit plan, or group life insurance policy described in subsection (a) or (b) of this section may designate as that beneficiary a trustee named or to be named in the testator's will whether or not the will is in existence at the time of the designation. The proceeds received by the trustee shall be held and disposed of as part of the trust estate under the terms of the will as they exist at the death of the testator. If no trustee makes claim to the proceeds within six months after the death of the testator, payments shall be made to the personal representative of the estate of the testator unless it is otherwise provided by an alternative designation or by the policy or plan. The proceeds received by the trustee is not subject to claims against the estate of the testator to estate or inheritance taxes to any greater extent than if the proceeds were payable directly to the beneficiary or beneficiaries named in the trust. The proceeds may be commingled with any other assets that may properly become part of the trust, but the proceeds shall not become part of the testator's estate for purposes of trust administration unless the will expressly so provides. (1957, c. 1444, s. 1; 1977, c. 502, s. 2; 1999-337, s. 7(j); 2005-192, s. 2.)

NORTH CAROLINA COMMENT

This section, which is not a part of the Uniform Trust Code, recodifies the provisions of former G.S. 36A-100 and expressly confirms that an unfunded trust is valid where the trust is a designated beneficiary of a life insurance policy or retirement benefits. The Uniform Trust Code implicitly provides for the same result in paragraph (1) of Section 401 which validates the creation of a trust by the transfer of property in a "disposition taking effect upon the settlor's death." The Official Comment to G.S. 36C-4-401 acknowledges that a designation of the trustee as beneficiary of life insurance and retirement benefits is a property interest sufficient to create a trust.

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in the 2005 act having been G.S. 36C-4-401A.

Legal Periodicals. — For comment on this section, see 36 N.C.L. Rev. 59 (1957).

For survey of 1977 law on wills, trusts and estates, see 56 N.C.L. Rev. 1152 (1978).

CASE NOTES

Editor's Note. — *The case below was decided under prior law.*

Formality of Will Not Necessary in Executive of Insurance Trust. — The mere fact that the proceeds are not payable until the death of the insured does not make a disposition testamentary. An insurance trust will be upheld even though it has not been executed with the formality necessary to constitute a will. Ballard v. Lance, 6 N.C. App. 24, 169 S.E.2d 199 (1969).

§ 36C-4-402. Requirements for creation.

(a) A trust is created only if:
- (1) The settlor has capacity to create a trust;
- (2) The settlor indicates an intention to create the trust;
- (3) The trust has a definite beneficiary or is:
  - a. A charitable trust;
  - b. A trust for the care of an animal, as provided in G.S. 36C-4-408; or
  - c. A trust for a noncharitable purpose, as provided in G.S. 36C-4-409;
- (4) The trustee has duties to perform; and
- (5) The same person is not the sole trustee and sole beneficiary.

(b) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(c) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails, and the property subject to the power passes to the persons who would have taken the property had the power not been conferred. (2005-192, s. 2.)

OFFICIAL COMMENT

Subsection (a) codifies the basic requirements for the creation of a trust. To create a valid trust, the settlor must indicate an intention to create a trust. *See* Restatement (Third) of Trusts Section 13 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 23 (1959). But only such manifestations of intent as are admissible as proof in a judicial proceeding may be considered. *See* Section 103(17) ("terms of a trust" defined).

To create a trust, a settlor must have the requisite mental capacity. To create a revocable or testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have capacity during lifetime to transfer the property free of trust. *See* Section 601 (capacity of settlor to create revocable trust), and *see generally* Restatement (Third) of Trusts Section 11 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 18-22 (1959); and Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.1 (Tentative Draft No. 3, 2001).

Subsection (a)(3) requires that a trust, other than a charitable trust, a trust for the care of an animal, or a trust for another valid noncharitable purpose, have a definite beneficiary. While some beneficiaries will be definitely ascertained as of the trust's creation, subsection (b) recognizes that others may be ascertained in the future as long as this occurs within the applicable perpetuities period. The definite beneficiary requirement does not prevent a settlor from making a disposition in favor of a class of persons. Class designations are valid as long as the membership of the class will be finally determined within the applicable perpetuities period. For background on the definite beneficiary requirement, see Restatement (Third) of Trusts Sections 44-46 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 112-122 (1959).

Subsection (a)(4) recites standard doctrine that a trust is created only if the trustee has duties to perform. *See* Restatement (Third) of Trusts Section 2 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 2 (1959). Trustee duties are usually active, but a validating duty may also be passive, implying only that the trustee has an obligation not to interfere with the beneficiaries' enjoyment of the trust property. Such passive trusts, while valid under this Code, may be terminable under the enacting jurisdiction's Statute of Uses. *See* Restatement (Third) of Trusts Section 6 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 67-72 (1959).

Subsection (a)(5) addresses the doctrine of merger, which, as traditionally stated, provides that a trust is not created if the settlor is the sole trustee and sole beneficiary of all beneficial interests. The doctrine of merger has been inappropriately applied by the courts in some jurisdictions to invalidate self-declarations of trust in which the settlor is the sole life beneficiary but other persons are designated as beneficiaries of the remainder. The doctrine of merger is properly applicable only if all beneficial interests, both life interests and remainders, are vested in the same person, whether in the settlor or someone else. An example of a trust to which the doctrine of merger would apply is a trust of which the settlor is sole trustee, sole beneficiary for life, and with the remainder payable to the settlor's probate estate. On the doctrine of merger generally, see Restatement (Third) of Trusts Section 69 (Tentative Draft No. 3, 2001); Restatement (Second) of Trusts Section 341 (1959).

Subsection (c) allows a settlor to empower the trustee to select the beneficiaries even if the class from whom the selection may be made cannot be ascertained. Such a provision would fail under traditional doctrine; it is an imperative power with no designated beneficiary capable of enforcement. Such a provision is valid, however, under both this Code and the Restatement, if there is at least one person who can meet the description. If the trustee does not exercise the power within a reasonable time, the power fails and the property will pass by resulting trust. *See* Restatement (Third) of Trusts Section 46 (Tentative Draft No. 2, approved 1999). *See also* Restatement (Second) of Trusts Section 122 (1959); Restatement (Second) of Property: Donative Transfers Section 12.1 cmt. a (1986).

NORTH CAROLINA COMMENT

Subsection (a) is somewhat similar to prior North Carolina law which held that the elements necessary to create a valid trust are (1) sufficient words to show an intention to create a trust, (2) a definite subject, and (3) an ascertained object. *See, e.g., Finch v. Honeycutt,* 246 N.C. 91, 97 S.E.2d 478 (1957); *Bland v. Branch Banking & Trust Co.,* 143 N.C. App. 282, 547

S.E.2d 62 (2001). In *Williams v. Mullen,* 31 N.C. App. 41, 228 S.E.2d 512 (1976), *cert. granted,* 291 N.C. 329, 230 S.E.2d 678 (1976), the court added "designated beneficiaries" as a fourth element.

Subsection (a)(5) applies the doctrine of merger to a trust of which the settlor is the sole trustee and sole beneficiary. North Carolina law recognizes this doctrine. *See, e.g., Blades v. Norfolk Southern Ry. Co.,* 224 N.C. 32, 29 S.E.2d 148 (1944).

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, an agent under a power of attorney and a general guardian or guardian of the estate may create a trust notwithstanding the provisions of subdivisions (a) (1) and (2) of this section. See G.S. 36C-6-602.1(a) (agent) and G.S. 35A-1251(24) (guardian).

§ 36C-4-403. Trusts created in other jurisdictions.

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation:

(1) The settlor was domiciled, had a place of abode, or was a national;
(2) A trustee was domiciled or had a place of business; or
(3) Any trust property was located. (2005-192, s. 2.)

OFFICIAL COMMENT

The validity of a trust created by will is ordinarily determined by the law of the decedent's domicile. No such certainty exists with respect to determining the law governing the validity of inter vivos trusts. Generally, at common law a trust was created if it complied with the law of the state having the most significant contacts to the trust. Contacts for making this determination include the domicile of the trustee, the domicile of the settlor at the time of trust creation, the location of the trust property, the place where the trust instrument was executed, and the domicile of the beneficiary. *See* 5A Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts Sections 597, 599 (4th ed. 1987). Furthermore, if the trust has contacts with two or more states, one of which would validate the trust's creation and the other of which would deny the trust's validity, the tendency is to select the law upholding the validity of the trust.

See 5A Austin Wakeman Scott & William Franklin Fratcher, The Law of Trusts 600 (4th ed. 1987).

Section 403 extends the common law rule by validating a trust if its creation complies with the law of any of a variety of states in which the settlor or trustee had significant contacts. Pursuant to Section 403, a trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed, or the law of the jurisdiction in which, at the time of creation the settlor was domiciled, had a place of abode, or was a national; the trustee was domiciled or had a place of business; or any trust property was located.

Section 403 is comparable to Section 2-506 of the Uniform Probate Code, which validates wills executed in compliance with the law of a variety of places in which the testator had a significant contact. Unlike the UPC, however, Section 403 is not limited to execution of the instrument but applies to the entire process of a trust's creation, including compliance with the requirement that there be trust property. In addition, unlike the UPC, Section 403 validates a trust valid under the law of the domicile or place of business of the designated trustee, or if valid under the law of the place where any of the trust property is located.

The section does not supercede local law requirements for the transfer of real property, such that title can be transferred only by recorded deed.

NORTH CAROLINA COMMENT

This section is broader than former G.S. 36A-50 which validated a charitable trust created in another State only if the trust was valid under the laws of the State of the domicile of the settlor.

§ 36C-4-404. Trust purposes.

A trust may be created only to the extent that its purposes are lawful, not contrary to public policy, and possible to achieve. A trust and its terms must be for the benefit of its beneficiaries. (2005-192, s. 2.)

OFFICIAL COMMENT

For an explication of the requirement that a trust must not have a purpose that is unlawful or against public policy, see Restatement (Third) of Trusts Sections 27-30 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Sections 59-65 (1959). A trust with a purpose that is unlawful or against public policy is invalid. Depending on when the violation occurred, the trust may be invalid at its inception or it may become invalid at a later date. The invalidity may also affect only particular provisions. Generally, a trust has a purpose which is illegal if (1) its performance involves the commission of a criminal or tortious act by the trustee; (2) the settlor's purpose in creating the trust was to defraud creditors or others; or (3) the consideration for the creation of the trust was illegal. *See* Restatement (Third) of Trusts Section 28 cmt. a (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 60 cmt. a (1959). Purposes violative of public policy include those that tend to encourage criminal or tortious conduct, that interfere with freedom to marry or encourage divorce, that limit religious freedom, or which are frivolous or capricious. *See* Restatement (Third) of Trusts Section 29 cmt. d-h (Tentative Draft No. 2, 1999); Restatement (Second) of Trusts Section 62 (1959).

Pursuant to Section 402(a), a trust must have an identifiable beneficiary unless the trust is of a type that does not have beneficiaries in the usual sense, such as a charitable trust or, as provided in Sections 408 and 409, trusts for the care of an animal or other valid noncharitable purpose. The general purpose of trusts having identifiable beneficiaries is to benefit those beneficiaries in accordance with their interests as defined in the trust's terms. The requirement of this section that a trust and its terms be for the benefit of its beneficiaries, which is derived from Restatement (Third) of Trusts Section 27(2) (Tentative Draft No. 2, approved 1999), implements this general purpose. While a settlor has considerable latitude in specifying how a particular trust purpose is to be pursued, the administrative and other nondispositive trust terms must reasonably relate to this purpose and not divert the trust property to achieve a trust purpose that is invalid, such as one which is frivolous or capricious. *See* Restatement (Third) of Trusts Section 27 cmt. b (Tentative Draft No. 2, approved 1999).

Section 412(b), which allows the court to modify administrative terms that are impracticable, wasteful, or impair the trust's administration, is a specific application of the requirement that a trust and its terms be for the benefit of the beneficiaries. The fact that a settlor suggests or directs an unlawful or other inappropriate means for performing a trust does not invalidate the trust if the trust has a substantial purpose that can be achieved by other methods. *See* Restatement (Third) of Trusts Section 28 cmt. e (Tentative Draft No. 2, approved 1999).

§ 36C-4-405. Charitable purposes.

(a) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, benevolent, literary, governmental, or municipal purposes, or other purposes the achievement of which is beneficial to the community.

(b) It is the policy of the State that a gift for charitable purposes, whether in trust or otherwise, is valid, notwithstanding the fact that the gift is made in general terms, and this section shall be construed liberally to effect this policy.

(c) No gift for charitable purposes, whether in trust or otherwise, is void or invalid because:

(1) The gift is in general terms or is uncertain as to the specific charitable purposes;

(2) When the gift is made in trust, the trustee is granted discretionary powers in the selection and designation of the beneficiaries of that charitable trust or in carrying out the purpose of that trust;

(3) The trustee or other recipient of the gift is given no specific instructions, powers, or duties as to the manner or means of carrying out those charitable purposes; or

(4) The gift contravenes any statute or rule against perpetuities.

(d) When any gift is made in general terms, the trustee or other recipient of the gift may:

(1) Select from time to time one or more specific charitable beneficiaries or purposes for which any trust or property or income is held and administered; and

(2) Determine the means to accomplish those charitable purposes, unless otherwise provided, including the creation of corporations or other legal entities for those purposes.

(e) For purposes of this section, the reference to a "gift" includes both inter vivos and testamentary gifts, grants, and other transfers. (2005-192, s. 2.)

OFFICIAL COMMENT

The required purposes of a charitable trust specified in subsection (a) restate the well-established categories of charitable purposes listed in Restatement (Third) of Trusts Section 28 (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Section 368 (1959), which ultimately derive from the Statute of Charitable Uses, 43 Eliz. I, c.4 (1601). The directive to the courts to validate purposes the achievement of which are beneficial to the community has proved to be remarkably adaptable over the centuries. The drafters concluded that it should not be disturbed.

Charitable trusts are subject to the restriction in Section 404 that a trust purpose must be legal and not contrary to public policy. This would include trusts that involve invidious discrimination. *See* Restatement (Third) of Trusts Section 28 cmt. f (Tentative Draft No. 3, approved 2001).

. . .

NORTH CAROLINA COMMENT

Subsection (a) modifies the Uniform Trust Code by adding the words "scientific benevolent, literary" after the word "health."

Subsection (b) brings forward in place of subsection (b) of the Uniform Trust Code with minor modifications the provisions of former G.S. 36A-52(a) regarding the policy of the State with respect to gifts for charity in general terms. The drafters omitted subsection (b) of the Uniform Trust Code, which provides that the court may select a charitable purpose or beneficiary if the trust does not indicate a particular purpose or beneficiary, because that subject is addressed in more detail in G.S. 36C-4-405.1 which is not a part of the Uniform Trust Code.

Subsection (c) brings forward in place of subsection (c) of the Uniform Trust Code the substance of provisions in former G.S. 36A-52(b) confirming the validity of a gift for charitable purposes when the gift is in general terms, the trustee has discretion or is given no instructions to select a charity, or the gift contravenes a statute. Subsection (c) of the Uniform Trust Code providing that the settlor, "among others," may enforce a charitable trust was omitted because that subject is also addressed in more detail in G.S. 36C-4-405.1.

Subsections (d) and (e) were added to this section to also bring forward the substance of the provisions in former G.S. 36A-52(b) granting certain authority to the trustee to select a charity or determine the means to accomplish a charitable purpose when the gift is in general terms.

CASE NOTES

Editor's Note. — *The cases below were decided under prior law.*

The rule against perpetuities does not apply to charitable trusts. Penick v. Bank of Wadesboro, 218 N.C. 686, 12 S.E.2d 253 (1940); American Trust Co. v. Williamson, 228 N.C. 458, 46 S.E.2d 104 (1948); Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 275 N.C. 399, 168 S.E.2d 358 (1969).

Charitable trusts are not subject to the rule against perpetuities, this section being merely declaratory of the existing law, and limitations over from one charity to another may be made to take effect after the period prescribed by the rule against perpetuities. Williams v. Williams, 215 N.C. 739, 3 S.E.2d 334 (1939).

Restraints on Alienation of Property Are Not Void. — North Carolina has tacitly recognized the right of a donor to restrain alienation of property in charitable trusts since it recognizes the right of the court, in its equitable jurisdiction, to order the sale of trust property under certain conditions, even when the trust forbids the trustee to mortgage or sell. Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 275 N.C. 399, 168 S.E.2d 358 (1969).

Charitable trusts are exceptions to the rule that a restraint on alienation is void. Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 275 N.C. 399, 168 S.E.2d 358 (1969).

Equity Courts May Modify Terms of Charitable Trust. — Courts in the exercise of their equitable jurisdiction may modify the terms of a charitable trust when it appears that some exigency, contingency, or emergency not anticipated by the trustor has arisen requiring a disregard of a specific provision of the trust in order to preserve the trust estate or protect the cestuis. Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 275 N.C. 399, 168 S.E.2d 358 (1969).

Court May Order Real Property Sold and Reinvested. — In order to accomplish the ultimate purpose or intent of the trustor, the court may order real property sold and reinvested in other property when a change in circumstances makes such sale necessary to accomplish the purposes of the trust, even though the trust forbids the trustees to mortgage or sell the property. Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 275 N.C. 399, 168 S.E.2d 358 (1969).

Courts of equity have long exercised the jurisdiction to sell property devised for charitable uses, where, on account of changed conditions, the charity would fail or its usefulness would be materially impaired without a sale. Wachovia Bank & Trust Co. v. John Thomasson Constr. Co., 275 N.C. 399, 168 S.E.2d 358 (1969).

Trusts Held Valid. — A devise of all the income and profits of lands in trust for a charitable organization of a certain church "to be used by the stewards of the church in defraying the expenses of the institution" is a sufficient designation of the stewards of that church as trustees for the execution of the trust contemplated by the instrument, and to vest in them the title and right of possession for its purposes. Ladies Benevolent Soc'y v. Orrell, 195 N.C. 405, 142 S.E. 493 (1928).

Devise establishing trust for the advancement of a religious denomination held not void for indefiniteness. Williams v. Williams, 215 N.C. 739, 3 S.E.2d 334 (1939).

A gift to the trustees of a named church, in trust for the home and foreign missions and benevolent causes of that church, was held valid under this section and good as against the contention that no cause was named capable of enforcing a lawful claim, as each benevolent cause supported by that church had an interest in the devise. King v. Richardson, 46 F. Supp. 510 (M.D.N.C. 1942), aff'd in part and rev'd in part, 136 F.2d 849 (4th Cir. 1943).

Trust Held Invalid. — Bequest of a certain sum to be held in trust, and paid out in 20 years "to such corporations or associations of individuals as will in their judgment best promote the cause of preventing cruelty to animals in the vicinity of Asheville," held void for uncertainty. Woodcock v. Wachovia Bank & Trust Co., 214 N.C. 224, 199 S.E. 20 (1938).

Devise Giving Trustees Power to Convey. — A devise of property in trust subject to an intervening life estate, with direction to the trustees to keep the principal invested and use the proceeds for purposes designated, gives the trustees the power to convey the real estate in fee, since the right to invest and use the proceeds necessarily implies the power to convert into proceeds by sale. Hall v. Wardwell, 228 N.C. 562, 46 S.E.2d 556 (1948).

Details of Administration May Be Left to Trustee. — A charity in its legal sense is a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, and it is the policy of this State, as indicated by our statutes, not to declare such gift void because created for the benefit of an indefinite class, and if the founder describes the general nature of the charitable trust he may leave details of its administration to duly appointed trustees. Whitsett v. Clapp, 200 N.C. 647, 158 S.E. 183 (1931).

The policy of protecting charitable trusts is repeatedly declared throughout the statutory provisions of former Chapter 36A. Edmisten v. Sands, 307 N.C. 670, 300 S.E.2d 387 (1983).

Policy Is to Preserve Intent of Testator or Donor. — The public policy of North Carolina is to preserve, to the fullest extent possible, the manifested intention of a testator or donor to bestow a gift for charitable purposes. Edmisten v. Sands, 307 N.C. 670, 300 S.E.2d 387 (1983).

§ 36C-4-405.1. Enforcement of charitable gift or trust.

(a) The settlor of a charitable trust, the Attorney General, the district attorney, a beneficiary, or any other interested party may maintain a proceeding to enforce a charitable trust, including the following:

(1) A proceeding to require a trustee to make a selection as may be necessary to establish the charitable beneficiaries or purposes for which the trust was established, as provided in subdivisions (d)(1) and (d)(2) of G.S. 36C-4-405;

(2) A proceeding for breach of fiduciary duty if there is reason to believe that the trust property has been mismanaged through negligence or fraud; and

(3) A proceeding for an accounting of the trustee's administration of the trust.

(b) The donor of a charitable gift, the Attorney General, the district attorney, or any other interested party may maintain a proceeding to enforce the gift, including a proceeding to require the recipient of the gift to make a selection as may be necessary to establish the charitable beneficiaries or purposes for which the gift was intended, as provided in subdivisions (d)(1) and (d)(2) of G.S. 36C-4-405. (2005-192, s. 2.)

NORTH CAROLINA COMMENT

This section, which is not a part of the Uniform Trust Code, brings forward the substance of the provisions of former G.S. 36A-48 and former G.S. 36A-52(c) regarding enforcement of charitable trusts and gifts. The section replaces Section 405(b) of the Uniform Trust Code regarding selection by the court of a charitable purpose or beneficiary and Section 405(c) of the Uniform Trust Code dealing with enforcement of a charitable trust. *See* the North Carolina Comment to G.S. 36C-4-405.

Subsection (a) of this section deals with the enforcement of charitable *trusts* whereas subsection (b) deals with the enforcement of charitable *gifts*.

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in the 2005 act having been G.S. 36C-4-405A.

Legal Periodicals. — For article, "The Common Law Powers of the Attorney General of North Carolina," see 9 N.C. Cent. L.J. 1 (1977).

For note, "The Nonprofit Corporation in North Carolina: Recognizing a Right to Member Derivative Suits," see 63 N.C.L. Rev. 999 (1985).

CASE NOTES

Editor's Note. — *The cases below were decided under prior law.*

The trustees of a charitable trust who violate its provisions are subject to the procedure prescribed by this section, and where the trust is created by will the trust estate is not forfeited in favor of a residuary legatee solely upon the ground that the moneys derived have been diverted to other uses than the testator intended. Humphrey v. Board of Trustees, 203 N.C. 201, 165 S.E. 547 (1932), decided under prior law.

Negligence or Fraud in Mismanagement of Trust. — In the absence of a showing of special interest, a party seeking enforcement of a charitable trust should have the Attorney General or district attorney commence an action pursuant to the provisions of this section when it appears that the trust is being mismanaged through negligence or fraud. Kania v. Chatham, 297 N.C. 290, 254 S.E.2d 528 (1979).

The policy of protecting charitable trusts is repeatedly declared throughout the statutory provisions of former Chapter 36A. Edmisten v. Sands, 307 N.C. 670, 300 S.E.2d 387 (1983).

Policy Is to Preserve Intent of Testator or Donor. — The public policy of North Carolina is to preserve, to the fullest extent possible, the manifested intention of a testator or donor to bestow a gift for charitable purposes. Edmisten v. Sands, 307 N.C. 670, 300 S.E.2d 387 (1983).

§ 36C-4-406. Creation of trust induced by fraud, duress, or undue influence.

A trust is voidable to the extent that its creation was induced by fraud, duress, or undue influence. (2005-192, s. 2.)

OFFICIAL COMMENT

This section is a specific application of Restatement (Third) of Trusts Section 12 (Tentative Draft No. 1, approved 1996), and Restatement (Second) of Trusts Section 333 (1959), which provide that a trust can be set aside or reformed on the same grounds as those which apply to a transfer of property not in trust, among which include undue influence, duress, and fraud, and mistake. This section addresses undue influence, duress, and fraud. For reformation of a trust on grounds of mistake, see Section 415. *See* also Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.3 (Tentative Draft No. 3, approved 2001), which closely tracks the language above. Similar to a will, the invalidity of a trust on grounds of undue influence, duress, or fraud may be in whole or in part.

NORTH CAROLINA COMMENTS

This section is consistent with prior law which recognized that fraud and undue influence are grounds to set aside a trust. *See Stilwell v. Walden,* 70 N.C. App. 543, 320 S.E.2d 329 (1984) where, in overturning the trial court's dismissal by directed verdict of a claim alleging constructive fraud, undue influence and mental incapacity as grounds to invalidate a transfer of assets in trust, the court ruled that the evidence was sufficient to establish constructive fraud and that evidence of undue influence and mental incapacity was erroneously excluded by the trial court. With regard to the requirement of mental capacity to create a trust, see G.S. 36C-4-402(a)(1) and the Official Comment to that section.

This section substitutes the word "voidable" in place of the word "void" appearing in the Uniform Trust Code in order to preserve defenses generally available in equity to trustees, bona fide purchasers and other recipients of trust property who had no knowledge that the creation of a trust was induced by fraud, duress or undue influence. *See* The Restatement of Restitution and Unjust Enrichment § 13 (fraud and misrepresentation), § 14 (duress) and § 15 (undue influence) (tentative Draft No. 1 approved April 6, 2001) which provides that a transfer under these circumstances confers voidable title on the transferee subject to certain limited exceptions.

§ 36C-4-407. Evidence of oral trust.

Except as required by a State statute other than this Chapter, a trust need not be evidenced by a trust instrument, but the creation of an oral trust, and its terms may be established only by clear and convincing evidence. (2005-192, s. 2.)

OFFICIAL COMMENT

While it is always advisable for a settlor to reduce a trust to writing, the Uniform Trust Code follows established law in recognizing oral trusts. Such trusts are viewed with caution, however. The requirement of this section that an oral trust can be established only by clear and convincing evidence is a higher standard than is in effect in many States. *See* Restatement (Third) of Trusts Section 20 Reporter's Notes (Tentative Draft No. 1, approved 1996).

Absent some specific statutory provision, such as a provision requiring that transfers of real property be in writing, a trust need not be evidenced by a writing. States with statutes of frauds or other provisions requiring that the creation of certain trusts must be evidenced by a writing may wish specifically to cite such provisions.

For the Statute of Frauds generally, see Restatement (Second) of Trusts Sections 40-52 (1959). For a description of what the writing must contain, assuming that a writing is required, see Restatement (Third) of Trusts Section 22 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 46-49 (1959). For a discussion of when the writing must be signed, see Restatement (Third) of Trusts Section 23 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 41-42 (1959). For the law of oral trusts, see Restatement (Third) of Trusts Section 20 (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Sections 43-45 (1959).

NORTH CAROLINA COMMENT

This section is consistent with prior North Carolina law which recognized that express trusts of real or personal property may be oral and that the evidence of establishment of a parole trust must be "clear, cogent and convincing." *See, e.g., Ellis v. Vespoint,* 102 N.C. App. 739, 403 S.E.2d 542 (1991), *disc. review denied,* 329 N.C. 496, 407 S.E.2d 532 (1991) (real property); *Bryant v. Kelly,* 279 N.C. 123, 181 S.E.2d 438 (1971) (real property); and *Rousseau v. Call,* 169 N.C. 173, 85 S.E. 414 (1915) (personal property). Real property may be the subject of a parole trust because North Carolina has never adopted the Seventh Section of the English Statute of Frauds which required all trusts to be in writing. *E.g., Bryant v. Kelly, supra.*

§ 36C-4-408. Trust for care of animal.

(a) Subject to this section, a trust for the care of one or more designated domestic or pet animals alive at the time of creation of the trust is valid.

(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of the designated animal or animals.

(c) The trust terminates at the death of the animal or last surviving animal. Upon termination, the trustee shall transfer the unexpended trust property in the following order:

(1) As directed in the trust instrument.
(2) If the trust was created in a preresiduary clause in the settlor's will or in a codicil to the settlor's will, under the residuary clause in the settlor's will.
(3) If no taker is produced by the application of subdivision (1) or (2) of this subsection, to the settlor, if then living, otherwise to the settlor's heirs determined as of the date of the settlor's death under Chapter 29 of the General Statutes.

(d) The intended use of the principal or income can be enforced by a person designated for that purpose in the trust instrument or, if none, by a person appointed by the clerk of superior court having jurisdiction over the trust upon application to the clerk of superior court by a person.

(e) Except as ordered by the clerk of superior court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, bond, or fee is required by reason of the existence of the fiduciary relationship of the trustee.

(f) A governing instrument shall be liberally construed to bring the transfer within this section, to presume against the merely precatory or honorary nature of the disposition, and to carry out the general intent of the settlor. Extrinsic evidence is admissible in determining the settlor's intent.

(g) The clerk of superior court may reduce the amount of the property transferred, if the clerk of superior court determines that the amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property under subsection (c) of this section.

(h) If no trustee is designated or if no designated trustee agrees to serve or is able to serve, the clerk of superior court must name a trustee. The clerk of superior court may order the transfer of the property to another trustee, if required to assure that the intended use is carried out and if no successor trustee is designated in the trust instrument or if no designated successor trustee agrees to serve or is able to serve. The clerk of superior court may also make other orders and determinations as are advisable to carry out the intent of the settlor and the purpose of this section. (1995, c. 225, s. 1; 2005-192, s. 2; 2006-259, s. 13(b).)

OFFICIAL COMMENT

This section and the next section of the Code validate so called honorary trusts. Unlike honorary trusts created pursuant to the common law of trusts, which are arguably no more than powers of appointment, the trusts created by this and the next section are valid and enforceable. For a discussion of the common law doctrine, see Restatement (Third) of Trusts Section 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 124 (1959).

This section addresses a particular type of honorary trust, the trust for the care of an animal. Section 409 specifies the requirements for trusts without ascertainable beneficiaries that are created for other noncharitable purposes. A trust for the care of an animal may last for the life of the animal. While the animal will ordinarily be alive on the date the trust is created, an animal may be added as a beneficiary after that date as long as the addition is made prior to the settlor's death. Animals in gestation but not yet born at the time of the trust's creation may also be covered by its terms. A trust authorized by this section may be created to benefit one designated animal or several designated animals.

... Noncharitable trusts ordinarily may be enforced by their beneficiaries. Charitable trusts may be enforced by the State's attorney general or by a person deemed to have a special interest. *See* Restatement (Second) of Trusts Section 391 (1959). But at common law, a trust for the care of an animal or a trust without an ascertainable beneficiary created for a noncharitable purpose was unenforceable because there was no person authorized to enforce the trustee's obligations.

Sections 408 and 409 close this gap. The intended use of a trust authorized by either section may be enforced by a person designated in the terms of the trust or, if none, by a person appointed by the court. In either case, Section 110(b) grants to the person appointed the rights of a qualified beneficiary for the purpose of receiving notices and providing consents. If the trust is created for the care of an animal, a person with an interest in the welfare of the animal has standing to petition for an appointment. The person appointed by the court to enforce the trust should also be a person who has exhibited an interest in the animal's welfare. The concept of granting standing to a person with a demonstrated interest in the animal's welfare is derived from the Uniform Guardianship and Protective Proceedings Act, which allows a person interested in the welfare of a ward or protected person to file petitions on behalf of the ward or protected person. *See, e.g.,* Uniform Probate Code Sections 5-210(b), 5-414(a).

... If the court determines that the trust property exceeds the amount needed for the intended purpose and that the terms of the trust do not direct the disposition, a resulting trust is ordinarily created in the settlor or settlor's successors in interest. *See* Restatement (Third) of Trusts Section 47 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 124 (1959). Successors in interest include the beneficiaries under the settlor's will, if the settlor has a will, or in the absence of an effective will provision, the settlor's heirs. The settlor may also anticipate the problem of excess funds by directing their disposition in the terms of the trust. The disposition of excess funds is within the settlor's control. *See* Section 105(a). While a trust for an animal is usually not created until the settlor's death, subsection (a) allows such a trust to be created during the settlor's lifetime. Accordingly, if the settlor is still living, subsection (c) provides for distribution of excess funds to the settlor, and not to the settlor's successors in interest.

Should the means chosen not be particularly efficient, a trust created for the care of an animal can also be terminated by the trustee or court under Section 414. Termination of a trust under that section, however, requires that the trustee or court develop an alternative means for carrying out the trust purposes. *See* Section 414(c).

This section and the next section are suggested by Section 2-907 of the Uniform Probate Code, but much of this and the following section is new.

NORTH CAROLINA COMMENT

This section of the Uniform Trust Code validating the creation of trusts for the care of "an animal alive during the settlor's lifetime" was omitted, and the provisions of former G.S. 36A-147 providing for the validity of trusts for the care of "one or more designated domestic or pet animals alive at the time of creation of the trust" were brought forward in its place.

Editor's Note. — Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(b), effective October 1, 2006, substituted "settlor" for "transferor" throughout the section; in subdivision (c)(3), substituted "the settlor, if then living, otherwise to the settlor's heirs" for "the transferor or the transferor's heirs"; and in subsection (d), substituted "over the trust" for "over the decedent's estate"; and made minor punctuation changes. See Editor's note for applicability.

§ 36C-4-409. Noncharitable trust without ascertainable beneficiary.

Except as otherwise provided in G.S. 36C-4-408 or by another statute, the following rules apply:

(1) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. The trust may not be enforced for more than 21 years. If the trust is still in existence after 21 years, the trust shall terminate. The unexpended trust property shall be transferred in the following order:
   a. As directed in the trust instrument.
   b. If the trust was created in a preresiduary clause in the settlor's will or in a codicil to the settlor's will, under the residuary clause in the settlor's will.
   c. If no taker is produced by the application of sub-subdivisions a. or b. of this subdivision, to the settlor, if then living, otherwise to the settlor's heirs as determined under Chapter 29 of the General Statutes as of the date of the settlor's death.

(2) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(3) Property of a trust authorized by this section may be applied only to its intended use, except to the extent that the court determines that the value of the trust property exceeds the amount required for the intended use. The property not required for the intended use shall be distributed under subdivision (1) of this section.

(4) Notwithstanding subdivisions (1) through (3) of this section, a trust, contract, or other arrangement to provide for the care of a cemetery lot, grave, crypt, niche, mausoleum, columbarium, grave marker, or monument is valid without regard to remoteness of vesting, duration of the arrangement, or lack of definite beneficiaries to enforce the trust, provided that the trust, contract, or other arrangement meets the requirements of G.S. 28A-19-10, Article 4 of Chapter 65 of the General Statutes, Article 9 of Chapter 65 of the General Statutes, or other applicable law. This section does not repeal or supersede G.S. 36C-4-413. (1995, c. 225, s. 1; 2005-192, s. 2; 2007-106, s. 15.)

OFFICIAL COMMENT

This section authorizes two types of trusts without ascertainable beneficiaries; trusts for general but noncharitable purposes, and trusts for a specific noncharitable purpose other than the care of an animal, on which see Section 408. Examples of trusts for general noncharitable purposes include a bequest of money to be distributed to such objects of benevolence as the trustee might select. Unless such attempted disposition was interpreted as charitable, at common law the disposition was honorary only and did not create a trust. Under this section, however, the disposition is enforceable as a trust for a period of up to 21 years, although that number is placed in brackets to indicate that States may wish to select a different time limit.

The most common example of a trust for a specific noncharitable purpose is a trust for the care of a cemetery plot. The lead-in language to the section recognizes that some special purpose trusts, particularly those for care of cemetery plots, are subject to other statutes. Such legislation will typically endeavor to facilitate perpetual care as opposed to care limited to 21 years as under this section.

For the requirement that a trust, particularly the type of trust authorized by this section, must have a purpose that is not capricious, see Section 404 Comment. For examples of the types of trusts authorized by this section, see Restatement (Third) of Trusts Section 47 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 62 cmt. w and Section 124 (1959). The case law on capricious purposes is collected in 2 Austin W. Scott & William F. Fratcher, The Law of Trusts Section 124.7 (4th ed. 1987).

This section is similar to Section 408, although less detailed. Much of the Comment to Section 408 also applies to this section.

NORTH CAROLINA COMMENT

Subdivision (1) is consistent with the former G.S. 36A-145 regarding a trust for a noncharitable purpose without a beneficiary.

Subdivision (2) clarifies prior law as to who may enforce such a trust.

Subdivision (3) requiring distribution to the settlor or the settlor's successors in interest of property not required for the intended use of the trust is new to North Carolina law.

Subdivision (4) was added to the section to bring forward the provisions of former G.S. 36A-146 regarding trusts and other arrangements for cemetery lots and burial structures.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section is amended to provide that (i) a noncharitable trust without an ascertainable beneficiary terminates after twenty-one years and (ii) the manner in which any assets remaining in the trust are to be distributed when the trust terminates.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 15, effective October 1, 2007, added the last two sentences in subdivision (1) and added subdivisions (1)a. through (1)c.; in subdivision (3), substituted "The" for "Except as otherwise provided in the terms of the trust," and substituted "shall be distributed under subdivision (1) of this section" for "must be distributed to the settlor, if then living, or otherwise to the settlor's successors in interest." See Editor's note for applicability.

§ 36C-4-410. Modification or termination of trust; proceedings for approval or disapproval.

(a) In addition to the methods of termination prescribed by G.S. 36C-4-411 through G.S. 36C-4-414, a trust terminates to the extent that the trust is revoked or expires under its terms, no purpose of the trust remains to be achieved, or the purposes of the trust have become unlawful, contrary to public policy, or impossible to achieve.

(b) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411 through G.S. 36C-4-416. A settlor may commence a proceeding to approve or disapprove a proposed modification or termination under G.S. 36C-4-411. The settlor of a charitable trust may maintain a proceeding to modify the trust under G.S. 36C-4-413. A trustee is a necessary party to any proceeding under this Article.

(c) Repealed by Session Laws 2006-259, s. 13(c), effective October 1, 2006. (2005-192, s. 2; 2006-259, s. 13(c); 2007-106, s. 16.)

OFFICIAL COMMENT

Subsection (a) lists the grounds on which trusts typically terminate. For a similar formulation, see Restatement (Third) of Trusts Section 61 (Tentative Draft No. 3, approved 2001). Terminations under subsection (a) may be in either in whole or in part. Other types of terminations, all of which require action by a court, trustee, or beneficiaries, are covered in Sections 411-414, which also address trust modification. Of these sections, all but Section 411 apply to charitable trusts and all but Section 413 apply to noncharitable trusts.

Withdrawal of the trust property is not an event terminating a trust. The trust remains in existence although the trustee has no duties to perform unless and until property is later contributed to the trust.

Subsection (b) specifies the persons who have standing to seek court approval or disapproval of proposed trust modifications, terminations, combinations, or divisions. An approval or disapproval may be sought for an action that does not require court permission, including a petition questioning the trustee's distribution upon termination of a trust under $50,000 (Section 414), and a petition to approve or disapprove a proposed trust division or consolidation (Section 417). Subsection (b) makes the settlor an interested person with respect to a judicial proceeding brought by the beneficiaries under Section 411 to terminate or modify a trust. Contrary to Restatement (Second) of Trusts Section 391 (1959), subsection (b) grants a settlor standing to petition the court under Section 413 to apply cy pres to modify the settlor's charitable trust.

. . .

NORTH CAROLINA COMMENT

Subsection (b) is consistent with the provisions of former G.S. 36A-125.11(b) in allowing proceedings for modification and termination of an irrevocable trust to be commenced by a trustee or beneficiary but differs from prior law in allowing the settlor to bring an action to approve or disapprove a modification or termination of a trust by consent of the settlor and the beneficiaries. The last sentence of this subsection was added to bring forward the provision in former G.S. 36A-125.11(b) requiring the trustee to be a necessary party to any such proceeding.

Subsection (c) was added to this section to clarify the jurisdiction of a proceeding to modify or terminate a trust.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, this section is amended to delete the provisions of subsection (c) which are unnecessary in light of other provisions of Article 36C regarding jurisdiction.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section is amended to clarify that there is no requirement that a trust combination or division under G.S. 36C-4-417 must be accomplished by judicial order.

Editor's Note. — Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(c), effective October 1, 2006, repealed subsection (c), which read: "Jurisdiction of a proceeding brought under this section is as provided in G.S. 36C-2-203." See Editor's note for applicability.

Session Laws 2007-106, s. 16, effective October 1, 2007, in subsection (b), deleted "or trust combination or division under G.S. 36C-4-417" following "G.S. 36C-4-416" at the end of the first sentence, and substituted "Article" for "section" at the end of the last sentence. See Editor's note for applicability.

§ 36C-4-411. Modification or termination of noncharitable irrevocable trust by consent.

(a) If the settlor and all beneficiaries of a noncharitable irrevocable trust consent, they may compel the modification or termination of the trust without the approval of the court even if the modification or termination is inconsistent with a material purpose of the trust. If any beneficiary (i) is a minor or incompetent or a person who is unborn or whose identity or location is unknown and (ii) is unable to be represented under Article 3 of this Chapter, the settlor or any competent adult beneficiary or the representative of any beneficiary properly represented under Article 3 of this Chapter may institute a proceeding before the court to appoint a guardian ad litem. The court shall allow the modification or termination if the court finds that, following the appointment of a guardian ad litem, all beneficiaries or their representatives have consented. A settlor's power to consent to a trust's modification or termination may be exercised by:

(1) An agent under a power of attorney only to the extent expressly authorized by the power of attorney or the terms of the trust.

(2) The settlor's general guardian or the guardian of the estate with the approval of the court supervising the guardianship.

(b) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified upon consent of all of the beneficiaries, if the court concludes that modification is consistent with a material purpose of the trust.

(c) Where the beneficiaries of an a noncharitable irrevocable trust seek to compel a termination of the trust and the continuance of the trust is necessary to carry out a material purpose of the trust, or where the beneficiaries seek to compel a modification of the trust in a manner that is inconsistent with its material purpose, the trust may be modified or terminated, in the discretion of the court, only if the court determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust.

(d) If not all of the beneficiaries consent to a proposed modification or termination of the trust under subsection (a), (b), or (c) of this section, the modification or termination may be approved by the court if the court is satisfied that all of the following apply:

(1) If all of the beneficiaries had consented, the trust could have been modified or terminated under this section.

(2) The interests of a beneficiary who does not consent will be adequately protected.

(e) Repealed by Session Laws 2006-259, s. 13(d), effective October 1, 2006.

(f) In determining the class of beneficiaries whose consent is necessary to modify or terminate a trust under this section, the presumption of fertility is rebuttable.

(g) If a trust instrument provides for the disposition of property to a class of persons described only as "heirs" or "next of kin" of any person or uses other words that describe the class of all persons who would take under the rules of intestacy, the court may limit the class of beneficiaries whose consent is needed to compel the modification or termination of the trust to the beneficiaries who are reasonably likely to take under the circumstances. (2005-192, s. 2; 2006-259, s. 13(d); 2007-106, s. 17.)

OFFICIAL COMMENT

This section describes the circumstances in which termination or modification of a noncharitable irrevocable trust may be compelled by the beneficiaries, with or without the concurrence of the settlor. For provisions governing modification or termination of trusts without the need to seek beneficiary consent, see Sections 412 (modification or termination due to unanticipated circumstances or inability to administer trust effectively), 414 (termination or modification of uneconomic noncharitable trust), and 416 (modification to achieve settlor's tax objectives). If the trust is revocable by the settlor, the method of revocation specified in Section 602 applies.

Subsection (a) ... states the test for termination or modification by the beneficiaries with the concurrence of the settlor...

Subsection (b) states the test for termination or modification by unanimous consent of the beneficiaries without the concurrence of the settlor. The rules on trust termination in Subsections (a)-(b) carries forward the *Claflin* rule, first stated in the famous case of *Claflin v. Claflin,* 20 N.E. 454 (Mass. 1889)...

Under this section, a trust may be modified or terminated over a trustee's objection. However, pursuant to Section 410, the trustee has standing to object to a proposed termination or modification.

The settlor's right to join the beneficiaries in terminating or modifying a trust under this section does not rise to the level of a taxable power. *See* Treas. Reg. Section 20.2038-1(a)(2). No gift tax consequences result from a termination as long as the beneficiaries agree to distribute the trust property in accordance with the value of their proportionate interests.

The provisions of Article 3 on representation, virtual representation and the appointment and approval of representatives appointed by the court apply to the determination of whether all beneficiaries have signified consent under this section. The authority to consent on behalf of another person, however, does not include authority to consent over the other person's objection. *See* Section 301(b). Regarding the persons who may consent on behalf of a beneficiary, see Sections 302 through 305. A consent given by a representative is invalid to the extent there is a conflict of interest between the representative and the person represented. Given this limitation, virtual representation of a beneficiary's interest by another beneficiary pursuant to Section 304 will rarely be available in a trust termination case, although it should be routinely available in cases involving trust modification, such as a grant to the trustee of additional powers. If virtual or other form of representation is unavailable, Section 305 of the Code permits the court to appoint a representative who may give the necessary consent to the proposed modification or termination on behalf of the minor, incapacitated, unborn, or unascertained beneficiary. The ability to use virtual and other forms of representation to consent on a beneficiary's behalf to a trust termination or modification has not traditionally been part of the law, although there are some notable exceptions. *Compare* Restatement (Second) Section 337(1) (1959) (beneficiary must not be under incapacity), with *Hatch v. Riggs National Bank,* 361 F.2d 559 (D.C. Cir. 1966) (guardian ad litem authorized to consent on beneficiary's behalf).

Subsection (a) also addresses the authority of an agent, conservator, or guardian to act on a settlor's behalf. Consistent with Section 602 on revocation or modification of a revocable trust, the section assumes that a settlor, in granting an agent general authority, did not intend for the agent to have authority to consent to the termination or modification of a trust... In order for an agent to validly consent to a termination or modification of the settlor's revocable trust, such authority must be expressly conveyed either in the power or in the terms of the trust.

Subsection (a), however, does not impose restrictions on consent by a conservator or guardian, other than prohibiting such action if the settlor is represented by an agent. The section instead leaves the issue of a conservator's or guardian's authority to local law. Many conservatorship statutes recognize that termination or modification of the settlor's trust is a sufficiently important transaction that a conservator should first obtain the approval of the court supervising the conservatorship. *See, e.g.,* Unif Probate Code Section 5-411(a)(4). Because the Uniform Trust Code uses the term "conservator" to refer to the person appointed by the court to manage an individual's property (*see* Section 103.), a guardian may act on behalf of a settlor under this section only if a conservator has not been appointed.

Subsection (a) is similar to Restatement (Third) of Trusts Section 65(2) (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Section 338(2) (1959), both of which permit termination upon joint action of the settlor and beneficiaries. Unlike termination by the beneficiaries alone under subsection (b), termination with the concurrence of the settlor does not require a finding that the trust no longer serves a material purpose. No finding of failure of material purpose is required because all parties with a possible interest in the trust's continuation, both the settlor and beneficiaries, agree there is no further need for the trust. Restatement Third goes further than ... Restatement Second, however, in also allowing the beneficiaries to compel termination of a trust that still serves a material purpose if the reasons for termination outweigh the continuing material purpose.

Subsection (b), similar to Restatement Third but not Restatement Second, allows modification by beneficiary action. The beneficiaries may modify any term of the trust if the modification is not inconsistent with a material purpose of the trust. Under the Code, however, Section 706 is the exclusive provision on removal of trustees...

The requirement that the trust no longer serve a material purpose before it can be terminated by the beneficiaries does not mean that the trust has no remaining function. In order to be material, the purpose remaining to be performed must be of some significance:

> Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective on the part of the settlor, such as concern with regard to the beneficiary's management skills, judgment, or level of maturity. Thus, a court may look for some circumstantial or other evidence indicating that the trust arrangement represented to the settlor more than a method of allocating the benefits of property among multiple beneficiaries, or a means of offering to the beneficiaries (but not imposing on them) a particular advantage. Sometimes, of course, the very nature or design of a trust suggests its protective nature or some other material purpose.

Restatement (Third) of Trusts Section 65 cmt. d (Tentative Draft No. 3, approved 2001).

...

Subsection (e), similar to Restatement (Third) of Trusts Section 65 cmt. c (Tentative Draft No. 3, approved 2001), and Restatement (Second) of Trusts Sections 338(2) & 340(2) (1959), addresses situations in which a termination or modification is requested by less than all the beneficiaries, either because a beneficiary objects, the consent of a beneficiary cannot be obtained, or representation is either unavailable or its application uncertain. Subsection (e) allows the court to fashion an appropriate order protecting the interests of the nonconsenting beneficiaries while at the same time permitting the remainder of the trust property to be distributed without restriction. The order of protection for the nonconsenting beneficiaries might include partial continuation of the trust, the purchase of an annuity, or the valuation and cashout of the interest.

...

NORTH CAROLINA COMMENT

Subsection (a) is generally consistent with the provisions of former G.S. 36A-125.3 in permitting a trust to be modified or terminated by the consent of the settlor and beneficiaries, but it differs from prior law in that it expressly permits the consent of a settlor to be given by an attorney-in-fact if authorized in the power of attorney or terms of a trust and, if not, by the general guardian or guardian of the estate or guardian of the person of the settlor with court approval.

Subsection (a) of the Uniform Trust Code was modified to substitute the words "general guardian or guardian of the estate" in place of "conservator" and "guardian of the person" for "guardian" and "guardianship" for "conservatorship." In the North Carolina context, references in the Official Comments to a "conservator" should be read to apply to a general guardian or a guardian of the estate and references to "guardian" should be read to apply to a guardian of the person.

Subsection (b) is generally consistent with the provisions of former G.S. 36A-125.4(a) with respect to termination or modification upon consent of all of the beneficiaries.

Subsection (c) brings forward in place of subsection (c) of the Uniform Trust Code the provisions of former G.S. 36A-125.4(b), authorizing the court to modify or terminate a trust upon consent of the beneficiaries when the circumstances outweigh the interest in accomplishing a material purpose of the trust. The authority of the court to modify or terminate a trust under such circumstances is not a part of the Uniform Trust Code.

Subsection (c) of the Uniform Trust Code which was omitted contains a provision providing that a spendthrift provision is not presumed to constitute a material purpose. This subject is addressed in G.S. 36C-4-419 which brings forward with minor modifications the provisions of former G.S. 36A-125.8 regarding the effect of an inalienable interest on the modification or termination of a trust. Subsection (c) of the Uniform Trust Code also contains a provision directing the trustee to distribute property upon termination of a trust as agreed by the beneficiaries. This provision appears in G.S. 36C-4-418 which, in addition, brings forward the provisions of former G.S. 36A-125.10 regarding distributions if minors or incompetents become entitled to trust property upon termination of the trust.

Subsection (d), which authorizes the court to approve a modification or termination of a trust if the interest of a nonconsenting beneficiary will be adequately protected, is new to North Carolina law.

Subsection (e) was added to clarify the jurisdiction of a proceeding brought under this section.

Reference to "subsection (e)" in the Official Comment should be understood to refer to "subsection (d)" of this section.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, this section is amended to delete the provisions of subsection (e) which are unnecessary in light of other provisions of Article 36C regarding jurisdiction.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (a) of this section is amended to set forth a procedure by which parties seeking to modify or terminate an irrevocable trust non-judicially may obtain court appointment of a guardian ad litem where Article 3 representation cannot be obtained. The purpose of the amendment is to allow a limited court procedure for the sole purpose of ensuring that all beneficiaries of the irrevocable trust are properly represented without imposing any requirement that the court consider any other factors set forth in the other subsections of this section in determining whether to allow the modification or termination of the trust. The amendment to subsection (a) also (i) makes clear that a guardian of a settlor may consent to certain trust modifications without revoking a power of attorney granted by the settlor to another person and (ii) deletes the language allowing a guardian of the person to consent on behalf of his or her ward because of the limited powers conferred on a guardian of the person under Chapter 35A.

This section has also been amended to add new subsections (f) and (g) which bring forward the provisions of former G.S. 36A-125.5(2) and (3) in former Article 11 of Chapter 36A entitled "Modification and Termination of Irrevocable Trusts." These provisions were inadvertently left out of G.S. 36C-4-411.

Editor's Note. — This section was amended by Session Laws 2007-106, s. 17, in the coded bill drafting format provided by G.S. 120-20.1. The word "an" in subsection (c) was not stricken through. The subsection has been set out in the form above at the direction of the Revisor of Statutes.

Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(d), effective October 1, 2006, repealed subsection (e), which read: "Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203." See Editor's note for applicability.

Session Laws 2007-106, s. 17, effective October 1, 2007, rewrote subsection (a); inserted "a noncharitable" preceding "irrevocable trust" in subsection (b); added "all of the following apply" at the end of the introductory paragraph of subsection (d); made a minor stylistic change in subdivision (d)(1); and added subsections (f) and (g). See Editor's note for applicability.

CASE NOTES

Editor's Note. — *The cases cited below were decided under prior law.*

Illustrative Cases. — Action filed by a trust beneficiary and a settlor's siblings, pursuant to G.S. 36A-125.4, seeking an order modifying a trust was really an action seeking replacement of the trustee for exercising discretion in managing the trust, and the trial court's judgment dismissing the action for lack of subject matter jurisdiction was upheld. In re Testamentary Trust of Charnock, 158 N.C. App. 35, 579 S.E.2d 887, 2003 N.C. App. LEXIS 938 (2003), aff'd, 358 N.C. 523, 597 S.E.2d 706 (2004).

Removal of trustee. — Legislature did not intend for "modification of a trust," under G.S. 36A-125.4(a), to include the removal and appointment of a trustee or for G.S. 36A-125.4 to be an alternative mechanism for removal of a trustee without cause by consent of the trust beneficiaries. In re Charnock, 358 N.C. 523, 597 S.E.2d 706, 2004 N.C. LEXIS 657 (2004).

Jurisdiction. — When trust beneficiaries filed a petition under G.S. 36A-125.4(a) to modify a trust to provide that it would be administered by the settlor's grand-niece and a bank, instead of the trustee appointed by the trust instrument, the proceeding was actually one to remove the trustee, over which the clerk of superior court had exclusive jurisdiction, and the superior court had no jurisdiction to hear their petition. In re Charnock, 358 N.C. 523, 597 S.E.2d 706, 2004 N.C. LEXIS 657 (2004).

§ 36C-4-412. Modification or termination because of unanticipated circumstances or inability to administer trust effectively.

(a) The court may modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust. To the extent practicable, the modification must be made in accordance with the settlor's probable intention.

(b) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration.

(c) Repealed by Session Laws 2006-259, s. 13(e), effective October 1, 2006. (2005-192, s. 2; 2006-259, s. 13(e).)

OFFICIAL COMMENT

This section broadens the court's ability to apply equitable deviation to terminate or modify a trust. Subsection (a) allows a court to modify the dispositive provisions of the trust as well as its administrative terms. For example, modification of the dispositive provisions to increase support of a beneficiary might be appropriate if the beneficiary has become unable to provide for support due to poor health or serious injury. Subsection (a) is similar to Restatement (Third) of Trusts Section 66(1) (Tentative Draft No. 3, approved 2001), except that this section, unlike the Restatement, does not impose a duty on the trustee to petition the court if the trustee is aware of circumstances justifying judicial modification. The purpose of the "equitable deviation" authorized by subsection (a) is not to disregard the settlor's intent but to modify inopportune details to effectuate better the settlor's broader purposes. Among other things, equitable deviation may be used to modify administrative or dispositive terms due to the failure to anticipate economic change or the incapacity of a beneficiary. For numerous illustrations, see Restatement (Third) of Trusts Section 66 cmt. b (Tentative Draft No. 3, approved 2001). While it is necessary that there be circumstances not anticipated by the settlor before the court may grant relief under subsection (a), the circumstances may have been in existence when the trust was created. This section thus complements Section 415, which allows for reformation of a trust based on mistake of fact or law at the creation of the trust.

Subsection (b) broadens the court's ability to modify the administrative terms of a trust. The standard under subsection (b) is similar to the standard for applying cy pres to a charitable trust. *See* Section 413(a). Just as a charitable trust may be modified if its particular charitable purpose becomes impracticable or wasteful, so can the administrative terms of any trust, charitable or noncharitable. Subsections (a) and (b) are not mutually exclusive. Many situations justifying modification of administrative terms under subsection (a) will also justify modification under subsection (b). Subsection (b) is also an application of the requirement in Section 404 that a trust and its terms must be for the benefit of its beneficiaries. See also Restatement (Third) of Trusts Section 27(2) & cmt. b (Tentative Draft No. 2, approved 1999). Although the settlor is granted considerable latitude in defining the purposes of the trust, the principle that a trust have a purpose which is for the benefit of its beneficiaries precludes unreasonable restrictions on the use of trust property. An owner's freedom to be capricious about the use of the owner's own property ends when the property is impressed with a trust for the benefit of others. *See* Restatement (Second) of Trusts Section 124 cmt. g (1959). Thus, attempts to impose unreasonable restrictions on the use of trust property will fail. *See* Restatement (Third) of Trusts Section 27 Reporter's Notes to cmt. b (Tentative Draft No. 2, approved 1999). Subsection (b), unlike subsection (a), does not have a direct precedent in the common law, but various states have insisted on such a measure by statute. *See, e.g.,* Mo. Rev. Stat. Section 456.590.1.

. . .

Modification under this section, because it does not require beneficiary action, is not precluded by a spendthrift provision.

NORTH CAROLINA COMMENT

Subsection (a) is generally consistent with former G.S. 36A-125.7(a)(2) in authorizing a court to modify or terminate a trust because of circumstances not anticipated by the settlor.

Subsection (b), however, differs from former G.S. 36A-125.7(a)(1) in that it allows modification of the administrative terms of a trust "if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration." In contrast former G.S. 36A-125.7(a)(1) allowed modification in any term of the trust "if the purpose of the trust has been fulfilled or has become illegal or impossible of fulfillment."

Subsection (c) substitutes in place of subsection (c) of the Uniform Trust Code provisions clarifying the jurisdiction of a proceeding brought under this section. The omitted provision of subsection (c) of the Uniform Trust Code directs the trustee to distribute property upon termination of the trust in a manner consistent with the purposes of the trust. This provision appears in G.S. 36C-4-418 which, in addition, brings forward the provisions of former G.S.

36A-125.10 regarding distributions if minors or incompetents become entitled to trust property upon termination of the trust.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, this section is amended to delete the provisions of subsection (c) which are unnecessary in light of other provisions of Article 36C regarding jurisdiction.

Editor's Note. — Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(e), effective October 1, 2006, repealed subsection (c), which read: "Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203." See Editor's note for applicability.

CASE NOTES

Editor's Note. — *The case below was decided under prior law.*

Court May Relieve Trustee of Restriction on Purchasing Trust Property. — This section, by allowing a court of competent jurisdiction to relieve the trustee of "any or all of the duties and restrictions" placed upon him by this Article, gives statutory authority to the court to relieve the trustee of the restriction that he cannot purchase property from the trust. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967).

§ 36C-4-413. Cy pres.

(a) Except as otherwise provided in subsection (d) of this section, if a charitable trust becomes unlawful, impracticable, impossible to achieve, or wasteful:

(1) The trust does not fail, in whole or in part;
(2) The trust property does not revert to the settlor or the settlor's successors in interest; and
(3) The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes.

(b) The settlor or a trustee of a charitable trust, the Attorney General, a beneficiary, or any other interested party may maintain a cy pres proceeding under Article 2 of this Chapter.

(c) Repealed by Session Laws 2007-106, s. 17.1, effective October 1, 2007.

(d) This section is not applicable if the settlor has provided, either directly or indirectly, for an alternative plan in the event that the charitable trust is or becomes unlawful, impracticable, impossible to achieve, or wasteful. However, if the alternative plan is also a charitable trust and that trust fails, the intention shown in the original plan shall prevail in the application of this section. (2005-192, s. 2; 2007-106, s. 17.1.)

OFFICIAL COMMENT

Subsection (a) codifies the court's inherent authority to apply cy pres. The power may be applied to modify an administrative or dispositive term. The court may order the trust terminated and distributed to other charitable entities. Partial termination may also be ordered if the trust property is more than sufficient to satisfy the trust's current purposes. Subsection (a), which is similar to Restatement (Third) of Trusts Section 67 (Tentative Draft No. 3, approved 2001), modifies the doctrine of cy pres by presuming that the settlor had a general charitable intent when a particular charitable purpose becomes impossible or impracticable to achieve. Traditional doctrine did not supply that presumption, leaving it to the courts to determine whether the settlor had a general charitable intent. If such an intent is found, the trust property is applied to other charitable purposes. If not, the charitable trust fails. *See* Restatement (Second) of Trusts Section 399 (1959). In the great majority of cases the settlor would prefer that the property be used for other charitable purposes. Courts are usually able to find a general charitable purpose to which to apply the property, no matter how vaguely such purpose may have been expressed by the settlor. Under subsection (a), if the particular purpose for which the trust was created becomes impracticable, unlawful, impossible to achieve, or wasteful, the trust does not fail. The court instead must either modify the terms of the trust or distribute the property of the trust in a manner consistent with the settlor's charitable purposes.

The settlor ... may mandate that the trust property pass to a noncharitable beneficiary upon failure of a particular charitable purpose...

The doctrine of cy pres is applied not only to trusts, but also to other types of charitable dispositions, including those to charitable corporations. This Section does not control dispositions made in nontrust form. However, in formulating rules for such dispositions, the courts often refer to the principles governing charitable trusts, which would include this Code.

For the definition of charitable purpose, see Section 405(a). Pursuant to [Section] 410(b), a petition requesting a court to enforce a charitable trust or to apply cy pres may be maintained by a settlor. Such actions can also be maintained by a cotrustee, the state attorney general, or by a person having a special interest in the charitable disposition. See Restatement (Second) of Trusts Section 391 (1959).

NORTH CAROLINA COMMENT

Subsection (a) is generally consistent with provisions in North Carolina's former cy pres statute, G.S. 36A-53(a).

Subsection (b) brings forward in place of subsection (b) of the Uniform Trust Code the substance of provisions of former G.S. 36A-52(a) authorizing a settlor, trustee, attorney, beneficiaries or interested party to maintain a cy pres proceeding. The drafters omitted subsection (b) of the Uniform Trust Code regarding when the terms of the trust providing for distribution of property to a noncharitable beneficiary prevail over the power of the court to apply cy pres. This subject is addressed in subsection (d).

Subsection (c) was added to the section to bring forward the provisions of former G.S. 36A-53(a) concerning notification of the Attorney General of a cy pres proceeding.

Subsection (d) was added to the section to bring forward the provisions of former G.S. 36A-53(a) regarding distributions pursuant to alternative plans of the settlor.

Editor's Note. — Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 17.1, effective October 1, 2007, deleted subsection (c) which read: "In every cy pres proceeding, the Attorney General shall be notified and given an opportunity to be heard."

Legal Periodicals. — As to the doctrine of cy pres in North Carolina, see 27 N.C.L. Rev. 591 (1949).

CASE NOTES

Editor's Note. *— The cases cited below were decided under prior law.*

The General Assembly acted within its competence in enacting this section. Banner v. North Carolina Nat'l Bank, 266 N.C. 337, 146 S.E.2d 89 (1966).

Funds Turned Over to National Charity by County Chapter. — Where a county chapter of a national charity was required to turn over surplus funds to the national office, such funds were not impressed with a trust restricting use of the money to care of persons in the county, since the county chapter agreed to be governed by national regulations and the national organization did not mislead the county chapter into a belief that a certain percentage of funds would be retained within the county. National Found. v. First Nat'l Bank, 288 F.2d 831 (4th Cir. 1961).

Section Sanctions and Defines Public Policy. — It has long been a strong public policy that, if possible, gifts for charitable purposes should not fail because of unforeseen events, but that the courts should assist in carrying out charitable purposes. This section lends statutory sanction and definition to that policy. Special Report of the General Statutes Commission on Chapter 119, Session Laws 1967; Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.E.2d 356 (1971).

Legislative Intent. — This section represents an obvious intent on the part of the legislature to invest the superior courts of this State with the power of cy pres. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970), aff'd, 279 N.C. 265, 182 S.E.2d 356 (1971).

The cy pres doctrine is the rule which courts of equity use when a gift given for a particular charitable purpose cannot be applied according to the exact intention of the donor. In such cases, the court will direct that the gift be applied as nearly as possible in conformity with the original purpose and intent of the testator. Cy pres literally means "as near as possible." Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.E.2d 356 (1971).

Courts May Apply Cy Pres Doctrine. — This section expressly gives the courts the power to apply the cy pres doctrine to charitable trusts. YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

G.S. 36A-53(a) expressly gives the courts the power to apply the cy pres doctrine to charitable trusts, but the statute applies only when three conditions have been met: (1) the testator manifested a general charitable intent; (2) the trust has become illegal, impossible, or impracticable; (3) the testator has not provided for an alternative disposition if the trust fails. Changes in the management, administration, and distribution of funds by a foundation that was the remainder beneficiary of a charitable trust did not make the trust impossible or impracticable where the foundation continued to comply with the trust's purpose of making gifts to a wide variety of nonprofit organizations Morris v. E.A. Morris Charitable Found., 161 N.C. App. 673, 589 S.E.2d 414, 2003 N.C. App. LEXIS 2254 (2003), cert. denied, 358 N.C. 235, 593 S.E.2d 592 (2004).

The cy pres doctrine came into the law of North Carolina in 1967 when this section became effective. Wilson v. First Presbyterian Church, 284 N.C. 284, 200 S.E.2d 769 (1973).

Prior Law. — Before October 1, 1967 North Carolina rejected the cy pres doctrine as such, while upholding modification of charitable trusts provisions under the court's general equitable power to supervise trust administration. Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.W.2d 356 (1971).

"Charity" Defined. — A charity may be defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970), aff'd, 279 N.C. 265, 182 S.E.2d 356 (1971).

"Charitable Trust". — A charitable trust has been defined as a fiduciary relationship with respect to property, arising as a result of a manifestation of an intent to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose. YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

Generally, when a trust is created for any lawful purpose which promotes the well-being of mankind and does not contravene public policy, it is charitable in its purpose. YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

Limitations on Use of Funds. — Property conveyed to a trustee for a charitable purpose is limited to the uses set forth in the terms of the trust, and that property conveyed to a charitable corporation, free of a trust, is limited to the purposes set forth in its corporate charter. YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

Failure of method designed by trust for carrying out a general charitable purpose does not destroy the trust. Wachovia Bank

& Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970), aff'd, 279 N.C. 265, 182 S.E.2d 356 (1971).

The substantial intention shall not depend on the insufficiency of the formal intention. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970), aff'd, 279 N.C. 265, 182 S.E.2d 356 (1971).

And the general intent of the testator must prevail over the particular mode prescribed. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970), aff'd, 279 N.C. 265, 182 S.E.2d 356 (1971).

Fulfillment of Settlor's Primary Objective. — Where the construction of a new dramatic arts facility at a university, made possible by the legislative grant of sufficient funds, expressly made "impracticable" the achievement of a trust, in that the settlor's primary objective had been fulfilled, the trial court did not err in ruling that this charitable trust had become "impossible or impracticable of fulfillment" within the meaning of this section. Board of Trustees v. Unknown & Unascertained Heirs, 311 N.C. 644, 319 S.E.2d 239 (1984).

Mode for Administering Trust Must Be Either Impossible or Impracticable. — In order for this section to apply, the evidence presented must establish that the mode directed by the settlor for administering the trust has become either impossible or impracticable for the reasons asserted in the petition, or because of the facts found by the court. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970), aff'd, 279 N.C. 265, 182 S.E.2d 356 (1971).

Power of Court to Modify Trust. — When there is a charitable trust, bequest, or devise evidencing a general charitable intent by the grantor, and the specific, express purpose cannot be fulfilled because of illegality, impossibility or impracticability, this section specifically empowers the court, in the absence of alternate disposition, to modify the trust so as to apply the fund to a purpose as nearly as possible like the originally expressed purpose. YWCA v. Morgan, 281 N.C. 485, 189 S.E.2d 169 (1972).

Where the trust provisions no longer serve the intended purpose of providing medical and hospital services to people who cannot afford to pay for such services, and where the will itself contains no alternative plan, the superior court may order an administration of the trust which would as nearly as possible fulfill the general charitable intention of the testatrix. Wachovia Bank & Trust Co. v. Morgan, 279 N.C. 265, 182 S.E.2d 356 (1971).

The statutory scheme of subsection (a) of this section, and the strong public policy embodied therein, is merely reflective of the well-established principle that courts, in the exercise of their equitable powers, may modify the terms of a trust instrument, consistent with the settlor's intentions, in order to preserve the trust. Edmisten v. Sands, 307 N.C. 670, 300 S.E.2d 387 (1983).

All that need be shown to enable a superior court judge to order an administration of the trust is that: (1) the trust is a charitable trust, i.e., that the settlor, or testator, manifested a general intention to devote the property to charity; (2) the trust is or becomes illegal, or impossible or impracticable of fulfillment; and (3) no alternative disposition is made of the corpus in the event the charitable trust fails. Edmisten v. Sands, 307 N.C. 670, 300 S.E.2d 387 (1983).

Application of Section. — The legislature has clearly indicated that the prohibition against self-dealing is not the only administrative requirement the omission of which will invoke the application of this section. Edmisten v. Sands, 307 N.C. 670, 300 S.E.2d 387 (1983).

The failure to include the prohibition against self-dealing and the failure to include the other required administrative provisions renders a trust "impracticable of fulfillment" under this section. Edmisten v. Sands, 307 N.C. 670, 300 S.E.2d 387 (1983).

To invoke the application of this section, plaintiff must show that the three following conditions exist: (1) That the testatrix manifested a general charitable intent; (2) that the trust has become either illegal, impossible or impracticable of fulfillment; and (3) that the testatrix made no provision for alternative disposition of the trust corpus in the event that the charitable trust fails. Board of Trustees v. Unknown & Unascertained Heirs, 311 N.C. 644, 319 S.E.2d 239 (1984).

Application of Cy Pres Doctrine Held Erroneous. — Where testator's will itself clearly reflected only the testator's specific intent to aid a particular hospital, and there was no other evidence to the contrary, the trial court's finding that the testator manifested a general charitable intent was not supported by the evidence, and the trial court erred in finding and concluding that the cy pres doctrine was applicable. Trustees of L.C. Wagner Trust v. Barium Springs Home for Children, Inc., 102 N.C. App. 136, 401 S.E.2d 807, rev'd on other grounds, 330 N.C. 187, 409 S.E.2d 913 (1991).

Superior Court Cannot Modify Every Trust Becoming Impracticable. — Under the doctrine of this section, the superior court does not have authority to modify every charitable trust when it becomes impracticable to carry out the original purpose of the settlor or testator. Wilson v. First Presbyterian Church, 284 N.C. 284, 200 S.E.2d 769 (1973).

When Power to Modify Is Conferred. — Power to modify a charitable trust when it becomes impracticable to carry out the original purpose of the settlor or testator is conferred upon the superior court only where the instrument creating the trust, interpreted in the light of all the circumstances known to the settlor or testator, manifests a "general intention to devote the property to charity." Wilson v. First Presbyterian Church, 284 N.C. 284, 200 S.E.2d 769 (1973).

Equitable Jurisdiction to Supervise Administration of Fund. — Notwithstanding the impossibility of effectuating a particular method prescribed for carrying out the provisions of a trust, the court will exercise its equitable jurisdiction and supervise the administration of the fund so as to accomplish the purposes expressed in the will. Wachovia Bank & Trust Co. v. Morgan, 9 N.C. App. 460, 176 S.E.2d 860 (1970), aff'd, 279 N.C. 265, 182 S.E.2d 356 (1971).

§ 36C-4-414. Modification or termination of uneconomic trust.

(a) After notice to the qualified beneficiaries, the trustee of a trust consisting of trust property having a total value of less than fifty thousand dollars ($50,000) may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration. The trustee may enter into an agreement or make other provisions that the trustee deems necessary or appropriate to protect the interests of the beneficiaries and to carry out the intent and purpose of the trust. This subsection shall not apply where the instrument creating the trust, by specific reference to this section, or to former G.S. 36A-125.6, provides that it shall not apply. The trustee shall not be liable for that termination and distribution notwithstanding the existence or potential existence of other beneficiaries who are not sui juris. Any beneficiary receiving a distribution from a trust terminated under this section shall incur no liability and shall not be required to account to anyone for such distribution.

(b) The court may modify or terminate a trust or remove the trustee and appoint a different trustee if the court determines that the value of the trust property is insufficient to justify the cost of administration.

(c) This section does not apply to an easement for conservation or preservation.

(d) Repealed by Session Laws 2006-259, s. 13(f), effective October 1, 2006. (2005-192, s. 2; 2006-259, s. 13(f).)

OFFICIAL COMMENT

Subsection (a) assumes that a trust with a value of $50,000 or less is sufficiently likely to be inefficient to administer that a trustee should be able to terminate it without the expense of a judicial termination proceeding. The amount has been placed in brackets to signal to enacting jurisdictions that they may wish to designate a higher or lower figure. Because subsection (a) is a default rule, a settlor is free to set a higher or lower figure or to specify different procedures or to prohibit termination without a court order. *See* Section 105 and Article 4 General Comment.

Subsection (b) allows the court to modify or terminate a trust if the costs of administration would otherwise be excessive in relation to the size of the trust. The court may terminate a trust under this section even if the settlor has forbidden it. *See* Section 105(b)(4). Judicial termination under this subsection may be used whether or not the trust is larger or smaller than $50,000.

When considering whether to terminate a trust under either subsection (a) or (b), the trustee or court should consider the purposes of the trust. Termination under this Section is not always wise. Even if administrative costs may seem excessive in relation to the size of the trust, protection of the assets from beneficiary mismanagement may indicate that the trust be continued. The court may be able to reduce the costs of administering the trust by appointing a new trustee.

. . .

Even though not accompanied by the usual trappings of a trust, the creation and transfer of an easement for conservation or preservation will frequently create a charitable trust. The organization to whom the easement was conveyed will be deemed to be acting as trustee of what will ostensibly appear to be a contractual or property arrangement. Because of the fiduciary obligation imposed, the termination or substantial modification of the easement by the "trustee" could constitute a breach of trust. The drafters of the Uniform Trust Code concluded that easements for conservation or preservation are sufficiently different from the typical cash and securities found in small trusts that they should be excluded from this section.. Most creators of such easements, it was surmised, would prefer that the easement be continued unchanged even if the easement, and hence the trust, has a relatively low market value. For the law of conservation easements, see Restatement (Third) of Property: Servitudes Section 1.6 (2000).

While this Section is not directed principally at honorary trusts, it may be so applied. *See* Sections 408, 409.

Because termination of a trust under this section is initiated by the trustee or ordered by the court, termination is not precluded by a spendthrift provision.

NORTH CAROLINA COMMENT

The first sentence of subsection (a) is generally consistent with the provisions of former G.S. 36A-125.6(b) authorizing the trustee to terminate a trust if the value of the assets is $50,000 or less. The remaining sentences of subsection (a) were added to subsection (a) to bring forward the provisions of former G.S. 36A-125.6(b).

Subsection (b) is generally consistent with the provisions of former G.S. 36A-125.6(a).

The drafters omitted the first sentence of subsection (c) of the Uniform Trust Code which directed the trustee to distribute property upon termination of the trust in a manner consistent with the purpose of the trust. This provision appears in G.S. 36C-4-418 which, in addition, brings forward the provisions of former G.S. 36A-125.10 regarding distributions if minors or incompetents become entitled to trust property upon termination of the trust.

Subsection (d) was added to the section to clarify the jurisdiction of a proceeding brought under this section.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, this section is amended to delete the provisions of subsection (d) which are unnecessary in light of other provisions of Article 36C regarding jurisdiction.

Editor's Note. — Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(f), effective October 1, 2006, repealed subsection (d), which read: "Jurisdiction of a proceeding brought under this section is as provided in G.S. 36C-2-203." See Editor's note for applicability.

§ 36C-4-415. Reformation to correct mistakes.

The court may reform the terms of a trust, even if unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement. Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203. (2005-192, s. 2.)

OFFICIAL COMMENT

Reformation of inter vivos instruments to correct a mistake of law or fact is a long established remedy. Restatement (Third) of Property: Donative Transfers Section 12.1 (Tentative Draft No. 1, approved 1995), which this section copies, clarifies that this doctrine also applies to wills.

This section applies whether the mistake is one of expression or one of inducement. A mistake of expression occurs when the terms of the trust misstate the settlor's intention, fail to include a term that was intended to be included, or include a term that was not intended to be excluded. A mistake in the inducement occurs when the terms of the trust accurately reflect what the settlor intended to be included or excluded but this intention was based on a mistake of fact or law. *See* Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. i (Tentative Draft No. 1, approved 1995). Mistakes of expression are frequently caused by scriveners' errors while mistakes of inducement often trace to errors of the settlor.

Reformation is different from resolving an ambiguity. Resolving an ambiguity involves the interpretation of language already in the instrument. Reformation, on the other hand, may involve the addition of language not originally in the instrument, or the deletion of language originally included by mistake, if necessary to conform the instrument to the settlor's intent. Because reformation may involve the addition of language to the instrument, or the deletion of language that may appear clear on its face, reliance on extrinsic evidence is essential. To guard against the possibility of unreliable or contrived evidence in such circumstance, the higher standard of clear and convincing proof is required. *See* Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. e (Tentative Draft No. 1, approved 1995).

In determining the settlor's original intent, the court may consider evidence relevant to the settlor's intention even though it contradicts an apparent plain meaning of the text. The objective of the plain meaning rule, to protect against fraudulent testimony, is satisfied by the requirement of clear and convincing proof. *See* Restatement (Third) of Property: Donative Transfers Section 12.1 cmt. d and Reporter's Notes (Tentative Draft No. 1, approved 1995). *See also* John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?,130 U. Pa. L. Rev. 521 (1982).*

For further discussion of the rule of this section and its application to illustrative cases, *see* Restatement (Third) of Property: Donative Transfers Section 12.1 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

NORTH CAROLINA COMMENT

This section, which has no statutory equivalent in prior North Carolina law, is generally consistent with prior case law regarding reformation of instruments. Although no published court decision has addressed the reformation of a trust, there is a substantial body of case law in North Carolina to the effect that equity will reform an instrument when a mistake of fact has been made and the mistake does not express the true intent of the parties. *See, e.g., Matthews v. Shamrock Van Lines, Inc.,* 264 N.C. 722, 142 S.E.2d 665 (1965); *Branch Banking & Trust Co. v. Gill,* 286 N.C. 342, 211 S.E.2d 327 (1975). Under prior law, although a "bare, naked" mistake of law affords no grounds for reformation, this was a general rule subject to many exceptions, such as where a mistake of law induces a mistake of fact. *See, e.g., State Trust Co. v. Brasnell,* 227 N.C. 211, 41 S.E. 2d 744 (1947).

This section modifies the Uniform Trust Code by adding the second sentence to clarify the jurisdiction of a proceeding brought under this section.

§ 36C-4-416. Modification to achieve settlor's tax objectives.

To achieve a settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect. (2005-192, s. 2; 2006-259, s. 13(g).)

OFFICIAL COMMENT

This section is copied from Restatement (Third) of Property: Donative Transfers Section 12.2 (Tentative Draft No. 1, approved 1995). "Modification" under this section is to be distinguished from the "reformation" authorized by Section 415. Reformation under Section 415 is available when the terms of a trust fail to reflect the donor's original, particularized intention. The mistaken terms are then reformed to conform to this specific intent. The modification authorized here allows the terms of the trust to be changed to meet the settlor's tax saving objective as long as the resulting terms, particularly the dispositive provisions, are not inconsistent with the settlor's probable intent. The modification allowed by this subsection is similar in concept to the cy pres doctrine for charitable trusts (*see* Section 413), and the deviation doctrine for unanticipated circumstances (*see* Section 412).

Whether a modification made by the court under this section will be recognized under federal tax law is a matter of federal law. Absent specific statutory or regulatory authority, binding recognition is normally given only to modifications made prior to the taxing event, for example, the death of the testator or settlor in the case of the federal estate tax. *See* Rev. Rul. 73 142, 1973 1 C.B. 405. Among the specific modifications authorized by the Internal Revenue Code or Service include the revision of split interest trusts to qualify for the charitable deduction, modification of a trust for a noncitizen spouse to become eligible as a qualified domestic trust, and the splitting of a trust to utilize better the exemption from generation skipping tax.

For further discussion of the rule of this section and the relevant case law, see Restatement (Third) of Property: Donative Transfers Section 12.2 cmts. and Reporter's Notes (Tentative Draft No. 1, approved 1995).

NORTH CAROLINA COMMENT

This section has no statutory equivalent in prior North Carolina law and changes prior law at least as expressed by the court in *Davison v. Duke Univ.,* 282 N.C. 676, 717, 194 S.E.2d 761, 786 (1973) where the court, quoting with approval *In re Estate of Benson,* 447 Pa. 62, 285 A.2d 101 (1971) said: "As to the obviation of taxes, it is incontestable that almost every settlor and testator desires to minimize his tax burden to the greatest extent possible. However, courts cannot be placed in a position of estate planners, charged with the task of reinterpreting deeds of trust and testamentary dispositions so as to generate the most favorable possible tax consequences for the estate." Although former G.S. 36A-125.9, enacted after the *Davison* decision, directed the court to consider tax consequences of modifying or terminating a trust, North Carolina law did not expressly authorize modification to achieve the settlor's tax objectives.

This section modifies the Uniform Trust Code by adding the second sentence to clarify the jurisdiction of proceedings brought under this section.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, this section is amended to delete the provisions of the third sentence which are unnecessary in light of other provisions of Article 36C regarding jurisdiction.

Editor's Note. — Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(g), effective October 1, 2006, deleted the last sentence, which read: "Jurisdiction of a proceeding brought under this section shall be as provided in G.S. 36C-2-203." See Editor's note for applicability.

§ 36C-4-417. Combination and division of trusts.

(a) Unless otherwise provided in the trust instrument, a trustee may do any of the following:

(1) Consolidate the assets of more than one trust and administer the assets as one trust under the terms of one of the trusts if the terms of

the trusts are substantially similar and the beneficiaries of the trusts are identical.

(2) Divide one trust into two or more separate trusts if the new trusts provide in the aggregate for the same succession of interests and beneficiaries as are provided in the original trust.

(b) In dividing a trust into two or more separate trusts, a trustee shall accomplish the division by severing the trusts on a fractional basis and funding the separate trusts either (i) with a pro rata portion of each asset held by the undivided trust; or (ii) on a non-pro rata basis based on either the fair market value of the assets on the date of funding or in a manner that fairly reflects the net appreciation or depreciation in the value of the assets measured from the valuation date to the date of funding.

(c) In any case where two separate identical trusts are created under this section, one of which is fully exempt from the federal generation-skipping transfer tax and one of which is fully subject to that tax, the trustee may thereafter, to the extent possible consistent with the terms of the trust, determine the value of any mandatory or discretionary distributions to trust beneficiaries on the basis of the combined value of both trusts, but may satisfy those distributions by a method other than pro rata from the separate trusts in a manner designed to minimize the current and potential generation-skipping transfer tax. (2005-192, s. 2; 2006-259, s. 13(h).)

OFFICIAL COMMENT

This section, which authorizes the combination or division of trusts, is subject to contrary provision in the terms of the trust. *See* Section 105 and Article 4 General Comment. Many trust instruments and standardized estate planning forms include comprehensive provisions governing combination and division of trusts....

This section allows a trustee to combine two or more trusts even though their terms are not identical. Typically the trusts to be combined will have been created by different members of the same family and will vary on only insignificant details, such as the presence of different perpetuities savings periods. The more the dispositive provisions of the trusts to be combined differ from each other the more likely it is that a combination would impair some beneficiary's interest, hence the less likely that the combination can be approved. Combining trusts may prompt more efficient trust administration and is sometimes an alternative to terminating an uneconomic trust as authorized by Section 414. Administrative economies promoted by combining trusts include a potential reduction in trustees' fees, particularly if the trustee charges a minimum fee per trust, the ability to file one trust income tax return instead of multiple returns, and the ability to invest a larger pool of capital more effectively. Particularly if the terms of the trust are identical, available administrative economies may suggest that the trustee has a responsibility to pursue a combination. *See* Section 805 (duty to incur only reasonable costs).

Division of trusts is often beneficial and, in certain circumstances, almost routine. Division of trusts is frequently undertaken due to a desire to obtain maximum advantage of exemptions available under the federal generation skipping tax. While the terms of the trusts which result from such a division are identical, the division will permit differing investment objectives to be pursued and allow for discretionary distributions to be made from one trust and not the other. Given the substantial tax benefits often involved, a failure by the trustee to pursue a division might in certain cases be a breach of fiduciary duty. The opposite could also be true if the division is undertaken to increase fees or to fit within the small trust termination provision. *See* Section 414.

This section authorizes a trustee to divide a trust even if the trusts that result are dissimilar. Conflicts among beneficiaries, including differing investment objectives, often invite such a division, although as in the case with a proposed combination of trusts, the more the terms of the divided trusts diverge from the original plan, the less likely it is that the settlor's purposes would be achieved and that the division could be approved.

This section does not require that a combination or division be approved either by the court or by the beneficiaries. Prudence may dictate, however, that court approval under Section 410 be sought and beneficiary consent obtained whenever the terms of the trusts to be combined or the trusts that will result from a division differ substantially one from the other. For the provisions relating to beneficiary consent or ratification of a transaction, or release of trustee from liability, see Section 1009.

While the consent of the beneficiaries is not necessary before a trustee may combine or divide trusts under this section, advance notice to the qualified beneficiaries of the proposed combination or division is required....

Numerous States have enacted statutes authorizing division of trusts, either by trustee action or upon court order. For a list of these statutes, see Restatement (Third) Property: Donative Transfers Section 12.2 Statutory Note (Tentative Draft No. 1, approved 1995). Combination or division has also been authorized by the courts in the absence of authorizing statute. *See, e.g., In re Will of Marcus,* 552 N.Y.S. 2d 546 (Surr. Ct. 1990) (combination); *In re Heller Inter Vivos Trust,* 613 N.Y.S. 2d 809 (Surr. Ct. 1994) (division); and *BankBoston v. Marlow,* 701 N.E. 2d 304 (Mass. 1998) (division).

For a provision authorizing a trustee, in distributing the assets of the divided trust, to make non pro rata distributions, see Section 816(22).

NORTH CAROLINA COMMENT

The drafters omitted the provisions of this section of the Uniform Trust Code providing that after notice to the "qualified beneficiaries" the trustee may divide and combine two or more trusts if this does not impair the rights of a beneficiary or adversely affect the achievement of the purposes of the trust. In its place the drafters brought forward (i) the provisions of former G.S. 32-27(25b) granting the trustee the power to consolidate two or more trusts when the terms of the trust are substantially similar and the beneficiaries are identical, and (ii) with modifications, the provisions of former G.S. 36A-136(24) granting a trustee the power to divide a single trust into several trusts and to make distributions from the trusts in a certain manner. This section retains the requirement in the Uniform Trust Code to notify the qualified beneficiaries of a consolidation or division. Such notifications were not required in prior law.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, subsection (a) is amended to delete the requirement that notice of a consolidation of trusts or division of a trust be given to qualified beneficiaries of the trust being consolidated or divided.

Editor's Note. — Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(h), effective October 1, 2006, in subsection (a), substituted "a trustee may do any of the following:" for "after notice to the qualified beneficiaries, a trustee may:" in the introductory language; and deleted "or" at the end of subdivision (a)(1). See Editor's note for applicability.

§ 36C-4-418. Distribution upon termination of trust.

Upon termination of a trust under G.S. 36C-4-411(a), the trustee shall distribute the trust property as agreed by the beneficiaries. Upon termination of a trust under G.S. 36C-4-411(b) or (c), the trustee shall distribute the trust property in accordance with the order entered by the court. Upon termination of a trust under G.S. 36C-4-412(a) or G.S. 36C-4-414, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust. (1999-266, s. 2; 2005-192, s. 2; 2007-106, s. 18.)

NORTH CAROLINA COMMENT

This section, not a part of the Uniform Trust Code, was added by the drafters to cover in one section the distribution of property upon termination of the trust. The first sentence of the section contains the provisions of sections 411(c), 412(c) and 414(c) of the Uniform Trust Code regarding the persons to whom distribution of such property is to be made. The remainder of the section brings forward the provisions of former G.S. 36A-125.10 regarding the manner in which distribution may be made if minors or incompetents become entitled to trust property upon termination of a trust. It does not authorize other methods of distributions on behalf of a minor or incompetent that are permitted under G.S. 36C-8-816(21).

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section is amended (i) to clarify the manner in which trust property is to be distributed upon termination of the trust pursuant to specific sections of Article 4 of Chapter 36C, and (ii) to delete the provisions concerning distributions of property distributable to a minor or incompetent because the same provisions appear in substance in G.S. 36C-8-816(21).

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 18, effective October 1, 2007, rewrote the section. See Editor's note for applicability.

§ 36C-4-419. Effect of inalienable interest on modification or termination.

The court, in exercising its discretion to modify or terminate an irrevocable trust under G.S. 36C-4-411, 36C-4-412, or 36C-4-414 shall consider provisions making the interest of a beneficiary inalienable, including those described in Article 5, but the court is not precluded from the exercise of that discretion solely because of such provisions. (2005-192, s. 2; 2006-259, s. 13(i).)

NORTH CAROLINA COMMENT

This section, not a part of the Uniform Trust Code, was added to bring forward with minor modifications the provisions of former G.S. 36A-125.8 regarding the effect of an inalienable interest on the modification or termination of an irrevocable trust. The section replaces Section 411(c) of the Uniform Trust Code providing that a spendthrift provision is not presumed to constitute a material purpose with respect to the modification or termination of a trust by consent of the beneficiaries.

Editor's Note. — Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(i), effective October 1, 2006, substituted "36C-4-414" for "36C-4-413." See Editor's note for applicability.

Article 4A.

Tax Status of Charitable Trusts.

§ 36C-4A-1. Prohibited transactions.

(a) Notwithstanding any provisions in the laws of this State or in the governing instrument to the contrary unless otherwise decreed by a court of competent jurisdiction except as provided in subsection (b) of this section, the trust instrument of each trust that is a private foundation described in section 509 of the Internal Revenue Code (including each nonexempt charitable trust described in section 4947(a)(1) of the Internal Revenue Code that is treated as a private foundation) and the trust instrument of each nonexempt split-interest trust described in section 4947(a)(2) of the Internal Revenue Code (but only to the extent that section 508(e) of the Internal Revenue Code is applicable to the nonexempt split-interest trust under section 4947(a)(2) of the Internal Revenue Code) is considered to contain the following provisions: "The trust shall make distributions at any time and in any manner as not to subject it to tax under section 4942 of the Internal Revenue Code; the trust shall not engage in any act of self-dealing which would subject it to tax under section 4941 of the Internal Revenue Code; the trust shall not retain any excess business holdings that would subject it to tax under section 4943 of the Internal Revenue Code; the trust shall not make any investments that would subject it to tax under section 4944 of the Internal Revenue Code; and the trust shall not make any taxable expenditures that would subject it to tax under section 4945 of the Internal Revenue Code." With respect to any trust created before January 1, 1970, this section shall apply only for its taxable years beginning on or after January 1, 1972.

(b) Notwithstanding any provisions in the laws of this State or in the governing instrument to the contrary, unless otherwise decreed by a court of competent jurisdiction except as provided in subsection (a) of this section, the governing instrument of each trust that is a nonexempt charitable trust described in section 4947(a)(1) of the Internal Revenue Code is considered to contain the following provisions:

(1) The trust shall be operated exclusively for charitable, educational, religious, and scientific purposes within the meaning of section 501(c)(3) and section 170(c)(2) of the Internal Revenue Code.

(2) Upon any dissolution, winding up, or liquidation of the trust, its assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or shall be distributed to the federal government, or a state or local government for a public purpose.

(c) The trustee of any trust described in this section may do one of the following:

(1) Without judicial proceedings, amend the trust to expressly exclude the application of this section by executing a written amendment to the trust instrument and filing a duplicate original of the amendment with the Attorney General. Upon filing of the amendment, this section shall not apply to that trust.

(2) Institute a proceeding under Article 2 of this Chapter seeking reformation of the trust instrument. (1971, c. 1136, s. 4; 1977, c. 502, s. 2; 1981 (Reg. Sess., 1982), c. 1210, ss. 1-3; 2005-192, s. 2.)

NORTH CAROLINA COMMENT

This section recodifies the provisions of former G.S. 36A-54. It does not appear in the Uniform Trust Code.

Effective Date and Applicability. — Session Laws 2005-192, which enacted Chapter 36C, in s. 7(a) provides: "Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

"Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded."

§ 36C-4A-2. Reformation of charitable remainder trust.

If a federal estate tax deduction is not allowable at the time of a decedent's death because of the failure of an interest in property that passes from the decedent under a will or trust to a person, or for a use, described in section 2055(a) of the Internal Revenue Code, to meet the requirements of subsections 2055(e)(2)(A) or (B) of the Internal Revenue Code, then in order that the deduction shall nevertheless be allowable under section 2055(e)(3) of the Internal Revenue Code, the court may, on application of any trustee or interested party with either (i) the written consent of the qualified beneficiaries, or (ii) a finding that the interest of those beneficiaries is substantially preserved, order an amendment to the trust so that the remainder interest is in a trust that is a charitable remainder annuity trust, a charitable remainder unitrust (as those terms are described in section 664 of the Internal Revenue Code), or a pooled income fund (as that term is described in section 642(c)(5) of the Internal Revenue Code), or so that any other interest of a charitable beneficiary is in the form of a guaranteed annuity or is a fixed percentage distributed yearly of the fair market value of the property (to be determined yearly), in accordance with section 2055(e)(2)(B) of the Internal Revenue Code. In every proceeding under this section, the Attorney General shall be notified, and given an opportunity to be heard. (1971, c. 1136, s. 4; 1977, c. 502, s. 2; 1981 (Reg. Sess., 1982), c. 1210, ss. 1-3; 2005-192, s. 2.)

NORTH CAROLINA COMMENT

This section recodifies the provisions of former G.S. 36A-53(b). It does not appear in the Uniform Trust Code.

ARTICLE 4B.

Charitable Remainder Trust Administration Act.

NORTH CAROLINA GENERAL COMMENT

This Article recodifies all of the provisions of former Article 4A of Chapter 36A entitled "Charitable Remainder Trust Administration Act." It does not appear in the Uniform Trust Code.

§ 36C-4B-1. Short title.

This Article shall be known as the Charitable Remainder Administration Trust Act. (1981 (Reg. Sess., 1982), c. 1252, s. 1; 2005-192, s. 2.)

Effective Date and Applicability. — Session Laws 2005-192, which enacted Chapter 36C, in s. 7(a) provides: "Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

"Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded."

§ 36C-4B-2. General rule.

Notwithstanding any provisions in the laws of this State or in the governing instruments to the contrary, any charitable remainder annuity trust and any charitable remainder unitrust that cannot qualify for a deduction for federal tax purposes under section 2055 or section 2522 of the Internal Revenue Code in the absence of this Article shall be administered in accordance with this Article. (1981 (Reg. Sess., 1982), c. 1252, s. 1; 2005-192, s. 2.)

§ 36C-4B-3. Definitions.

The following definitions apply to this Article unless the context clearly requires otherwise:

(1) "Charitable remainder trust" means a trust that provides for a specified distribution at least annually for either life or a term of years

to one or more beneficiaries, at least one of which is not a charity (hereinafter referred to as "beneficiaries"), with an irrevocable remainder interest to be held for the benefit of, or paid over to, charity. For purposes of this Article, only a charitable remainder annuity trust or a charitable remainder unitrust is considered a charitable remainder trust.

(2) "Charitable remainder annuity trust" means a charitable remainder trust:

a. From which a sum certain (that is not less than five percent (5%) of the initial net fair market value of all property placed in trust) is to be paid at least annually to one or more persons (at least one of which is not an organization described in section 170(c) of the Internal Revenue Code and, in the case of individuals, only to an individual who was living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of that individual or those individuals; however, in the case of an individual, the amount to be paid to that individual may be subject to a qualified contingency according to the terms of the governing instrument;

b. From which no amount other than the payments described in sub-subdivision a. of this subdivision may be paid to or for or both to and for the use of anyone other than an organization that is or was described in section 170(c) of the Internal Revenue Code; and

c. Following the termination of the payments described in sub-subdivision a. of this subdivision, the remainder interest in the trust is to be transferred to, or for the use of, an organization that is or was described in section 170(c) of the Internal Revenue Code or is to be retained by the trust for that use.

(3) "Charitable remainder unitrust" means a charitable remainder trust:

a. From which a fixed percentage (that is not less than five percent (5%)) of the net fair market value of its assets, valued annually, is to be paid at least annually to one or more persons (at least one of which is not an organization described in section 170(c) of the Internal Revenue Code and, in the case of individuals, only to an individual who was living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of that individual or those individuals; however, in the case of an individual, the amount to be paid to that individual may be made subject to a qualified contingency according to the terms of the governing instrument;

b. From which no amount other than the payments described in sub-subdivision a. of this subdivision may be paid to or for the use of anyone other than an organization that is or was an organization described in section 170(c) of the Internal Revenue Code; and

c. Following the termination of the payments described in sub-subdivision a. of this subdivision, the remainder interest in the trust is to be transferred to, or for the use of, an organization that is or was described in section 170(c) of the Internal Revenue Code, or is to be retained by the trust for such a use.

Notwithstanding sub-subdivisions a. and b. of this subdivision, the trust instrument may provide that the trustee shall pay to the income beneficiary for any year (i) the amount of the trust income if that amount is less than the amount required to be distributed under sub-subdivision a. of this subdivision, and (ii) any amount of the trust income that exceeds the amount required to be distributed under sub-subdivision a. of this subdivision to the extent that (by reason of sub-subdivision a.) the aggregate of the amounts paid in prior years is less than the aggregate of the required amounts.

(4) "Qualified contingency" means any provision of the governing instrument that provides that, upon the happening of a contingency, the payments made to an individual noncharitable beneficiary of a charitable remainder trust will terminate not later than those payments would otherwise terminate under the governing instrument. (1981 (Reg. Sess., 1982), c. 1252, s. 1; 1985, c. 406, ss. 1-3; 2005-192, s. 2.)

§ 36C-4B-4. Administrative provisions applicable to both charitable remainder annuity trusts and charitable remainder unitrusts.

(a) Creation of Remainder Interests in Charity. — Upon the termination of the noncharitable interests, the trustee shall distribute all of the then principal and income of the trust, other than any amount due the noncharitable beneficiary or beneficiaries, to the designated charity or charities, or shall hold the property in trust for the designated charity or charities in accordance with the terms of the trust document.

(b) Selection of Alternate Charitable Beneficiary if Remaindermen Do Not Qualify Under Section 170(c) of the Internal Revenue Code at Time of Distribution. — If the designated charity is not an organization described in section 170(c) of the Internal Revenue Code at the time when any principal or income of the trust is to be distributed to it, the trustee must distribute the principal or income to one or more organizations then described in section 170(c) of the Internal Revenue Code selected in accordance with the terms of the trust instrument. If the trust instrument does not provide for a method of selecting alternate charitable beneficiaries that are then qualified under section 170(c) of the Internal Revenue Code, the trustee must, in the trustee's sole discretion, select alternate trust beneficiaries that are qualified under section 170(c) of the Internal Revenue Code.

(c) Selection of Alternative Charitable Beneficiary if Remaindermen Do Not Qualify Under Section 170(b)(1)(A) of the Internal Revenue Code at Time of Distribution. — Notwithstanding subsection (b) of this section, if the designated charity is, at the time of the creation of the trust, an organization described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code, and if the designated charity is not an organization described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code when any principal or income of the trust is to be distributed to it, the trustee must distribute the principal or income to one or more organizations then described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code selected in accordance with the terms of the governing instrument; however, in the event that the governing instrument does not provide a method of selecting alternative charitable beneficiaries that are then described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code, the trustee shall, in his sole discretion, select one or more alternative charitable beneficiaries that are described in both section 170(b)(1)(A) and section 170(c) of the Internal Revenue Code and must distribute the principal or income to the organization or organizations so selected in shares as the trustee, in the trustee's sole discretion, shall determine.

(d) Prohibitions Governing Trustees. — Except for payment of the annuity amount or the unitrust amount to the beneficiaries, whichever is applicable, the trustee is prohibited from engaging in any act of self-dealing as defined in section 4941(d) of the Internal Revenue Code, retaining any excess business holdings as defined in section 4943(c) of the Internal Revenue Code that would subject the trust to tax under section 4943 of the Code, making any investments that would subject the trust to tax under section 4944 of the Internal Revenue Code, and making any taxable expenditures as defined in section 4945(d) of the Code. The trustee shall make distributions at a time and in a manner as not to subject the trust to tax under section 4942 of the Internal Revenue Code.

(e) Distribution to Charity During Term of Noncharitable Interests and Distributions in Kind. — If the governing instrument of the trust provides for distribution to charity during the term of the noncharitable interests, the trustee may pay to the designated charity the amounts specified in the governing instrument that exceed the annuity amount or the unitrust amount payable to any of the beneficiaries for the taxable year of the trust in which the income is earned. If the governing instrument of the trust provides for distribution to charity in kind, the adjusted basis for federal income tax purposes of any trust property the trustee distributes in kind to charity during the term of the noncharitable interests must be fairly representative of the adjusted basis for those purposes of all trust property available for distribution on the date of distribution.

(f) Investment Restrictions on Trustee. — Nothing in the trust instrument shall be construed to restrict the trustee from investing the trust assets in a manner that could result in the annual realization of a reasonable amount of income or gain from the sale or disposition of trust assets.

(g) Distribution From Trust Used to Administer an Estate to Charitable Remainder Trust. — If the governing instrument of a revocable inter vivos trust provides that the revocable inter vivos trust will be used partially to administer the estate of the settlor or for some other purpose, and further provides the assets will then be distributed to another trust that is a charitable remainder trust, upon the death of the settlor, or upon the occurrence of any event that causes the trust to become irrevocable, then the trust shall become irrevocable, and the trustee of this trust shall perform any remaining duties or obligations provided for in the trust instrument and then transfer the property specified in the governing instrument to the trustee of the charitable remainder trust to be held, administered, and distributed in the manner and according to the terms and conditions provided by the charitable remainder trust.

(h) Payment of Taxes by Noncharitable Beneficiary. — In the case of any inter vivos charitable remainder trust that is liable to pay, from trust property, any federal estate, state inheritance, or other similar death taxes by reason of the death of the settlor of the trust, the interest of any noncharitable beneficiary of the trust shall terminate upon the death of the settlor unless the noncharitable beneficiary furnishes to the trust sufficient funds for payment of all those taxes attributable to the interest of the noncharitable beneficiary in the trust property, and the termination shall be deemed as the occurrence of a qualified contingency. (1981 (Reg. Sess., 1982), c. 1252, s. 1; 1985, c. 406, ss. 4, 5; 2005-192, s. 2.)

Editor's Note. — Subsections (c) to (h) were designated as such by the Revisor of Statutes, the designations in Session Laws 2005-192, s. 2, having been (b1) to (g).

§ 36C-4B-5. Administrative provisions applicable to charitable remainder trusts only.

(a) Creation of Annuity Amount for Period of Years or Life. — In each taxable year of the trust, the trustee shall pay the annuity amount designated in the trust instrument to the beneficiaries named in the trust instrument during their lives or, if the governing instrument so provides, for a period of 20 years or less. The annuity amount shall be paid annually or in more frequent equal or unequal installments if the governing instrument so provides. The annuity amount shall be paid from income and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the annuity amount shall be added to principal.

The total amount payable at least annually to a person or persons named in the trust document, at least one of which is not an organization described in section 170(c) of the Internal Revenue Code, may not be less than five percent (5%) of the initial net fair market value of the property placed in trust as finally determined for federal tax purposes, except as provided in subsection (g) of this section.

(b) Computation of Annuity Amount in Short and Final Taxable Years. — For a short taxable year and for the taxable year in which the noncharitable beneficiary's interest terminates by death or otherwise, the trustee shall prorate the annuity amount on a daily basis.

(c) Prohibition of Additional Contributions. — No additional contributions shall be made to the trust after the initial contribution.

(d) Deferral of Annuity Amount During Period of Administration or Settlement. — When property passes to the trust at the death of the settlor, the obligation to pay the annuity amount commences with the date of death of the settlor, but payment of the annuity amount may be deferred from the date of the settlor's death to the end of the taxable year in which complete funding of the trust occurs. Within a reasonable time after the end of the taxable year in which the complete funding of the trust occurs, the trustee must pay to the beneficiary, in the case of an underpayment, or must receive from the beneficiary, in the case of an overpayment, the difference between:

(1) Any annuity amounts actually paid, plus interest on those amounts computed at ten percent (10%) a year, compounded annually; and

(2) The annuity amounts payable, determined under the method described in Section 1.664-1(a)(5) of the federal income tax regulations, plus interest on those amounts computed at ten percent (10%) a year, compounded annually.

Notwithstanding the foregoing sentence, in computing any underpayment or overpayment of the annuity amounts, if the governing instrument was executed or last amended before August 9, 1984, and if the governing instrument does not specify that a ten percent (10%) rate of interest shall be used, the underpayment or overpayment of the annuity amounts must be computed using an interest rate at six percent (6%) a year, compounded annually.

(e) Dollar Amount Annuity May Be Stated as Fraction or Percentage. — If the governing instrument of the trust states the amount of the annuity as a fraction or a percentage, the trustee must pay to the beneficiaries in each taxable year of the trust during their lives an annuity amount equal to a percentage (that percentage being stipulated in the governing instrument of the trust and, in any event, being five percent (5%) or greater) of the initial net fair market value of the assets constituting the trust. In determining this amount, assets shall be valued at their values as finally determined for federal tax purposes. If the fiduciary incorrectly determines the initial net fair market value of the assets constituting the trust, then, within a reasonable period after a final determination, the trustee shall pay to the beneficiaries, in the case of an undervaluation or shall receive from the beneficiaries, in the case of an overvaluation, an amount equal to the difference between the annuity amount properly payable and the annuity amount actually paid.

(f) Annuity Amount May Be Allocated Among Class of Noncharitable Beneficiaries in Discretion of Trustee. — If the governing instrument of the trust provides that the annuity trust amount may be allocated among a class of noncharitable beneficiaries in the discretion of the trustee, then the trustee must pay the annuity amount, which is defined in the governing instrument of the trust, in each taxable year of the trust, to the member or members of the class of noncharitable beneficiaries in an amount and proportions as the trustee in the trustee's absolute discretion shall from time to time determine until the last of the noncharitable beneficiaries dies. The trustee may pay the entire annuity amount to one member of this class or may apportion it among the various members in a manner as the trustee from time to time considers advisable as long as the power to allocate does not cause any person to be treated as the owner of any part of the trust under the rules of section 671 through section 678 of the Internal Revenue Code. If the class provided for in the governing instrument is open, then the distribution must be for a period of years not to exceed 20 years, notwithstanding a provision to the contrary in the trust instrument. If the class provided for in the governing instrument is closed at the creation of the trust, and all members of the class are ascertainable, the distribution may be for the lives of the members of the class or for a period not exceeding 20 years. The trustee shall pay the entire annuity amount for each taxable year annually and may not delay payment of the annuity amount.

(g) Reduction of Annuity Amount If Part of Corpus Is Paid to Charity at Expiration of Term of Years or on Death of Recipient. — If the governing instrument of the trust provides for the reduction of the annuity amount if part of the corpus is paid to charity at the expiration of a term of years or upon the death of a recipient, then during the term of years or during the joint lives of the noncharitable beneficiaries, the trustee shall, in each taxable year of the trust, pay a total annuity amount of at least five percent (5%) of the initial net fair market value of the assets placed in trust. Upon the expiration of the term of years or the death of a beneficiary, the trustee shall distribute an amount or percentage of the trust assets, as provided in the governing instrument of the trust, to the charity named in the governing instrument, and thereafter the trustee shall pay, annually or in more frequent installments, to the survivors for their lives, an annuity amount that in each taxable year of the trust, bears the same ratio to five percent (5%) of the initial net fair market value of the trust assets as the net fair market value of the trust assets valued as of the date of distribution, less the amount or percentage of trust assets distributed to the charity, bears to the net fair market value of the trust assets as of the date of distribution.

(h) Termination of Annuity Amount on Payment Date Preceding Termination of Noncharitable Interest. — If the governing instrument of the trust provides that payment of the annuity amount may terminate with the regular payment preceding the termination of all noncharitable interests, then the trustee must pay to the noncharitable beneficiary during the term of the noncharitable interest the annuity amount, defined in the trust document, in each taxable year of the trust. The obligation of the trustee to pay the annuity amount shall terminate with the payment preceding the death of the noncharitable beneficiary or other event that terminates the noncharitable interest.

(i) Retention of Testamentary Power to Revoke Noncharitable Interest. — If the governing instrument of the trust provides that the settlor of the trust retains the power, exercisable only by will, to revoke or terminate the interest of any recipient other than an organization described in section 170(c) of the Internal Revenue Code, then the trustee shall pay to the settlor during the settlor's life the annuity amount, as defined in the governing instrument of the trust and, upon the death of the settlor, if the noncharitable beneficiary survives the settlor, the trustee must pay to the noncharitable beneficiary during that beneficiary's life the annuity amount equal to the amount paid to the settlor. The settlor shall have the power, exercisable only by will, to revoke and terminate the interest of the noncharitable beneficiary under the trust. Upon the first to occur of (i) the death of the survivor of the settlor and noncharitable beneficiary; or (ii) the death of the settlor if the settlor effectively exercised the settlor's testamentary power to revoke and terminate the interest of the noncharitable beneficiary, the trustee must distribute all of the then principal and income of the trust, other than any amount due the settlor or noncharitable beneficiary, to the charity named in the trust document or, if the governing instrument so provides, the trustee must continue to hold the principal and income in trust for the charity or for the charitable purposes specified in the trust. No other retained power to terminate an interest in the trust is effective. (1981 (Reg. Sess., 1982), c. 1252, s. 1; 1985, c. 406, s. 6; 2005-192, s. 2.)

§ 36C-4B-6. Administrative provisions applicable to charitable remainder unitrusts only.

(a) Creation of Unitrust Amount for a Period of Years or Life. — The trustee shall pay to the beneficiaries named in the trust investment in each taxable year of the trust during their lives or, if the governing instrument so provides, for a period not exceeding 20 years, a unitrust amount equal to a fixed percentage, as stated in the governing instrument of the trust, of the net fair market value of the trust assets valued annually on the date or by the method designated in the governing instrument of the trust or, if no date or method is specified, on the date or by the method selected by the trustee in the trustee's discretion, so long as the same valuation date or dates or valuation methods are used each year. The unitrust amount is paid annually or in more frequent equal or unequal installments if the governing instrument so provides. The unitrust amount is paid from income and, to the extent that income is not sufficient, from principal. Any income of the trust for a taxable year in excess of the unitrust amount is added to principal. The fixed percentage to be paid at least annually to all beneficiaries cannot be less than five percent (5%).

(b) Unitrust Amount Expressed as the Lesser of Income or a Fixed Percentage. — If the governing instrument of the trust provides that the trustee shall pay, instead of a regular unitrust amount (the fixed percentage of the net fair market value of the trust assets, determined annually), the amount of trust income for the taxable year to the extent that this amount is not greater than the amount required to be distributed as a regular unitrust amount for that taxable year or the amount of the trust income for the taxable year that exceeds the regular unitrust amount for that taxable year to the extent that the aggregate of the amounts paid in prior years is less than the aggregate of the regular unitrust amount for those prior years, then the trustee must pay to the beneficiaries in each taxable year of the trust during their lives, or for a period not exceeding 20 years if the trust agreement so provides, an amount equal to the lesser of (i) the trust income for the taxable year, as defined in section 643(b) of the Internal Revenue Code and the regulations under that section, and (ii) the percentage, as stated in the governing instrument, of the net fair market value of the trust assets valued as of the taxable year decreased as elsewhere provided if the taxable year is a short taxable year or is the taxable year in which the noncharitable interest terminates by death or otherwise, and increased as elsewhere provided if additional contributions are made in the taxable year.

If the governing instrument of the trust so provides and if the trust income for any taxable year exceeds the amount determined under (ii) above, the payment to beneficiaries also must include the excess income to the extent that the aggregate of the amounts paid to beneficiaries in prior years is less than the percentage of the aggregate net fair market value of the trust assets, which percentage is defined in the governing instrument of the trust, for these years. Payments to beneficiaries must be made annually or in more frequent equal or unequal installments if the governing instrument so provides. Any income of the trust in excess of these payments must be added to principal.

(c) Adjustment for Incorrect Valuation. — If the fiduciary incorrectly determines the net fair market value of the trust assets for any taxable year, the trustee must, within a reasonable period after the final determination of the correct value, pay to the beneficiaries, in the case of an undervaluation, or receive from the beneficiaries, in the case of an overvaluation, an amount equal to the difference between the unitrust amount properly payable and the unitrust amount actually paid.

(d) Computation of Unitrust Amount in Short and Final Taxable Years. — For a short taxable year and for the taxable year in which the noncharitable beneficiary's interest terminates by death or otherwise, the trustee shall prorate the unitrust amount on a daily basis. If a trust provides for a valuation date other than the first day of the taxable year, and the valuation date does not occur in a taxable year of the trust because the taxable year is either a short taxable year or is the taxable year in which the noncharitable interests terminate, the trust assets must be valued as of the last day of the short taxable year or the day on which the noncharitable interests terminate, as appropriate.

(e) Additional Contributions. — If the governing instrument does not prohibit additional contributions and additional contributions are made to the trust after the initial contribution in the trust, the unitrust amount for the taxable year in which the additional contributions are made must be a fixed percentage, as stated in the governing instrument of the trust, of the sum of (i) the net fair market value of trust assets, excluding the additional contributions and any income from or appreciation of these contributions and (ii) that proportion of the value of the additional contributions excluded under (i) which the number of days in the period beginning with the date of contribution and ending with the earlier of the last day of the taxable year or the day the noncharitable beneficiary's interest terminated bears to the number of days in the period beginning on the first day of the taxable year and ending with the earlier of the last day in the taxable year or the day the noncharitable beneficiary's interest terminated. If no valuation date occurs after the contributions are made, the assets so added are valued as of the time of contribution.

(f) Deferral of Unitrust Amount During Period of Administration or Settlement. — When property passes to the trust at the death of the settlor, the obligation to pay the unitrust amount commences with the date of the settlor's death, but payment of the unitrust amount may be deferred from the date of the settlor's death to the end of the taxable year of the trust in which complete funding of the trust occurs. Within a reasonable time after the end of the taxable year in which the complete funding of the trust occurs, the trustee must pay to the beneficiary, in the case of an underpayment, or must receive from the beneficiary, in the case of an overpayment, the difference between:

(1) Any unitrust amounts actually paid, plus interest on those amounts computed at ten percent (10%) a year, compounded annually; and

(2) The unitrust amounts payable, determined under the method described in section 1.664-1(a)(5) of the federal income tax regulations, plus interest on those amounts computed at ten percent (10%) a year, compounded annually.

Notwithstanding the foregoing sentence, in computing any underpayment or overpayment of the unitrust amounts, if the governing instrument was executed or last amended before August 9, 1984, and if the governing instrument does not specify that a ten percent (10%) rate of interest shall be used, the underpayment or overpayment of the unitrust amounts shall be computed using an interest rate of six percent (6%) a year, compounded annually.

(g) Unitrust Amount May Be Allocated Among Class of Noncharitable Beneficiaries in Discretion of Trustee. — If the governing instrument of the trust provides that the unitrust amount may be allocated to a class of noncharitable beneficiaries in the discretion of the trustee, then the trustee must pay, in each taxable year of the trust, the unitrust amount to the member or members of the class of noncharitable beneficiaries in amounts and proportions as the trustee in the trustee's absolute discretion shall from time to time determine until the last of the noncharitable beneficiaries dies. The trustee may pay the unitrust amount to any one member of the class or may apportion it among the various members in a manner that the trustee shall from time to time consider advisable as long as the power to allocate does not cause any person to be treated as the owner of any part of the trust under the rules of section 671 through section 678 of the Internal Revenue Code. If the class provided for in the governing instrument is open, the distribution must be for a period not exceeding 20 years, notwithstanding a provision to the contrary in the trust instrument. If the class provided for in the governing instrument is closed at the creation of the trust, and all members of the class are ascertainable, the distribution may be for the lives of the members of the class or for a period not exceeding 20 years. The trustee shall pay the entire unitrust amount for each taxable year annually and may not delay payment of the unitrust amount.

(h) Reduction of Unitrust Amount if Part of Corpus Is Paid to Charity at Expiration of Term of Years or on Death of a Recipient. — If the governing instrument of the trust provides for the reduction of the unitrust amount if part of the corpus is paid to charity at the expiration of a term of years or upon the death of a recipient, then during the term of years or during the joint lives of the noncharitable beneficiaries the trustee shall, in each taxable year of the trust, pay the total unitrust amount equal to a percentage of the net fair market value of the trust assets valued annually, which shall not be less than five percent (5%). Upon expiration of the term of years or the death of a recipient, the trustee shall distribute an amount or percentage of the trust assets, as provided in the governing instrument of the trust, to the charity named in the governing instrument, and thereafter the trustee shall pay to the survivors for their lives a unitrust amount in each taxable year of the trust equal to at least five percent (5%)(the actual percentage being defined in the trust instrument) of the net fair market value of the remaining trust assets valued annually.

(i) Termination of Unitrust Amount on Payment Date Preceding Termination of Noncharitable Interests. — If the governing instrument of the trust provides that payment of the unitrust amount may terminate with the regular payment preceding the termination of all noncharitable interests, then the trustee must pay the unitrust amount to the noncharitable beneficiary in each taxable year of the trust during the term of the noncharitable interest. The obligation of the trustee to pay the unitrust amount terminates with the payment preceding the termination of the noncharitable interest by death or otherwise. The five percent (5%) requirement provided in subsection (a) of this section shall be met until the termination of all payments of the unitrust amount.

(j) Retention of Testamentary Power to Revoke Noncharitable Interest. — If the governing instrument of the trust provides that the settlor of the trust shall retain the power, exercisable only by will, to revoke or terminate the interest of any recipient other than an organization described in section 170(c) of the Internal Revenue Code, then the trustee must pay the unitrust amount to the settlor during the settlor's life and, upon the death of the settlor, shall pay the unitrust amount to the noncharitable beneficiary during the charitable beneficiary's life, provided the noncharitable beneficiary survives the settlor. The settlor shall have the power, exercisable only by will, to revoke and terminate the interest of the noncharitable beneficiary under the trust. Upon the first to occur of (i) the death of the survivor of the settlor and the noncharitable beneficiary; or (ii) the death of the settlor if the settlor effectively exercised the testamentary power to revoke and terminate the interest of the noncharitable beneficiary, the trustee shall distribute all of the then principal and income of the trust, other than any amount due the noncharitable beneficiaries, to the charity named in the trust document or, if the governing instrument so provides, the trustee shall continue to hold the principal and income in trust for the charity or for the charitable purposes specified in the trust. No other retained power to terminate an interest in the trust is effective. (1981 (Reg. Sess., 1982), c. 1252, s. 1; 1985, c. 406, s. 7; 2005-192, s. 2.)

§ 36C-4B-7. Interpretation.

This Article shall be interpreted and construed to effectuate its general purpose to cause all charitable remainder annuity trusts and all charitable remainder unitrusts to be administered in accordance with section 2055 and section 2522 of the Internal Revenue Code and the regulations under those sections. (1981 (Reg. Sess., 1982), c. 1252, s. 1; 2005-192, s. 2.)

GENERAL COMMENT

This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 501 and 502 state the general rules... Section 502 states the effect of a spendthrift provision. Unless a claim is being made by an exception creditor, a spendthrift provision bars a beneficiary's creditor from reaching the beneficiary's interest until distribution is made by the trustee. An exception creditor, however, can reach the beneficiary's interest subject to the court's power to limit the relief. Section 503 lists the ... exception creditors whose claims are not subject to a ... restriction. Sections 504 through 507 address special categories in which the rights of a beneficiary's creditors are the same whether or not the trust contains a spendthrift provision. Section 504 deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 505 covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor's lifetime or incident to the settlor's death. Section 506 provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 507 clarifies that although the trustee holds legal title to trust property, that property is not subject to the trustee's personal debts.

The provisions of this article relating to the validity and effect of a spendthrift provision and the rights of certain creditors and assignees to reach the trust may not be modified by the terms of the trust. *See* Section 105(b)(5).

This article does not supersede state exemption statutes nor an enacting jurisdiction's Uniform Fraudulent Transfers Act which, when applicable, invalidates any type of gratuitous transfer, including transfers into trust.

ARTICLE 5.

Creditors' Claims; Spendthrift and Discretionary Trusts.

GENERAL COMMENT

This article addresses the validity of a spendthrift provision and the rights of creditors, both of the settlor and beneficiaries, to reach a trust to collect a debt. Sections 501 and 502 state the general rules.... Section 502 states the effect of a spendthrift provision. Unless a claim is being made by an exception creditor, a spendthrift provision bars a beneficiary's creditor from

reaching the beneficiary's interest until distribution is made by the trustee. An exception creditor, however, can reach the beneficiary's interest subject to the court's power to limit the relief. Section 503 lists the ... exception creditors whose claims are not subject to a ... restriction. Sections 504 through 507 address special categories in which the rights of a beneficiary's creditors are the same whether or not the trust contains a spendthrift provision. Section 504 deals with discretionary trusts and trusts for which distributions are subject to a standard. Section 505 covers creditor claims against a settlor, whether the trust is revocable or irrevocable, and if revocable, whether the claim is made during the settlor's lifetime or incident to the settlor's death. Section 506 provides a creditor with a remedy if a trustee fails to make a mandated distribution within a reasonable time. Section 507 clarifies that although the trustee holds legal title to trust property, that property is not subject to the trustee's personal debts.

The provisions of this article relating to the validity and effect of a spendthrift provision and the rights of certain creditors and assignees to reach the trust may not be modified by the terms of the trust. *See* Section 105(b)(5).

This article does not supersede state exemption statutes nor an enacting jurisdiction's Uniform Fraudulent Transfers Act which, when applicable, invalidates any type of gratuitous transfer, including transfers into trust.

...

§ 36C-5-501. Rights of beneficiary's creditor or assignee.

(a) Except as provided in subsection (b) of this section, the court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions to or for the benefit of the beneficiary or other means. The court may limit the award to that relief as is appropriate under the circumstances.

(b) Subsection (a) of this section shall not apply, and a trustee shall have no liability to any creditor of a beneficiary for any distributions made to or for the benefit of the beneficiary, to the extent that a beneficiary's interest is protected or restricted by any of the following:

(1) A spendthrift provision.
(2) A discretionary trust interest as defined in G.S. 36C-5-504(a)(2).
(3) A protective trust interest as described in G.S. 36C-5-508. (2005-192, s. 2; 2007-106, s. 19.)

OFFICIAL COMMENT

This section applies only if the trust does not contain a spendthrift provision or the spendthrift provision does not apply to a particular beneficiary's interest. A settlor may subject to spendthrift protection the interests of certain beneficiaries but not others. A settlor may also subject only a portion of the trust to spendthrift protection such as an interest in the income but not principal. For the effect of a spendthrift provision on creditor claims, see Section 503.

Absent a valid spendthrift provision, a creditor may ordinarily reach the interest of a beneficiary the same as any other of the beneficiary's assets. This does not necessarily mean that the creditor can collect all distributions made to the beneficiary. The interest may be too indefinite or contingent for the creditor to reach or the interest may qualify for an exemption under the state's general creditor exemption statutes. See (Third) of Trusts § 56 (2003); Restatement (Second) of Trusts §§ 147-149, 162 (1959). Other creditor law of the State may limit the creditor to a specified percentage of a distribution. *See*, e.g., Cal. Prob. Code Section 15306.5. This section does not prescribe the procedures ("other means") for reaching a beneficiary's interest or of priority among claimants, leaving those issues to the enacting State's laws on creditor rights. The section does clarify, however, that an order obtained against the trustee, whatever state procedure may have been used, may extend to future distributions whether made directly to the beneficiary or to others for the beneficiary's benefit. By allowing an order to extend to future payments, the need for the creditor periodically to return to court will be reduced.

Because proceedings to satisfy a claim are equitable in nature, the second sentence of this section ratifies the court's discretion to limit the award as appropriate under the circumstances. In exercising its discretion to limit relief, the court may appropriately consider the circumstances of a beneficiary and the beneficiary's family. *See* Restatement (Third) of Trusts Section 56 cmt. e (Tentative Draft No. 2, approved 1999).

...

NORTH CAROLINA COMMENT

This section of the Uniform Trust Code was modified to include interests in a "discretionary trust interest" as defined in G.S. 36C-5-504(a)(2) and a "protective trust" as defined in G.S. 36C-5-508 as interests in trusts to which the provisions of subsection (a) of this section do not apply, in addition to an interest subject to a spendthrift provision as provided in the Uniform Trust Code.

Former G. S. 36A-115 provided creditor protection for a "discretionary trust," a "support trust" and a "protective trust." The definition of "discretionary trust interest" in G.S. 36C-5-504(a)(2) includes a discretionary trust and a support trust described in former G.S. 36A-115. It was the intention of the drafters to preserve in this Article the same creditor protection afforded a discretionary trust, support trust, and protective trust by former G.S. 36A-115, except as otherwise provided in this Article. The recognition of a spendthrift provision as also providing creditor protection changes North Carolina law. *See* G.S. 36C-5-502 and the N.C. Comment.

The reference in the Official Comment to a "spendthrift provision" providing creditor protection should be understood to include the creditor protection afforded by a discretionary trust interest and protective trust.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (b) of this section is amended to clarify that subsection (a), which addresses the rights of creditors to reach a beneficiary's interest, does not apply to the extent that the beneficiary's interest is "protected or restricted by" a spendthrift provision, discretionary trust interest or protective trust interest. Article 5 of Chapter 36C provides for exceptions to protection of the beneficiary's interest. The drafters thought that the former wording of subsection (a) without the added words "protected or restricted by" could be construed as indicating that these exceptions did not apply.

Effective Date and Applicability. — Session Laws 2005-192, which enacted Chapter 36C, in s. 7(a) provides: "Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

"Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded."

Official Comment on Effective Date and Applicability. — The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code Section 8 101.

North Carolina Comment on Effective Date and Applicability. — The drafters modified the provisions of the Uniform Trust Code relating to its application to trust instruments executed before its effective date by adding the phrase "or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary" to the end of the first sentence of the second paragraph. Although this Chapter is intended to have broad application, the drafters concluded that a rule of construction or presumption provided in this Chapter should not be applied to a trust instrument executed before the effective date of this Chapter if the application of such rule or presumption would impair the substantial rights of a beneficiary of a trust established under such a trust instrument.

Editor's Note. — Session Laws 2005-192, which enacted Chapter 36C, in s. 6, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Official Comments, copyright © 2005, are reprinted in this Chapter with the permission of the National Conference of Commissioners on Uniform State Laws. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 19, effective October 1, 2007, in the introductory paragraph of subsection (b), added "Subsection (a) of" at the beginning and added "is protected or restricted by any of the following" at the end; deleted "Is subject to" at the beginning of subdivision (b)(2); deleted "Is" at the beginning of subdivisions (b)(2) and (3); and made minor stylistic and punctuation changes. See Editor's note for applicability.

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina, " see 57 N.C.L. Rev. 727 (1979).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

For article on ERISA spendthrift rules, see 11 Campbell L. Rev. 29 (1988).

For comment, 'And Now for Something Completely Different: Spendthrift, Discretionary, and Protective Trusts in North Carolina and the Federal Tax Lien,' see 29 Campbell L. Rev. 737 (2007).

§ 36C-5-502. Spendthrift provision.

(a) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest.

(b) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust", or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(c) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this Article, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary. (2005-192, s. 2.)

OFFICIAL COMMENT

Under this section, a settlor has the power to restrain the transfer of a beneficiary's interest, regardless of whether the beneficiary has an interest in income, in principal, or in both.

Unless one of the exceptions under this article applies, a creditor of the beneficiary is prohibited from attaching a protected interest and may only attempt to collect directly from the beneficiary after payment is made. This section is similar to Restatement (Third) of Trusts Section 58 (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Sections 152 153 (1959). For the definition of spendthrift provision, *see* Section 103(15).

For a spendthrift provision to be effective under this Code, it must prohibit both the voluntary and involuntary transfer of the beneficiary's interest, that is, a settlor may not allow a beneficiary to assign while prohibiting a beneficiary's creditor from collecting, and vice versa. *See* Restatement (Third) of Trusts Section 58 cmt. B (Tentative Draft No. 2, approved 1999). *See also* Restatement (Second) of Trusts Section 152(2) (1959). A spendthrift provision valid under this Code will also be recognized as valid in a federal bankruptcy proceeding. *See* 11 U.S.C. Section 541(c)(2).

Subsection (b), which is derived from Texas Property Code Section 112.035(b), allows a settlor to provide maximum spendthrift protection simply by stating in the instrument that all interests are held subject to a "spendthrift trust" or words of similar effect.

A disclaimer, because it is a refusal to accept ownership of an interest and not a transfer of an interest already owned, is not affected by the presence or absence of a spendthrift provision. Most disclaimer statutes expressly provide that the validity of a disclaimer is not affected by a spendthrift protection. *See*, e.g., Unif. Probate Code Section 2 801(a). Releases and exercises of powers of appointment are also not affected because they are not transfers of property. *See* Restatement (Third) of Trusts Section 58 cmt. c (Tentative Draft No. 2, approved 1999).

A spendthrift provision is ineffective against a beneficial interest retained by the settlor. *See* Restatement (Third) of Trusts Section 58(2) (Tentative Draft No. 2, approved 1999). This is a necessary corollary to Section 505(a)(2), which allows a creditor or assignee of the settlor to reach the maximum amount that can be distributed to or for the settlor's benefit. This right to reach the trust applies whether or not the trust contains a spendthrift provision.

A valid spendthrift provision makes it impossible for a beneficiary to make a legally binding transfer, but the trustee may choose to honor the beneficiary's purported assignment. The trustee may recommence distributions to the beneficiary at anytime. The beneficiary, not having made a binding transfer, can withdraw the beneficiary's direction but only as to future payments. *See* Restatement (Third) of Trusts Section 58 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 152 cmt. i (1959).

NORTH CAROLINA COMMENT

This section represents a major change in North Carolina law by recognizing that a valid "spendthrift provision" restrains both the voluntary and involuntary transfer of a beneficiary's interest in a trust. Former G.S. 36A-115 provided an exception from alienability, whether voluntary or involuntary, only for interests in a discretionary trust, support trust and protective trust described in the statute. In *Swink v. Swink*, 6 N.C. App. 161, 169 S.E.2d 539 (1969), a case decided before the enactment of former G.S. 36A-115 in 1979, the court held that an interest in a common law spendthrift trust could be reached to satisfy claims for alimony and child support under North Carolina law because our courts did not recognize such spendthrift trusts as being effective to provide creditor protection.

Under subsection (c) of this section, the effect of the restraint of a spendthrift provision is to prohibit a creditor from reaching a distribution by the trustee before its receipt by a beneficiary. G.S. 36C-5-504(b) provides creditor protection for a "discretionary trust interest" in language identical to that in this subsection. The definition of "discretionary trust interest" in G.S. 36C-5-504(a)(2) includes a discretionary trust and a support trust in language brought forward from former G.S. 36A-115. Interests in discretionary trusts and support trusts and in protective trusts defined in G.S. 36C-5-508 do not have to be restrained by a spendthrift provision to be provided creditor protection.

§ 36C-5-503. Exceptions to spendthrift provision.

(a) As used in this section, the term "child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(b) Even if a trust contains a spendthrift provision, or if the beneficiary's interest is a discretionary trust interest as defined in G.S. 36C-5-504(a)(2) or a protective trust interest as defined in G.S. 36C-5-508, a beneficiary's child who has a judgment or court order against the beneficiary for support or maintenance may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to relief that is appropriate under the circumstances. (2005-192, s. 2.)

OFFICIAL COMMENT

This section exempts the claims of certain categories of creditors from the effects of a … restriction.…

The exception in subsection (b) … for judgments or orders to support a beneficiary's child … is in accord with Restatement (Third) of Trusts Section 59(a) (Tentative Draft No. 2, approved 1999), Restatement (Second) of Trusts Section 157(a) (1959), and numerous state statutes. It is also consistent with federal bankruptcy law, which exempts such support orders from discharge. The effect of this exception is to permit the claimant for unpaid support to attach present or future distributions that would otherwise be made to the beneficiary. Distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions the trustee has otherwise decided to make, such as through the exercise of discretion. Subsection (b) …, unlike Section 504, does not authorize the … child claimant to compel a distribution from the trust. Section 504 authorizes a … child claimant to compel a distribution to the extent the trustee has abused a discretion or failed to comply with a standard for distribution.

Subsection (b) … refers both to "support" and "maintenance" in order to accommodate differences among the States in terminology employed. No difference in meaning between the two terms is intended.

The definition of "child" in subsection (a) accommodates the differing approaches States take to defining the class of individuals eligible for child support, including such issues as whether support can be awarded to stepchildren. However the State making the award chooses to define "child" will be recognized under this Code, whether the order sought to be enforced was entered in the same or different State.…

…

NORTH CAROLINA COMMENT

This section is new to North Carolina law. Our courts never addressed the question of whether any category of creditor, such as minor children or spouses who have a claim for support, was exempt from the creditor protection provided a discretionary trust, a support trust, or protective trust by former G.S. 36 115. In *Swink v. Swink*, 6 N.C. App. 161,169 S.E.2d 539 (1969) the court ruled that a beneficiary's interest in a trust restrained by a spendthrift provision was subject to attachment for child support and alimony both (i) under the laws of the District of Columbia, which was in accord with the cases holding that these interests may be reached "because of the strong equity of these claims and because of repugnancy to public policy," and (ii) under the laws of North Carolina which did not recognize common law spendthrift trusts as providing creditor protection since in this State "[t]raditional notions of public policy and fair play have remained predominant." Whether these considerations would have led our courts to allow such a creditor to attach present or future distributions from a discretionary trust, support trust or protective trust described in former G.S. 36A 115 is problematic.

Subsection (b) differs significantly from the Uniform Trust Code in limiting the exception from creditor protection to a beneficiary's child who has a judgment or court order against a beneficiary for support and maintenance. The drafters omitted provisions in this section of the Uniform Trust Code which would have provided additional exceptions for (1) a spouse or former spouse having a judgment against a beneficiary for support, (2) a judgment creditor who had provided services for the protection of the beneficiary's interest, and (3) a claim of the State or United States to the extent a statute so provided. In balancing the need to respect the intent of settlors who desire to provide creditor protection for beneficiaries with "traditional notions of public policy and fair play," the drafters concluded that such notions should encompass an exception for a child with a support order but not for a spouse with a support order and a judgment creditor who provided services to protect a beneficiary's interest. The drafters omitted the exception for a claim based on state and federal laws because it was unnecessary.

Subsection (b) of the Uniform Trust Code provided for exceptions only with respect to an interest in a trust subject to spendthrift provision which under the Uniform Trust Code is the only interest recognized as being protected from attachment of a present or future distribution from the trust. In addition to limiting the exception to a child with a support order, the drafters modified subsection (b) of the Uniform Trust Code to extend that exception to a beneficiary's interest in a discretionary trust as defined in G.S. 36C-5-504(a)(2), which includes an interest in a discretionary trust and support trust described in former G.S. 36A-115, and in a protective trust as defined in G.S. 35C-5-508. The interests in these trusts do not have to be subject to a spendthrift provision to be protected from attachment by creditors.

§ 36C-5-504. Discretionary trusts; effect of standard.

(a) In this section:

(1) "Child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(2) "Discretionary trust interest" means an interest in a trust that is subject to the trustee's discretion, whether or not the discretion is expressed in the form of a standard of distribution. A discretionary trust interest shall include an interest in any one or any combination of the following:

a. A trust in which the amount to be received by the beneficiary, including whether or not the beneficiary, or a class of beneficiaries, is to receive anything at all, is within the discretion of the trustee.

b. A trust in which the trustee has no duty to pay or distribute any particular amount to the beneficiary, but has only a duty to pay or distribute to the beneficiary, or apply on behalf of the beneficiary, those sums that the trustee, in the trustee's discretion, determines are appropriate for the support, education, or maintenance of the beneficiary.

(b) The beneficiary may not transfer a discretionary trust interest. Except as otherwise provided in this Article, a creditor or assignee of a beneficiary may not reach a discretionary trust interest or a distribution by the trustee before its receipt by the beneficiary.

(c) Except as provided in subsection (d) of this section, a creditor of a beneficiary may not compel a distribution from a trust in which the beneficiary has a discretionary trust interest even if the trustee has abused the trustee's discretion.

(d) To the extent that a trustee has not complied with a standard of distribution or has abused a discretion:

(1) A distribution may be ordered by the court to satisfy a judgment or court order against the beneficiary for support or maintenance of the beneficiary's child; and

(2) The court shall direct the trustee to pay to the child an amount that is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(e) This section does not limit the right of a beneficiary to maintain a judicial proceeding against a trustee for an abuse of discretion or failure to comply with a standard for distribution.

(f) A creditor may not reach the interest of a beneficiary who is also a trustee or cotrustee, or otherwise compel a distribution, if the trustee's discretion to make distributions for the trustee's own benefit is limited by an ascertainable standard. (2005-192, s. 2.)

OFFICIAL COMMENT

This section addresses the ability of a beneficiary's creditor to reach the beneficiary's discretionary trust interest, whether or not the exercise of the trustee's discretion is subject to a standard. …

For a discussion of the definition of "child" in subsection (a), see Section 503 Comment.

Subsection (b), which establishes the general rule, forbids a creditor from compelling a distribution from the trust, even if the trustee has failed to comply with the standard of distribution or has abused a discretion. Under subsection (d), the power to force a distribution due to an abuse of discretion or failure to comply with a standard belongs solely to the beneficiary. …

Subsection (c) creates an exception for support claims of a child … who has a judgment or order against a beneficiary for support or maintenance. While a creditor of a beneficiary generally may not assert that a trustee has abused a discretion or failed to comply with a standard of distribution, such a claim may be asserted by the beneficiary's child … enforcing a judgment or court order against the beneficiary for unpaid support or maintenance. The court must direct the trustee to pay the child … such amount as is equitable under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to or for the benefit of the beneficiary. Before fixing this amount, the court having jurisdiction over the trust should consider that in setting the respective support award, the family court has already considered the respective needs and assets of the family. The Uniform Trust Code does not prescribe a particular procedural method for enforcing a judgment or order against the trust, leaving that matter to local collection law.

Subsection (e), which was added by a 2004 amendment, is discussed below.

2004 Amendment

Section 504(e), 103(11)

Trusts are frequently drafted in which a trustee is also a beneficiary. A common example is what is often referred to as a bypass trust, under which the settlor's spouse will frequently be named as both trustee and beneficiary. An amount equal to the exemption from federal estate tax will be placed in the bypass trust, and the trustee, who will often be the settlor's spouse, will be given discretion to make distributions to the beneficiaries, a class which will usually include the spouse/trustee. To prevent the inclusion of the trust in the spouse trustee's gross estate, the spouse's discretion to make distributions for the spouse's own benefit will be limited by an ascertainable standard relating to health, education, maintenance, or support.

The UTC, as currently drafted, does not specifically address the issue of whether a creditor of a beneficiary may reach the beneficial interest of a beneficiary who is also a trustee. However, Restatement (Third) of Trusts § 60, comment g, which was approved by the American law Institute in 1999, provides that the beneficial interest of a beneficiary/trustee may be reached by the beneficiary/trustee's creditors. Because the UTC is supplemented by the common law (see UTC Section 106), this Restatement rule might also apply in states enacting the UTC. The drafting committee has concluded that adoption of the Restatement rule would unduly disrupt standard estate planning and should be limited. Consequently, Section 504 is amended to provide that the provisions of this section, which generally prohibit a creditor of a beneficiary from reaching a beneficiary's discretionary interest, apply even if the beneficiary is also a trustee or cotrustee. The beneficiary-trustee is protected from creditor claims to the extent the beneficiary-trustee's discretion is protected by an ascertainable standard as defined in the relevant Internal Revenue Code sections. The result is that the beneficiary's trustee's interest is protected to the extent it is also exempt from federal estate tax. The amendment thereby achieves its main purpose, which is to protect the trustee-beneficiary of a bypass trust from creditor claims.

The protection conferred by this subsection, however, is no greater than if the beneficiary had not been named trustee. If an exception creditor can reach the beneficiary's interest under some other provision the interest is not insulated from creditor claims by the fact the beneficiary is or becomes a trustee.

In addition, the definition of "power of withdrawal" in Section 103 is amended to clarify that a power of withdrawal does not include a power exercisable by the trustee that is limited by an ascertainable standard. The purpose of this amendment is to preclude a claim that the power of a trustee-beneficiary to make discretionary distributions for the trustee-beneficiary's own benefit results in an enforceable claim of the trustee-beneficiary's creditors to reach the trustee-beneficiary's interest …. Similar to the amendment to Section 504, the amendment to "power of withdrawal" is being made because of concerns that Restatement (Third) of Trusts § 60, comment g, otherwise might allow a beneficiary-trustee's creditors to reach the trustee's beneficial interest.

…

NORTH CAROLINA COMMENT

Subsection (a) of the Uniform Trust Code was modified to add paragraph (2) defining a "discretionary trust interest" which includes an interest in a "discretionary trust" and a "support trust" described in language brought forward from former G.S. 36A-115(b)(1) and (2) with minor modifications.

Subsection (b), not a part of the Uniform

Trust Code, was added to this section to provide for the inalienability of a discretionary trust interest in language identical to that in G.S. 36C-5-502(c) with respect to an interest subject to a spendthrift provision. It was the drafters' intent to provide the same creditor protection for interests in discretionary trusts and support trusts that was afforded by former G.S. 36A-115, except as otherwise provided in this Article. Interests in a discretionary trust and a support trust and in a protective trust defined in G.S. 36C-5-508 do not have to have a spendthrift provision for creditor protection.

Subsection (c) incorporates the provisions of subsection (b) of the Uniform Trust Code and is new to North Carolina law. No court in this State has addressed the question of whether a creditor can compel a distribution from a discretionary trust even if the trustee has abused its discretion. The Uniform Trust Code provisions were modified to state that a creditor may not compel a distribution "from a trust in which the beneficiary has a discretionary trust interest" in place of the reference in the Uniform Trust Code to a distribution "that is subject to the trustee's discretion even ... if ... expressed in the form of a standard" because the definition of discretionary trust interest includes these matters. Any reference in the Official Comment to "subsection (b)" should be understood to refer to subsection (c) of this section.

Subsection (d), which incorporates the provisions of subsection (c) of the Uniform Trust Code, is also new to North Carolina law. The Uniform Trust Code provisions were modified to provide that only a child who has a judgment or court order against the beneficiary for support or maintenance may assert a claim that the trustee has not complied with the standard of distribution or abused a discretion. The provisions of the Uniform Trust Code giving a spouse or former spouse that right were omitted to be consistent with the omission of spouses as exception creditors under G.S. 36C-5-503. The criteria to determine whether a trustee has abused a discretion in exercising or failing to exercise a discretionary power are set forth in G.S. 36C-8-814. Any reference in the Official Comment to "subsection (c)" should be understood to refer to subsection (d) of this section.

Subsection (e) incorporates the provisions of subsection (d) of the Uniform Trust Code with respect to the right of a beneficiary to maintain a judicial proceeding against the trustee for abuse of discretion. Any reference in the Official Comment to "subsection (d)" should be understood to refer to subsection (e) of this section.

Subsection (f) incorporates the provisions of subsection (e) of the Uniform Trust Code with respect to the interest of a beneficiary who is also a trustee or cotrustee. Any reference in the Official Comment to "subsection (e)" should be understood to refer to subsection (f) of this section.

CASE NOTES

Trust which was created prior to October 1, 1979, was not subject to this section. — Lineback ex rel. Hutchens v. Stout, 79 N.C. App. 292, 339 S.E.2d 103 (1986), decided under law in effect prior to this section.

Testamentary trust created for "the lifetime" of beneficiary, the disabled daughter of settlor, containing provision for the distribution of the trust corpus remaining upon beneficiary's death, which was designed so that trust funds would be used to provide supplemental, rather than total, support for the beneficiary, was a discretionary trust and the superior court erred in requiring trustee to expend funds from the trust for the general welfare, support, maintenance and benefit of the beneficiary. Lineback ex rel. Hutchens v. Stout, 79 N.C. App. 292, 339 S.E.2d 103 (1986), decided under law in effect prior to this section.

§ 36C-5-505. Creditor's claim against settlor.

(a) Subject to the other applicable law, whether or not the terms of a trust contain a spendthrift provision or the interest in the trust is a discretionary trust interest as defined in G.S. 36C-504(a)(2) or a protective trust interest as defined in G.S. 36C-5-508, the following rules apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(2a) Notwithstanding subdivision (2) of this subsection, the trustee's discretionary authority to pay directly to the taxing authorities or to reimburse the settlor for any tax on trust income or trust principal that is payable by the settlor under the law imposing the tax shall not be considered to be an amount that can be distributed to or for the settlor's benefit, and a creditor or assignee of the settlor shall not be entitled to reach any amount.

(3) After the death of a settlor, and subject to the settlor's right to direct the source from which liabilities will be paid, the property of a trust that was revocable at the settlor's death is subject to claims of the settlor's creditors, costs of administration of the settlor's estate, the expenses of the settlor's funeral and disposal of remains, and statutory allowances to a surviving spouse and children to the extent that the settlor's probate estate is inadequate to satisfy those claims, costs, expenses, and allowances, unless barred by applicable law.

(b) For purposes of this section, with respect to a power of withdrawal over property of a trust exercisable by a holder of the power other than the settlor of the trust, both of the following shall apply:

(1) The property subject to the exercise of the power shall be subject to the claims of the creditors of the holder only when and to the extent that the holder exercises the power.

(2) The lapse, release, or waiver of a power shall not be deemed to be an exercise of the power and shall not cause the holder to be treated as a settlor of the trust. (2005-192, s. 2; 2007-106, s. 20.)

OFFICIAL COMMENT

Subsection (a)(1) states what is now a well accepted conclusion, that a revocable trust is subject to the claims of the settlor's creditors while the settlor is living. *See* Restatement (Third) of Trusts Section 25 cmt. e (Tentative Draft No. 1, approved 1996). Such claims were not allowed at common law, however. *See* Restatement (Second) of Trusts Section 330 cmt. o (1959). Because a settlor usually also retains a beneficial interest that a creditor may reach under subsection (a)(2), the common law rule, were it retained in this Code, would be of little significance. *See* Restatement (Second) of Trusts Section 156(2) (1959).

Subsection (a)(2), which is based on Restatement (Third) of Trusts Section 58(2) and cmt. e (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 156 (1959), follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors. The drafters of the Uniform Trust Code concluded that traditional doctrine reflects sound policy. Consequently, the drafters rejected the approach taken in States like Alaska and Delaware, both of which allow a settlor to retain a beneficial interest immune from creditor claims. *See* Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability,* 35 Real Prop. Prob. & Tr. J. 479 (2000); John E. Sullivan, III, *Gutting the Rule Against Self Settled Trusts: How the Delaware Trust Law Competes with Offshore Trusts,* 23 Del. J. Corp. L. 423 (1998). Under the Code, whether the trust contains a spendthrift provision or not, a creditor of the settlor may reach the maximum amount that the trustee could have paid to the settlor beneficiary. If the trustee has discretion to distribute the entire income and principal to the settlor, the effect of this subsection is to place the settlor's creditors in the same position as if the trust had not been created. For the definition of "settlor," see Section 103.

This section does not address possible rights against a settlor who was insolvent at the time of the trust's creation or was rendered insolvent by the transfer of property to the trust. This subject is instead left to the State's law on fraudulent transfers. A transfer to the trust by an insolvent settlor might also constitute a voidable preference under federal bankruptcy law.

Subsection (a)(3) recognizes that a revocable trust is usually employed as a will substitute. As such, the trust assets, following the death of the settlor, should be subject to the settlor's debts and other charges. However, in accordance with traditional doctrine, the assets of the settlor's probate estate must normally first be exhausted before the assets of the revocable trust can be reached. This section does not attempt to address the procedural issues raised by the need first to exhaust the decedent's probate estate before reaching the assets of the revocable trust. Nor does this section address the priority of creditor claims or liability of the decedent's other nonprobate assets for the decedent's debts and other charges. Subsection (a)(3), however, does ratify the typical pourover will, revocable trust plan. As long as the rights of the creditor or family member claiming a statutory allowance are not impaired, the settlor is free to shift liability from the probate estate to the revocable trust. Regarding other issues associated with potential liability of nonprobate assets for unpaid claims, see Section 6 102 of the Uniform Probate Code, which was added to that Code in 1998.

. . .

The Uniform Trust Code does not address creditor issues with respect to property subject to a special power of appointment or a testamentary general power of appointment. For creditor rights against such interests, see Restatement (Property) Second: Donative Transfers Sections 13.1 13.7 (1986).

AMENDED NORTH CAROLINA COMMENT (2007)

Subsection (a) is generally consistent with North Carolina case law with respect to the ability of a creditor to reach the property in a trust for the benefit of the settlor. See *Pilkington v. West,* 246 N.C. 575, 580, 99 S.E.2d 798, 802 (1957) where the court stated that "one cannot remove his property from liability for his debts or restrict his rights of alienation by conveyance to a trustee for the sole use and benefit of the owner, grantor." Subsection (a) of the Uniform Trust Code was modified to provide that the subsection applies whether or not the interest in the trust is a discretionary interest as defined in G.S. 36C-5-504(a)(2) or a protected trust interest as defined in G.S. 36C-5-508.

Effective October 1, 2007, subsection (a) is amended (i) to add the phrase "subject to the other applicable law" in the first sentence to clarify that the adoption of the Uniform Trust Code does not change the existing North Carolina law with respect to the exemptions from creditors, such as exemptions relating to life insurance and homestead protection and (ii) to add a new subdivision (a) (2a) to clarify that the trustee's discretionary authority to pay the tax on a trust's income or principal that is payable by the settlor is not an amount that can be distributed to or for the settlor's benefit within the meaning of subdivision (a) (2).

The drafters omitted the provisions of subsection (b) of the Uniform Trust Code and substituted in their place the provisions, effective October 1, 2007, that (i) a power of withdrawal by the holder of the power other than the settlor is subject to the claims of creditors only when and to the extent that the holder exercises the power and (ii) the lapse, release or waiver of the power shall not be deemed to be an exercise of the power and shall not cause the holder to be treated as the settlor of the trust. In contrast, subsection (b) of the Uniform Trust Code provides that a holder of a power of withdrawal is to be treated as a settlor of a revocable trust to the extent of the property subject to the power, except that upon the lapse, release or waiver of the power, the holder is treated as a settlor only to the extent that the value of the property affected by the lapse, release or waiver exceeds the greater of the amount specified in sections 2041(b)(2) or 2514(e) of the Internal Revenue Code.

In substituting the provisions of subsection (b) in place of those in the Uniform Trust Code, the drafters intended to codify the common law rule that assets subject to an unexercised general power of appointment not created by the donee of the power cannot be reached by the donee's creditors. This common law rule was adopted by Restatement (Second) of Property § 13.2 (1986) stating that the rationale of the rule is that until the donee exercises the power, the donee has not accepted the control over the assets that gives the donee the equivalent of ownership. The Reporters Notes to section 13.2 cite case law of jurisdictions that generally have recognized the rule. However, the Reporters Notes also point out that cases do exist reaching the opposite result which is also the position taken in Restatement (Third) of Trusts § 56 note b. (2003) with respect to the presently exercisable general powers of appointment. Prior North Carolina law on the subject of whether a creditor can reach assets subject to an unexercised general power of appointment is not clear. In holding that creditors could reach an exercised testamentary general power of appointment, the court in *Roger v. Hinton,* 62 N.C. 101 (1867), *rehearing dismissed,* 63 N.C. 78 (1868), recognized the common law rule only by implication, if at all.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 20, effective October 1, 2007, added "Subject to the other applicable law" at the beginning of subsection (a); added subdivision (a)(2a); substituted "applicable law" for "G.S. 28A-19-3" at the end of subdivision (a)(3); added present subsection (b) and subdivision (b)(1); redesignated the provisions of former subsection (b) as present subdivision (b)(2), and in subdivision (b)(2), substituted "shall not be deemed to be an exercise of the power and" for "of withdrawal" in the middle of the subdivision. See Editor's note for applicability.

§ 36C-5-506. Overdue distribution.

(a) In this section, "mandatory distribution" means a distribution of income or principal that the trustee is required to make to a beneficiary under the terms of the trust, including a distribution upon termination of the trust. The term excludes a distribution subject to the exercise of the trustee's discretion, regardless of whether the terms of the trust (i) include a support or other standard to guide the trustee in making distribution decisions; or (ii) provide that the trustee "may" or "shall" make discretionary distributions, including distributions under a support or other standard.

(b) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution of income or principal, including a distribution upon termination of the trust, if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date. (2005-192, s. 2.)

OFFICIAL COMMENT

The effect of a spendthrift provision is generally to insulate totally a beneficiary's interest until a distribution is made and received by the beneficiary. See Section 502. But this section, along with several other sections in this article, recognizes exceptions to this general rule. Whether a trust contains a spendthrift provision or not, a trustee should not be able to avoid creditor claims against a beneficiary by refusing to make a distribution required to be made by the express terms of the trust. On the other hand, a spendthrift provision would become largely a nullity were a beneficiary's creditors able to attach all required payments as soon as they became due. This section reflects a compromise between these two competing principles. A creditor can reach a mandatory distribution, including a distribution upon termination, if the trustee has failed to make the payment within a reasonable time after the designated distribution date. Following this reasonable period, payments mandated by the express terms of the trust are in effect being held by the trustee as agent for the beneficiary and should be treated as part of the beneficiary's personal assets.

This section is similar to Restatement (Third) of Trusts Section 58 cmt. d (Tentative Draft No. 2, approved 1999).

2001 AMENDMENT.

By amendment in 2001, "designated distribution date" was substituted for "required distribution date"... . The amendment conforms the language of this section to terminology used elsewhere in the Code.

...

NORTH CAROLINA COMMENT

Common examples of a "mandatory distribution" defined in this section may be found in a qualified terminal interest property trust, a charitable remainder trust and a grantor retained annuity trust where the trustee is required to make a distribution of income or an annuity or unitrust amount. The exclusion from the term "mandatory distribution" for a distribution subject to the exercise of the trustee's discretion includes a distribution from a trust in which the beneficiary interest is a "discretionary trust interest" as defined in G.S. 36C-5-504(a)(2).

§ 36C-5-507. Personal obligations of trustee.

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt. (2005-192, s. 2.)

OFFICIAL COMMENT

Because the beneficiaries of the trust hold the beneficial interest in the trust property and the trustee holds only legal title without the benefits of ownership, the creditors of the trustee have only a personal claim against the trustee. *See* Restatement (Third) Section 5 cmt. k (Tentative Draft No. 1, approved 1996); Restatement (Second) of Trusts Section 12 cmt. a (1959). Similarly, a personal creditor of the trustee who attaches trust property to satisfy the debt does not acquire title as a bona fide purchaser even if the creditor is unaware of the trust. *See* Restatement (Second) of Trusts Section 308 (1959). The protection afforded by this section is consistent with that provided by the Bankruptcy Code. Property in which the trustee holds legal title as trustee is not part of the trustee's bankruptcy estate. 11 U.S.C. Section 541(d).

The exemption of the trust property from the personal obligations of the trustee is the most significant feature of Anglo American trust law by comparison with the devices available in civil law countries. A principal objective of the Hague Convention on the Law Applicable to Trusts and on their Recognition is to protect the Anglo American trust with respect to transactions in civil law countries. *See* Hague Convention art. 11. *See* also Henry Hansmann & Ugo Mattei, The Functions of Trust Law: A Comparative Legal and Economic Analysis, 73 N.Y.U. L. Rev. 434 (1998); John H. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale L.J. 165, 179 80 (1997).

§ 36C-5-508. Protective trusts.

Except with respect to an interest retained by the settlor, a "protective trust interest" means an interest in a trust in which the terms of the trust provide that the interest terminates or becomes discretionary if:

(1) The beneficiary alienates or attempts to alienate that interest; or
(2) Any creditor attempts to reach the beneficiary's interest by attachment, levy, or otherwise; or
(3) The beneficiary becomes insolvent or bankrupt. (2005-192, s. 2.)

NORTH CAROLINA COMMENT

This section brings forward with minor modifications the provisions of former G.S. 36A-115(3) with respect to a protective trust in which the beneficiary's interest is not alienable either voluntarily or involuntarily.

Article 6.

Revocable Trusts.

GENERAL COMMENT

This article deals with issues of significance not totally settled under prior law. Because of the widespread use in recent years of the revocable trust as an alternative to a will, this short article is one of the more important articles of the Code. This article and the other articles of the Code treat the revocable trust as the functional equivalent of a will. Section 601 provides that the capacity standard for wills applies in determining whether the settlor had capacity to create a revocable trust. Section 602, after providing that a trust is presumed revocable unless stated otherwise, prescribes the procedure for revocation or amendment, whether the trust contains one or several settlors. Section 603 provides that while a trust is revocable and the settlor has capacity, the rights of the beneficiaries are subject to the settlor's control. Section 604 prescribes a statute of limitations on contest of revocable trusts.

Sections 601 and 604, because they address requirements relating to creation and contest of trusts, are not subject to alteration or restriction in the terms of the trust. *See* Section 105. Sections 602 and 603, by contrast, are not so limited and are fully subject to the settlor's control.

§ 36C-6-601. Capacity of settlor of revocable trust.

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will. (2005-192, s. 2.)

OFFICIAL COMMENT

This section is patterned after Restatement (Third) of Trusts Section 11(1) (Tentative Draft No. 1, approved 1996). The revocable trust is used primarily as a will substitute, with its key provision being the determination of the persons to receive the trust property upon the settlor's death. To solidify the use of the revocable trust as a device for transferring property at death, the settlor usually also executes a pourover will. The use of a pourover will assures that property not transferred to the trust during life will be combined with the property the settlor did manage to convey. Given this primary use of the revocable trust as a device for disposing of property at death, the capacity standard for wills rather than that for lifetime gifts should apply. The application of the capacity standard for wills does not mean that the revocable trust must be executed with the formalities of a will. There are no execution requirements under this Code for a trust not created by will, and a trust not containing real property may be created by an oral statement. See Section 407 and comment.

The Uniform Trust Code does not explicitly spell out the standard of capacity necessary to create other types of trusts, although Section 402 does require that the settlor have capacity. This section includes a capacity standard for creation of a revocable trust because of the uncertainty in the case law and the importance of the issue in modern estate planning. No such uncertainty exists with respect to the capacity standard for other types of trusts. To create a testamentary trust, the settlor must have the capacity to make a will. To create an irrevocable trust, the settlor must have the capacity that would be needed to transfer the property free of trust. See generally Restatement (Third) of Trusts Section 11 (Tentative Draft No. 1, approved 1996); Restatement (Third) of Property: Wills and Other Donative Transfers Section 8.1 (Tentative Draft No. 3, approved 2001).

NORTH CAROLINA COMMENT

This section has no counterpart in prior North Carolina law. The capacity to make a will is found in G.S. 31-1 which provides that "[a]ny person of sound mind, and 18 years of age or over, may make a will".

Editor's Note. — Session Laws 2005-192, which enacted Chapter 36C, in s. 6, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Official Comments, copyright © 2005, are reprinted in this Chapter with the permission of the National Conference of Commissioners on Uniform State Laws. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

Effective Date and Applicability. — Session Laws 2005-192, which enacted Chapter 36C, in s. 7(a) provides: "Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

"Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded."

Official Comment on Effective Date and Applicability. — The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code Section 8 101.

North Carolina Comment on Effective Date and Applicability. — The drafters modified the provisions of the Uniform Trust Code relating to its application to trust instruments executed before its effective date by adding the phrase "or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary" to the end of the first sentence of the second paragraph. Although this Chapter is intended to have broad application, the drafters concluded that a rule of construction or presumption provided in this Chapter should not be applied to a trust instrument executed before the effective date of this Chapter if the application of such rule or presumption would impair the substantial rights of a beneficiary of a trust established under such a trust instrument.

§ 36C-6-602. Revocation or amendment of revocable trust.

(a) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust without regard to the actual capacity of the settlor. This subsection does not apply to a trust created under an instrument executed before the effective date of this Chapter.

(b) If a revocable trust is created or funded by more than one settlor:

(1) To the extent the trust consists of community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses; and

(2) To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution.

(c) The settlor may revoke or amend a revocable trust:

(1) By substantial compliance with a method provided in the terms of the trust; or

(2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:

   a. A later will or codicil that expressly refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust; or

   b. By oral statement to the trustee if the trust was created orally; or

   c. Any other written method delivered to the trustee manifesting clear and convincing evidence of the settlor's intent.

(d) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(e) Repealed by Session Laws 2007-106, s. 21, effective October 1, 2007.

(f) Repealed by Session Laws 2007-106, s. 22, effective October 1, 2007.

(g) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked. (2005-192, s. 2; 2007-106, ss. 21, 22.)

OFFICIAL COMMENT

Subsection (a), which provides that a settlor may revoke or modify a trust unless the terms of the trust expressly state that the trust is irrevocable, changes the common law. Most states follow the rule that a trust is presumed irrevocable absent evidence of contrary intent. *See* Restatement (Second) of Trusts Section 330 (1959). California, Iowa, Montana, Oklahoma, and Texas presume that a trust is revocable. The Uniform Trust Code endorses this minority approach, but only for trusts created after its effective date. This Code presumes revocability when the instrument is silent because the instrument was likely drafted by a nonprofessional, who intended the trust as a will substitute. The most recent revision of the Restatement of Trusts similarly reverses the former approach. A trust is presumed revocable if the settlor has retained a beneficial interest. *See* Restatement (Third) of Trusts Section 63 cmt. c (Tentative Draft No. 3, approved 2001). Because professional drafters habitually spell out whether or not a trust is revocable, subsection (a) will have limited application.

A power of revocation includes the power to amend. An unrestricted power to amend may also include the power to revoke a trust. *See* Restatement (Third) of Trusts Section 63 cmt. g (Tentative Draft No. 3, approved 2001); Restatement (Second) of Trusts Section 331 cmt. g & h (1959).

Subsection (b), which is similar to Restatement (Third) of Trusts § 63 cmt. k (Tentative Draft No. 3, 2001), provides default rules for revocation or amendment of a trust having several settlors. The settlor's authority to revoke or modify the trust depends on whether the trust contains community property. To the extent the trust contains community property, the trust may be revoked by either spouse acting alone but may be amended only by joint action of both spouses. The purpose of this provision, and the reason for the use of joint trusts in community property states, is to preserve the community character of property transferred to the trust. While community property does not prevail in a majority of states, contributions of community property to trusts created in noncommunity property states does occur. This is due to the mobility of settlors, and the fact that community property retains its community character when a couple move from a community to a noncommunity state. For this reason, subsection (b), and its provision on contributions of community property, should be enacted in all states, whether community or noncommunity.

With respect to separate property contributed to the trust, or all property of the trust if none of the trust property consists of community property, subsection (b) provides that each settlor may revoke or amend the trust as to the portion of the trust contributed by that settlor. The inclusion of a rule for contributions of separate property does not mean that the drafters of this Code concluded that the use of joint trusts should be encouraged. The rule is included because of the widespread use of joint trusts in noncommunity property states in recent years. Due to the desire to preserve the community character of trust property, joint trusts are a necessity in community property states. Unless community property will be contributed to the trust, no similarly important reason exists for the creation of a joint trust in a noncommunity property state. Joint trusts are often poorly drafted, confusing the dispositive provisions of the respective settlors. Their use can also lead to unintended tax consequences. *See* Melinda S. Merk, *Joint Revocable Trusts for Married Couples Domiciled in Common-Law Property States*, 32 Real Prop. Prob. & Tr. J. 345 (1997).

Subsection (b) does not address the many technical issues that can arise in determining the settlors' proportionate contribution to a joint trust. Most problematic are contributions of jointly-owned property. In the case of joint tenancies in real estate, each spouse would presumably be treated as having made an equal contribution because of the right to sever the interest and convert it into a tenancy in common. This is in contrast to joint accounts in financial institutions, ownership of which in most states is based not on fractional interest but on actual dollar contribution. *See*, e.g., Unif. Probate Code Section 6-211. Most difficult may be determining a contribution rule for entireties property. In *Holdener v. Fieser*, 971 S.W. 2d 946 (Mo. Ct. App. 1998), the court held that a surviving spouse could revoke the trust with respect to the entire interest but did not express a view as to revocation rights while both spouses were living.

This section does not explicitly require that the other settlor or settlors be notified if a joint trust is revoked by less than all of the settlors, but such notice would be required pursuant to Section 603. While a trust is revocable ..., Section 603(a) provides that the duties of the trustee, including the duty to keep the beneficiaries informed of administrative developments, are owed exclusively to the settlor. With respect to trusts having several settlors, Section 603(b) clarifies that the trustee's duties, including the duty to keep the beneficiaries informed of developments, are owed to all settlors... . Notifying the other settlor or settlors of the revocation or amendment will place them in a better position to protect their interests. If the revocation or amendment by less than all of the settlors breaches an implied agreement not to revoke or amend the trust, those harmed by the action can sue for breach of contract. If the trustee fails to notify the other settlor or settlors of the revocation or amendment, the parties aggrieved by the trustee's failure can sue the trustee for breach of trust.

Subsection (c), which is similar to Restatement (Third) of Trusts Section 63 cmt. h & i (Tentative Draft No. 3, approved 2001), specifies the method of revocation and amendment. Revocation of a trust differs fundamentally from revocation of a will. Revocation of a will, because a will is not effective until death, cannot affect an existing fiduciary relationship. With a trust, however, because a revocation will terminate an already existing fiduciary relationship, there is a need to protect a trustee who might act without knowledge that the trust has been revoked. There is also a need to protect trustees against the risk that they will misperceive the settlor's intent and mistakenly assume that an informal document or communication constitutes a revocation when that was not in fact the settlor's intent. To protect trustees against these risks, drafters habitually insert provisions providing that a revocable trust may be revoked only by delivery to the trustee of a formal revoking document. Some courts require strict compliance with the stated formalities. Other courts, recognizing that the formalities were inserted primarily for the trustee's and not the settlor's benefit, will accept other methods of revocation as long as the settlor's intent is clear. *See* Restatement (Third) of Trusts Section 63 Reporter's Notes to cmt. h-i (Tentative Draft No. 3, approved 2001).

This Code tries to effectuate the settlor's intent to the maximum extent possible while at the same time protecting a trustee against inadvertent liability. While notice to the trustee of a revocation is good practice, this section does not make the giving of such notice a prerequisite to a trust's revocation. To protect a trustee who has not been notified of a revocation or amendment, subsection (g) provides that a trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust, as unamended, was still in effect. However, to honor the settlor's intent, subsection (c) generally honors a settlor's clear expression of intent even if inconsistent with stated formalities in the terms of the trust.

Under subsection (c), the settlor may revoke or amend a revocable trust by substantial compliance with the method specified in the terms of the trust or by a later will or codicil or any other method manifesting clear and convincing evidence of the settlor's intent. Only if the method specified in the terms of the trust is made exclusive is use of the other methods prohibited. Even then, a failure to comply with a technical requirement, such as required notarization, may be excused as long as compliance with the method specified in the terms of the trust is otherwise substantial.

While revocation of a trust will ordinarily continue to be accomplished by signing and delivering a written document to the trustee, ... an oral statement coupled with a withdrawal of the property, might also demonstrate the necessary intent. These less formal methods, because they provide less reliable indicia of intent, will often be insufficient, however. The method specified in the terms of the trust is a reliable safe harbor and should be followed whenever possible.

Revocation or amendment by will is mentioned in subsection (c) not to encourage the practice but to make clear that it is not precluded by omission. *See* Restatement (Third) of Property: Will and Other Donative Transfers Section 7.2 cmt. a (Tentative Draft No. 3, approved 2001), which validates revocation or amendment of will substitutes by later will. Situations do arise, particularly in death-bed cases, where revocation by will may be the only practicable method. In such cases, a will, a solemn document executed with a high level of formality, may be the most reliable method for expressing intent. A revocation in a will ordinarily becomes effective only upon probate of the will following the testator's death. For the cases, *see* Restatement (Third) of Trusts Section 63 Reporter's Notes to cmt. h-i (Tentative Draft No. 3, approved 2001).

A residuary clause in a will disposing of the estate differently than the trust is alone insufficient to revoke or amend a trust. The provision in the will must either be express or the will must dispose of specific assets contrary to the terms of the trust. The substantial body of law on revocation of Totten trusts by will offers helpful guidance. The authority is collected in William H. Danne, Jr., *Revocation of Tentative ("Totten") Trust of Savings Bank Account by Inter Vivos Declaration or Will*, 46 A.L.R. 3d 487 (1972).

Subsection (c) does not require that a trustee concur in the revocation or amendment of a trust. Such a concurrence would be necessary only if required by the terms of the trust. If the trustee concludes that an amendment unacceptably changes the trustee's duties, the trustee may resign as provided in Section 705.

Subsection (d), providing that upon revocation the trust property is to be distributed as the settlor directs, codifies a provision commonly included in revocable trust instruments.

Subsection (e) … authorizes an agent under a power of attorney to revoke or modify a revocable trust only to the extent the terms of the trust or power of attorney expressly so permit. An express provision is required because most settlors usually intend that the revocable trust, and not the power of attorney, to function as the settlor's principal property management device. The power of attorney is usually intended as a backup for assets not transferred to the revocable trust or to address specific topics, such as the power to sign tax returns or apply for government benefits, which may be beyond the authority of a trustee or are not customarily granted to a trustee.

Subsection (f) addresses the authority of a conservator or guardian to revoke or amend a revocable trust. Under the Uniform Trust Code, a "conservator" is appointed by the court to manage the ward's party, a "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 103. Consequently, subsection (f) authorizes a guardian to exercise a settlor's power to revoke or amend a trust only if a conservator has not been appointed.

Many state conservatorship statutes authorize a conservator to exercise the settlor's power of revocation with the prior approval of the court supervising the conservatorship. See, e.g., Unif. Probate Code Section 411(a)(4). Subsection (f) ratifies this practice. Under the Code, a conservator may exercise a settlor's power of revocation, amendment, or right to withdraw trust property upon approval of the court supervising the conservatorship. Because a settlor often creates a revocable trust for the very purpose of avoiding conservatorship, this power should be exercised by the court reluctantly. Settlors concerned about revocation by a conservator may wish to deny a conservator a power to revoke. However, while such a provision in the terms of the trust is entitled to considerable weight, the court may override the restriction if it concludes that the action is necessary in the interests of justice. *See* Section 105(b) … .

Steps a conservator can take to stem possible abuse is not limited to petitioning to revoke the trust. The conservator could petition for removal of the trustee under Section 706. The conservator, acting on the settlor-beneficiary's behalf, could also bring an action to enforce the trust according to its terms. Pursuant to Section 303, a conservator may act on behalf of the beneficiary whose estate the conservator controls whenever a consent or other action by the beneficiary is required or may be given under the Code.

If a conservator has not been appointed, subsection (f) authorizes a guardian to exercise a settlor's power to revoke or amend the trust upon approval of the court supervising the guardianship. The court supervising the guardianship will need to determine whether it can grant a guardian authority to revoke a revocable trust under local law or whether it will be necessary to appoint a conservator for that purpose.

NORTH CAROLINA COMMENT

Subsection (a) reverses the rule of prior case law to the effect that a trust is presumed irrevocable unless it contains language to the contrary. *See Starling v. Taylor,* 1 N.C. App. 287 161 S.E.2d 204 (1968). *See also City of Washington v. Ellsworth,* 253 N.C. 25, 116 S.E.2d 167 (1960). This subsection of the Uniform Trust Code was modified by adding the words "without regard to the actual capacity of the settlor" to the end of the first sentence to clarify that the incapacity of the settlor, which in a particular case may be difficult to determine, does not result in the trust becoming irrevocable. The power to revoke may still be exercised by the settlor's agent or guardian. *See* subsections (e) and (f) of this section.

Subsection (b) providing default rules for revocation or amendment of a trust with more than one settlor has no counterpart in prior North Carolina law.

Sub-subdivision (c)(2)a. providing that a settlor may amend or revoke a trust by a later will that expressly refers to the trust changes prior North Carolina law to the effect that, unless the trust instrument provides otherwise, a power to revoke a trust must be exercised before the death of the settlor. *See Ridge v. Bright*, 244 N.C. 345, 93 S.E. 2d 607 (1956).

Subdivision (c)(2) of the Uniform Trust Code was modified by adding a new sub-subdivision "b.", redesigning the Code's subparagraph "B" as sub-subdivision "c.", and inserting in sub-subdivision c. the words "written" before and the words "delivered to the trustee" after the word "method". These changes were made to clarify that an oral statement may only revoke a trust created orally and not one created in a writing.

Subsection (e) of the Uniform Trust Code was modified by adding the proviso denying the settlor's agent acting under a power of attorney the authority to amend or revoke a revocable trust in such a manner as to alter the designation of beneficiaries to receive property on the settlor's death under the settlor's existing estate plan. Since many revocable trusts serve as will substitutes, the drafters did not desire to change current North Carolina law precluding an attorney in fact for the testator from making or altering a will. This restriction on amending or revoking a revocable trust relates only to an agent under a power of attorney and not to any other person who may have a power of amendment or termination with respect to the trust. *See* G.S. 36C-8-808(c).

Subsection (f) of the Uniform Trust Code was modified to substitute the words "general guardian or guardian of the estate" in place of "conservator" and "guardian of the person" for "guardian" and "guardianship" for "conservatorship". In the North Carolina context, references in the Official Comments to a "conservator" should be read to apply to a general guardian or a guardian of the estate and references to "guardian" should be read to apply to a guardian of the person.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsections (e) relating to the exercise of a settlor's power by an agent under the power of attorney with respect to revocation and amendment of a revocable trust and distribution of the trust property is repealed and brought forward in substance in G.S. 36C-6-602.1(a) which also grants the agent additional powers to make additions to a revocable trust and to create a revocable trust.

Also effective October 1, 2007, subsection (f) relating to the exercise of the powers of the settlor with respect to a revocable trust by a general guardian or guardian of the estate is repealed and brought forward in G.S. 35A-1251(24) which authorizes such a guardian to exercise upon approval by the court the same powers with respect to a revocable trust that an agent under a power of attorney may exercise pursuant to G.S. 36C-6-602.1(a).

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, ss. 21 and 22, effective October 1, 2007, deleted subsection (e), which related to the exercise of certain settlor's powers by an agent under power of attorney under certain circumstances; and deleted subsection (f), which related to the exercise of certain settlor's powers only with the approval of the court supervising the guardianship. See Editor's note for applicability.

§ 36C-6-602.1. Exercise of settlor's powers with respect to revocable trust by agent or guardian.

(a) An agent acting under a power of attorney may exercise any of the following powers of the settlor with respect to a revocable trust only to the extent expressly authorized by the terms of the trust or the power of attorney:

(1) Revocation of the trust.
(2) Amendment of the trust.
(3) Additions to the trust.
(4) Direction to dispose of property of the trust.
(5) The creation of the trust, notwithstanding G.S. 36C-4-402(a)(1) and (2).

The exercise of the powers described in this subsection shall not alter the designation of beneficiaries to receive property on the settlor's death under that settlor's existing estate plan.

(b) A general guardian or a guardian of the estate of the settlor may exercise the powers of the settlor with respect to a revocable trust as provided in G.S. 35A-1251(24). (2007-106, s. 23.)

NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (a) brings forward in substance the provisions of former G.S. 36C-6-602(e) authorizing the settlor's agent under a power of attorney to revoke or amend a revocable trust and distribute trust property. It adds provisions, not a part of the Uniform Trust Code, authorizing an agent to make additions to a revocable trust and to create a revocable trust. Subsection (a) retains, and makes applicable to the power to make additions to a revocable trust and to create a revocable trust, the provisions in former G.S. 36C-6-602(e) prohibiting the agent from exercising the powers described in that section in a manner that alters the designation of beneficiaries to receive property on the settlor's death under the settlor's existing estate plan. The terms of the trust or power of attorney cannot override this restriction on the agent's powers. See G.S. 36C-1-105(b)(11) (trust) and G.S. 32A-3(c) (power of attorney).

Subsection (b), also effective October 1, 2007, acknowledges that a general guardian or guardian of the estate may exercise the settlor's powers with respect to a revocable trust as provided in G.S. 35A-1251(24). That section was amended effective October 1, 2007 to bring forward the provisions of former G.S. 36C-6-602(f) and authorize a general guardian or guardian of the estate to exercise upon approval by the court the same powers of the settlor with respect to a revocable trust that an agent may exercise pursuant to G.S. 36C-6-602.1(a), subject to provisions of statutes governing gifts by guardians.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

§ 36C-6-603. Settlor's control of revocable trust.

(a) While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor. If a trustee is a settlor, the trustee's actions are presumed to be taken at the direction of the settlor.

(b) If a revocable trust has more than one settlor, the duties of the trustee are owed to all of the settlors. (2005-192, s. 2; 2007-106, s. 24.)

OFFICIAL COMMENT

This section recognizes that the settlor of a revocable trust is in control of the trust and should have the right to enforce the trust. Pursuant to this section, the duty under Section 813 to inform and report to beneficiaries is owed to the settlor of a revocable trust....

...

Typically, the settlor of a revocable trust will also be the sole or primary beneficiary of the trust, and the settlor has control over whether to take action against a trustee for breach of trust. Upon the settlor's incapacity, any right of action the settlor-trustee may have against the trustee for breach of trust occurring while the settlor had capacity will pass to the settlor's agent or conservator, who would succeed to the settlor's right to have property restored to the trust. Following the death ... of the settlor, the beneficiaries would have a right to maintain an action against a trustee for breach of trust. However, with respect to actions occurring prior to the settlor's death ..., an action by the beneficiaries could be barred by the settlor's consent of by other events such as approval of the action by a successor trustee. For the requirements of a consent, *see* Section 1009.

...

2004 Amendment. The amendment places in brackets and makes optional the language in subsection (a) dealing with the settlor's capacity.

Section 603 generally provides that while a trust is revocable, all rights that the trust's beneficiaries would otherwise possess are subject to the control of the settlor. This section, however, negates the settlor's control if the settlor is incapacitated. In such case, the beneficiaries are entitled to assert all rights provided to them under the Code, including the right to information concerning the trust.

Two issues have arisen concerning this incapacity limitation. First, because determining when a settlor is incapacitated is not always clear, concern has been expressed that it will often be difficult in a particular case to determine whether the settlor has become incapacitated and the settlor's control of the beneficiary's rights have ceased. Second, concern has been expressed that this section prescribes a different rule for revocable trusts than for wills and that the rules for both should instead be the same. In the case of a will, the devisees have no right to know of the dispositions made in their favor until the testator's death, whether or not the testator is incapacitated. Under Section 603, however, the remainder beneficiary's right to know commences on the settlor's incapacity.

Concluding that uniformity among the states on this issue is not essential, the drafting committee has decided to place the reference to the settlor's incapacity in Section 603(a) in brackets. Enacting jurisdictions are free to strike the incapacity limitation or to provide a more precise definition of when a settlor is incapacitated, as has been done in the Missouri enactment (Mo. Stat. Ann. § 456.6-603).

NORTH CAROLINA COMMENT

This section has no equivalent in prior law.

Subsection (a) of the Uniform Trust Code was modified by deleting the optional words "and the settlor has capacity to revoke the trust" following the word "revocable".

Subsection (b) of the Uniform Trust Code was also modified by deleting the words "having capacity to revoke the trust" following the word "settlors".

In modifying subsections (a) and (b) the drafters concluded that the incapacity of the settlor should not negate the settlor's control of the beneficiary's rights or the trustee's duty to the settlor for the reasons stated in the Official Comment regarding the 2004 amendment to this section.

Subsection (c) of the Uniform Trust Code which provided that the holder of a power of withdrawal has the rights of a settlor of a revocable trust was omitted to avoid any inference that creditors of the power holder could reach property subject to an unexercised power of withdrawal. Under North Carolina law such property is not subject to the claims of the creditors. *See* the North Carolina Comment to G.S. 36C-5-505(b).

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (a), which provides that the duties of the trustee of a revocable trust are owed exclusively to the settlor, is amended to clarify that if the trustee of a revocable trust is the same person as the settlor, an action taken by the trustee is presumed to be directed by the settlor.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 24, effective October 1, 2007, substituted "control of revocable trust" for "powers; powers of withdrawal" in the section heading; and added the second sentence in subsection (a). See Editor's note for applicability.

§ 36C-6-604. Limitation on action contesting validity of revocable trust; distribution of trust property.

(a) A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of:

(1) Three years after the settlor's death; or

(2) 120 days after the trustee sent the person a copy of the trust instrument and a notice informing the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a proceeding.

(b) Upon the death of the settlor of a trust that was revocable at the settlor's death, the trustee may proceed to distribute the trust property in accordance with the terms of the trust. The trustee is not subject to liability for doing so unless:

(1) The trustee knows of a pending judicial proceeding contesting the validity of the trust; or

(2) A potential contestant has notified the trustee of a possible judicial proceeding to contest the trust, and a judicial proceeding is commenced within 60 days after the contestant sent the notification.

(c) A beneficiary of a trust that is determined to have been invalid is liable to return any distribution received. (2005-192, s. 2.)

OFFICIAL COMMENT

This section provides finality to the question of when a contest of a revocable trust may be brought. The section is designed to allow an adequate time in which to bring a contest while at the same time permitting the expeditious distribution of the trust property following the settlor's death.

A trust can be contested on a variety of grounds. For example, the contestant may allege that no trust was created due to lack of intent to create a trust or lack of capacity (see Section 402), that undue influence, duress, or fraud was involved in the trust's creation (see Section 406), or that the trust had been revoked or modified (see Section 602). A "contest" is an action to invalidate all or part of the terms of the trust or of property transfers to the trustee. An action against a beneficiary or other person for intentional interference with an inheritance or gift, not being a contest, is not subject to this section. For the law on intentional interference, see Restatement (Second) of Torts Section 774B

(1979). Nor does this section preclude an action to determine the validity of a trust that is brought during the settlor's lifetime, such as a petition for a declaratory judgment, if such action is authorized by other law. *See* Section 106 (Uniform Trust Code supplemented by common law of trusts and principles of equity).

This section applies only to a revocable trust that becomes irrevocable by reason of the settlor's death. A trust that became irrevocable by reason of the settlor's lifetime release of the power to revoke is outside its scope. A revocable trust does not become irrevocable upon a settlor's loss of capacity. Pursuant to Section 602, the power to revoke may be exercised by the settlor's agent, conservator, or guardian, or personally by the settlor if the settlor regains capacity.

Subsection (a) specifies a time limit on when a contest can be brought. A contest is barred upon the first to occur of two possible events. The maximum possible time for bringing a contest is three years from the settlor's death. This should provide potential contestants with ample time in which to determine whether they have an interest that will be affected by the trust, even if formal notice of the trust is lacking. The three-year period is derived from Section 3-108 of the Uniform Probate Code. Three years is the maximum limit under the UPC for contesting a nonprobated will. Enacting jurisdictions prescribing shorter or longer time limits for contest of a nonprobated will should substitute their own time limit. To facilitate this process, the "three-year" period has been placed in brackets.

A trustee who wishes to shorten the contest period may do so by giving notice. Drawing from California Probate Code Section 16061.7, subsection (a)(2) bars a contest by a potential contestant 120 days after the date the trustee sent that person a copy of the trust instrument and informed the person of the trust's existence, of the trustee's name and address, and of the time allowed for commencing a contest. The reference to "120" days is placed in brackets to suggest to the enacting jurisdiction that it substitute its statutory time period for contesting a will following notice of probate. The 120 day period in subsection (a)(2) is subordinate to the three-year bar in subsection (a)(1). A contest is automatically barred three years after the settlor's death even if notice is sent by the trustee less than 120 days prior to the end of that period.

Because only a small minority of trusts are actually contested, trustees should not be restrained from making distributions because of concern about possible liability should a contest later be filed. Absent a protective statute, a trustee is ordinarily absolutely liable for misdelivery of the trust assets, even if the trustee reasonably believed that the distribution was proper. *See* Restatement (Second) of Trusts Section 226 (1959). Subsection (b) addresses liability concerns by allowing the trustee, upon the settlor's death, to proceed expeditiously to distribute the trust property. The trustee may distribute the trust property in accordance with the terms of the trust until and unless the trustee receives notice of a pending judicial proceeding contesting the validity of the trust, or until notified by a potential contestant of a possible contest, followed by its filing within 60 days.

Even though a distribution in compliance with subsection (b) discharges the trustee from potential liability, subsection (c) makes the beneficiaries of what later turns out to have been an invalid trust liable to return any distribution received. Issues as to whether the distribution must be returned with interest, or with income earned or profit made are not addressed in this section but are left to the law of restitution.

For purposes of notices under this section, the substitute representation principles of Article 3 are applicable. The notice by the trustee under subsection (a)(2) or by a potential contestant under subsection (b)(2) must be given in a manner reasonably suitable under the circumstances and likely to result in its receipt. *See* Section 109(a).

This section does not address possible liability for the debts of the deceased settlor or a trustee's possible liability to creditors for distributing trust assets. For possible liability of the trust, see Section 505(a)(3) and Comment. Whether a trustee can be held personally liable for creditor claims following distribution of trust assets is addressed in Uniform Probate Code Section 6-102, which was added to that Code in 1998.

NORTH CAROLINA COMMENT

Subsection (a) of this section is new to North Carolina law.

With regard to the three year rule of subdivision (a)(1), although current law in G.S. 1-52 provides that an action to enforce an express trust must be commenced within three years, there was no provision in prior law specifying the time in which to contest the validity of a revocable trust after the settlor's death. In comparison, under G.S. 31-32 a caveat to a will must be filed within three years after the time of application for the probate of the will.

Under subdivision (a)(2) the trustee may shorten the three year contest period to 120 days by giving notice. The three year period to contest the validity of a will may also be shortened by probating the will in solemn form.

The provisions of subsection (b) concerning the liability of the trustee with respect to distributions of trust property of a revocable trust after the settlor's death are also new to North Carolina.

§ 36C-6-605. Failure of disposition of property of a trust by lapse or otherwise.

(a) If a beneficiary under a revocable trust predeceases the execution of the trust or the settlor or is treated as having predeceased the settlor, and if the beneficiary is a grandparent of or a descendant of a grandparent of the settlor, then the issue of the predeceased beneficiary who survive the settlor shall take in place of the deceased beneficiary. The deceased beneficiary's issue shall take the deceased beneficiary's share in the same manner that the issue would take as heirs of the deceased beneficiary under the intestacy provisions in effect at the time of the settlor's death. The provisions of this section apply whether the disposition of property is to an individual, to a class, or is a part of the residue of the trust. In the case of the disposition to a class, the issue shall take whatever share the deceased beneficiary would have taken had the deceased beneficiary survived the settlor. In the event the deceased class member leaves no issue, the deceased beneficiary's share shall devolve upon the members of the class who survived the settlor and the issue of any deceased members taking by substitution.

(b) If the provisions of subsection (a) of this section do not apply to the disposition of property that fails, the property shall pass to the beneficiaries in proportion to their share of the residue of the trust. If the disposition is part of the residue of the trust, it shall augment the shares of the other residuary beneficiaries, including the shares of any substitute takers under subsection (a) of this section. If there are no residuary beneficiaries, then the property shall pass by intestacy. (2007-106, s. 25.)

NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section, which is not a part of the Uniform Trust Code, provides anti-lapse rules governing the manner in which the share of a beneficiary of a revocable trust would be distributed if the beneficiary predeceases the settlor. The section tracks generally and makes applicable to revocable trusts the anti-lapse provisions of G.S. 31-42 applicable to wills. It does not bring forward the language in G.S. 31-42 that its anti-lapse rules do not apply if a contrary intent is expressed in the instrument. This language was omitted in view of the general provision in G.S. 36C-1-105(b) that the terms of the trust prevail over any provision in Chapter 36C, subject to certain exceptions not applicable to G.S. 36C-6-605.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

§ 36C-6-606. Revocation of provisions in revocable trust by divorce or annulment; revival.

Dissolution of the settlor's marriage by absolute divorce or annulment after executing a revocable trust revokes all provisions in the trust in favor of the settlor's former spouse, including, but not by way of limitation, any provision conferring a general or special power of appointment on the former spouse and any appointment of the former spouse as trustee. Property prevented from passing to the former spouse because of revocation by divorce or absolute annulment passes as if the former spouse failed to survive the settlor, and other provisions conferring some power or office on the former spouse are interpreted as if the former spouse failed to survive the settlor. If provisions are revoked solely by this section, they are revived by the settlor's remarriage to the former spouse. The reference to "former spouse" in this section includes a purported former spouse. (2007-106, s. 26.)

NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section, which provides for the revocation of provisions in a revocable trust in favor of the settlor's former spouse upon the dissolution of the settlor's marriage by absolute divorce or annulment, is not a part of the Uniform Trust Code. The section tracks generally and makes applicable to revocable trusts the provisions of G.S. 31-5.4 revoking the provisions in a will in favor of the testator's former spouse upon the dissolution of the marriage by absolute divorce or annulment. It does not bring forward the language in G.S. 31-5.4 that the revocation of the provisions in favor of the former spouse does not apply if the instrument provides otherwise. This language was omitted in view of the general provision in G.S. 36C-1-105(b) that the terms of the trust prevail over any provision in Chapter 36C, subject to certain exceptions not applicable to G.S. 36C-6-606.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

§ 36C-6-607. Modification or termination of a revocable trust.

(a) A revocable trust may be modified or terminated by the court pursuant to any of the methods for modification or termination of an irrevocable trust set forth in G.S. 36C-4-411(b) or (c), 36C-4-412, 36C-4-415, or 36C-4-416.

(b) The settlor is a necessary party to any proceeding brought to modify or terminate a revocable trust. (2007-106, s. 26.1.)

NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section, which is not a part of the Uniform Trust Code, provides that a revocable trust may be modified or terminated by court order pursuant to any of the methods set forth in Article 4 of Chapter 36C for modifying or terminating an irrevocable trust. There is no requirement that the settlor of the revocable trust must first be adjudicated or otherwise determined to be incompetent before a proceeding under this section may be maintained. The section also makes clear that the settlor is a necessary party to any proceeding brought under the section.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

ARTICLE 7.

Office of Trustee.

GENERAL COMMENT

This article contains a series of default rules dealing with the office of trustee. Sections 701 and 702 address the process for getting a trustee into office, including the procedures for indicating an acceptance and whether bond will be required. Section 703 addresses cotrustees, permitting the cotrustees to act by majority action and specifying the extent to which one trustee may delegate to another. Sections 704 through 707 address changes in the office of trustee, specifying the circumstances when a vacancy must be filled, the procedure for resignation, the grounds for removal, and the process for appointing a successor. Sections 708 and 709 prescribe the standards for determining trustee compensation and reimbursement for expenses advanced.

...[A]ll of the provisions of this article are subject to modification in the terms of the trust. *See* Section 105.

§ 36C-7-701. Accepting or declining trusteeship.

(a) Except as otherwise provided in subsection (c) of this section, a person designated as trustee accepts the trusteeship:

(1) By substantially complying with a method of acceptance provided in the terms of the trust; or

(2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(b) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within 120 days after written notice to accept the trusteeship is provided is considered to have rejected the trusteeship.

(c) A person designated as trustee, without accepting the trusteeship, may:

(1) Act to preserve the trust property if, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary; and

(2) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose. (2005-192, s. 2; 2006-259, s. 13(j).)

OFFICIAL COMMENT

This section, which specifies the requirements for a valid acceptance of the trusteeship, implicates many of the same issues that arise in determining whether a trust has been revoked. Consequently, the two provisions track each other closely. *Compare* Section 701(a), *with* Section 602(c) (procedure for revoking or modifying trust). Procedures specified in the terms of the trust are recognized, but only substantial, not literal compliance is required. A failure to meet technical requirements, such as notarization of the trustee's signature, does not result in a failure to accept. Ordinarily, the trustee will indicate acceptance by signing the trust instrument or signing a separate written instrument. However, this section validates any other method demonstrating the necessary intent, such as by knowingly exercising trustee powers, unless the terms of the trust make the specified method exclusive. This section also does not preclude an acceptance by estoppel. For general background on issues relating to trustee acceptance and rejection, see Restatement (Third) of Trusts Section 35 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 102 (1959). Consistent with Section 201(b), which emphasizes that continuing judicial supervision of a trust is the rare exception, not the rule, the Uniform Trust Code does not require that a trustee qualify in court.

To avoid the inaction that can result if the person designated as trustee fails to communicate a decision either to accept or to reject the trusteeship, subsection (b) provides that a failure to accept within a reasonable time constitutes a rejection of the trusteeship. What will constitute a reasonable time depends on the facts and circumstances of the particular case. A major consideration is possible harm that might occur if a vacancy in a trusteeship is not filled in a timely manner. A trustee's rejection normally precludes a later acceptance but does not cause the trust to fail. *See* Restatement (Third) of Trusts Section 35 cmt. c (Tentative Draft No. 2, approved 1999). Regarding the filling of a vacancy in the event of a rejection, see Section 704.

A person designated as trustee who decides not to accept the trusteeship need not provide a formal rejection, but a clear and early communication is recommended. The appropriate recipient of the rejection depends upon the circumstances. Ordinarily, it would be appropriate to communicate the rejection to the person who informed the designee of the proposed trusteeship. If judicial proceedings involving the trust are pending, the rejection could be filed with the court. In the case of a person named as trustee of a revocable trust, it would be appropriate to communicate the rejection to the settlor. In any event, it would be best to inform a beneficiary with a significant interest in the trust because that beneficiary might be more motivated than others to seek appointment of a new trustee.

Subsection (c)(1) makes clear that a nominated trustee may act expeditiously to protect the trust property without being considered to have accepted the trusteeship. However, upon conclusion of the intervention, the nominated trustee must send a rejection of office to the settlor, if living and competent, otherwise to a qualified beneficiary.

Because of the potential liability that can inhere in trusteeship, subsection (c)(2) allows a person designated as trustee to inspect the trust property without accepting the trusteeship. The condition of real property is a particular concern, including possible tort liability for the condition of the premises or liability for violation of state or federal environmental laws such as CERCLA, 42 U.S.C. Section 9607. For a provision limiting a trustee's personal liability for obligations arising from ownership or control of trust property, see Section 1010(b).

NORTH CAROLINA COMMENT

Subdivision (a)(1) is generally consistent with former G.S. 36A-23.1(b) in contemplating that acceptance of the trusteeship may proceed in accordance with the terms of the trust without judicial intervention.

Subdivision (a)(2) providing for the methods of acceptance of the trusteeship if terms of the trust do not provide a method or the method is not expressly made exclusive has no counterpart in prior law.

Subsection (b) of the Uniform Trust Code was modified to provide a 120 day limitation on the reasonable time a trustee has to accept the trusteeship. This is new to North Carolina law.

Subsection (c) specifying the actions a trustee may take without accepting the trusteeship is also new to North Carolina law.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, subsection (b) is amended to provide a 120 day limitation on the time a trustee has to accept the trusteeship without regard to whether acceptance is "within a reasonable time."

Editor's Note. — Session Laws 2005-192, which enacted Chapter 36C, in s. 6, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Official Comments, copyright © 2005, are reprinted in this Chapter with the permission of the National Conference of Commissioners on Uniform State Laws. It is believed that the Official Comments will prove of value to the practictioner in understanding and applying the text of this Chapter.

Effective Date and Applicability. — Session Laws 2005-192, which enacted Chapter 36C, in s. 7(a) provides: "Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

"Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded."

Official Comment on Effective Date and Applicability. — The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code Section 8 101.

North Carolina Comment on Effective Date and Applicability. — The drafters modified the provisions of the Uniform Trust Code relating to its application to trust instruments executed before its effective date by adding the phrase "or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary" to the end of the first sentence of the second paragraph. Although this Chapter is intended to have broad application, the drafters concluded that a rule of construction or presumption provided in this Chapter should not be applied to a trust instrument executed before the effective date of this Chapter if the application of such rule or presumption would impair the substantial rights of a beneficiary of a trust established under such a trust instrument.

Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(j), effective October 1, 2006, substituted "120 days after written notice to accept the trusteeship is provided" for "a reasonable time, after receiving written notice of the trusteeship" in subsection (b). See Editor's note for applicability.

§ 36C-7-702. Trustee's bond.

(a) A trustee shall provide bond to secure the performance of the trustee's duties if:

(1) The trust instrument was executed before January 1, 2006, unless the terms of the trust instrument provide otherwise;

(2) The trust instrument was executed on or after January 1, 2006, but only if the terms of the trust instrument require the trustee to provide bond;

(3) A beneficiary requests the trustee to provide bond, and the court finds the request to be reasonable; or

(4) The court finds that it is necessary for the trustee to provide bond in order to protect the interests of beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented.

However, in no event shall bond be required of a trustee if the governing instrument directs otherwise.

(b) If bond is required, it shall be in a sum of double the value of the personal property to come into the trustee's hands if bond is executed by a personal surety, and in an amount not less than one and one-fourth times the value of all personal property of the trust estate if the bond is secured by a suretyship bond executed by a corporate surety company authorized by the Commissioner of Insurance to do business in this State, provided that the court, when the value of the personal property exceeds one hundred thousand dollars ($100,000), may accept bond in an amount equal to the value of the personal property plus ten percent (10%) of that value, conditioned upon the faithful performance of the trustee's duties and for the payment to the persons entitled to receive property that may come into the trustee's hands. All bonds executed under this Article shall be filed with the clerk of superior court.

(c) On petition of the trustee or a qualified beneficiary, the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties.

(d) As provided in G.S. 53-159 and G.S. 53-366(a)(10), banks and trust companies licensed to do trust business in this State need not give bond, even if required by the terms of the trust. (1911, c. 39, s. 7; C.S., s. 4031; 1951, c. 264; 1965, c. 1177, s. 1; 1977, c. 502, s. 2; 2001-413, s. 1; 2003-261, s. 5; 2005-192, s. 2.)

OFFICIAL COMMENT

This provision is consistent with the Restatement Third and with the bonding provisions of the Uniform Probate Code. *See* Restatement (Third) of Trusts Section 34(3) and cmt. a (Tentative Draft No. 2, approved 1999); Uniform Probate Code Sections 3-604 (personal representatives), 5-415 (conservators), and 7-304 (trustees). Because a bond is required only if the terms of the trust require bond or a bond is found by the court to be necessary to protect the interests of beneficiaries, bond should rarely be required under this Code.

... [T]he court should order bond in such cases only for good reasons. Similarly, the court should rarely dispense with bond if the settlor directed that the trustee give bond.

... The amount of a bond otherwise required may be reduced by the value of trust property deposited in a manner that prevents its unauthorized disposition... Also, the court may excuse or otherwise modify a requirement of a bond, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties.

Subsection (c) clarifies that a regulated financial-service institution need not provide bond for individual trusts. Such institutions must meet detailed financial responsibility requirements in order to do trust business in the State, thereby obviating the need to post bonds in individual trusts. Subsection (c) is placed in brackets because the enacting jurisdiction may have already dealt with the subject in separate legislation, such as in its statutes on regulation of financial institutions. Instead of the phrase "regulated financial-service institution," enacting jurisdictions may wish to substitute their own term for institutions qualified to engage in trust business in the State.

NORTH CAROLINA COMMENT

The drafters omitted subsection (a) of the Uniform Trust Code which provided that a trustee gives bond to protect the interests of the beneficiary or if required by the trust. The drafters also omitted subsection (b) of the Uniform Trust Code which authorized the court to specify the amount of the bond and to modify or terminate it. In their place the drafters brought forward the more specific provisions of former G.S. 36A-31 as follows:

(i) Subsection (a) brings forward the substance of the provisions of former G.S. 36A-31(a) regarding when a bond is required and the first sentence of former G.S. 36A-31(b) directing that in no event shall a bond be required if the trust directs otherwise. The drafters omitted the mandatory rule in Section 105(b)(6) of the Uniform Trust Code which would have allowed the court to require a bond even if the trust did not do so.

(ii) Subsection (b) brings forward the provisions of the third and fourth sentences of former G.S. 36A-31(b) relating to the amount of the bond and the filing of bonds with the clerk of court.

(iii) Subsection (c) brings forward the provisions of the second sentence of former G.S. 36A-31(b) but substituting "qualified beneficiary" for "interested person".

Subsection (d) incorporates the provisions of subsection (c) of the Uniform Trust Code modified to substitute in place of "a regulated financial-service institution" the reference to banks and trust companies which need not give bond as provided in G.S. 53-159 and G.S. 53-366(a)(10).

CASE NOTES

Laches in Objecting to Lack of Bond. — Failure of order appointing successor trustee to include provision for the giving of a bond could not be raised by beneficiaries of the trust 16 years after the order was entered. State Trust Co. v. Toms, 244 N.C. 645, 94 S.E.2d 806 (1956), decided under prior law.

§ 36C-7-703. Cotrustees.

(a) Cotrustees who are unable to reach a unanimous decision may act by majority decision if more than two are serving. Unanimity is required when only two cotrustees are serving.

(b) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust and exercise all trustee powers, except those powers that the remaining trustees are prohibited from exercising under the trust instrument or by law.

(c) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity, or the cotrustee has properly delegated the performance of the function to another trustee.

(d) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(e) A trustee may delegate to a cotrustee with the consent of the cotrustee the performance of any function other than those the settlor reasonably expected the trustees to perform jointly. The following functions are not considered to be those that the settlor reasonably expected the trustees to perform jointly:

(1) Establish and maintain bank accounts for the trust and issue checks for the trust.
(2) Maintain inventories, accountings, and income and expense records of the trust.
(3) Enter any safety deposit box rented by the trust.
(4) Employ persons as advisors or assistants in the performance of administrative duties, including agents, attorneys, accountants, brokers, appraisers, and custodians.
(5) List trust property for taxes and prepare and file tax returns for the trust.
(6) Collect and give receipts for claims and debts of the trust.
(7) Pay debts, claims, costs of administration, and taxes of the trust.
(8) Compromise, adjust, or otherwise settle any claim by or against the trust and release, in whole or in part, a claim belonging to the trust.
(9) Have custody of the trust property.
(10) Perform any function relating to investment of trust assets.

The list of functions contained in this subsection is not intended to be exclusive of others that may be delegated to a cotrustee in accordance with this subsection.

(f) Repealed by Session Laws 2007-106, s. 27, effective October 1, 2007.

(g) A trustee shall exercise reasonable care in connection with matters for which the trustee is given authority under the terms of a trust to:

(1) Avoid enabling a cotrustee to commit a serious breach of trust; and
(2) Compel a cotrustee to redress a serious breach of trust.

(h) Notwithstanding subsection (g) of this section, a cotrustee is not liable for the action of a majority of the other trustees if either of the following apply:

(1) The trustee does not join in an action approved by a majority of the other trustees.
(2) The dissenting trustee joins in an action necessary to carry out the decision of the majority of the trustees and notifies in writing the cotrustees of the dissent at or before joining in the action, unless the trustee had knowledge that the action taken involved intentional misconduct or was taken with an intention to directly or indirectly provide an improper personal benefit to one or more trustees approving the action.

(i) Notwithstanding any other provision of this section to the contrary, if two or more trustees own shares of corporate stock or other securities, their acts with respect to voting shall have the following effect:

(1) If only one votes, in person or by proxy, the act binds all;
(2) If more than one vote, in person or by proxy, the act binds all; and
(3) If more than one vote, in person or by proxy, but the vote is evenly split on any particular matter, each faction is entitled to vote the stock or other securities in question proportionately. (2005-192, s. 2; 2007-106, ss. 27, 28, 29.)

OFFICIAL COMMENT

This section contains most but not all of the Code's provisions on cotrustees. Other provisions relevant to cotrustees include Sections 704 (vacancy in trusteeship need not be filled if cotrustee remains in office), 705 (notice of resignation must be given to cotrustee), 706 (lack of cooperation among cotrustees as ground for removal), 707 (obligations of resigning or removed trustee), 813 (reporting requirements upon vacancy in trusteeship), and 1013 (authority of cotrustees to authenticate documents.)

Cotrustees are appointed for a variety of reasons. Having multiple decision-makers serves as a safeguard against eccentricity or misconduct. Cotrustees are often appointed to gain the advantage of differing skills, perhaps a financial institution for its permanence and professional skills, and a family member to maintain a personal connection with the beneficiaries. On other occasions, cotrustees are appointed to make certain that all family lines are represented in the trust's management.

Cotrusteeship should not be called for without careful reflection. Division of responsibility among cotrustees is often confused, the accountability of any individual trustee is uncertain, obtaining consent of all trustees can be burdensome, and unless an odd number of trustees is named deadlocks requiring court resolution can occur. Potential problems can be reduced by addressing division of responsibilities in the terms of the trust. Like the other sections of this article, this section is freely subject to modification in the terms of the trust. *See* Section 105.

Much of this section is based on comparable provisions of the Restatement of Trusts, although with extensive modifications. Reference should also be made to ERISA Section 405 (29 U.S.C. Section 1105), which in recent years has been the statutory base for the most significant case law on the powers and duties of cotrustees.

Subsection (a) is in accord with Restatement (Third) of Trusts Section 39 (Tentative Draft No. 2, approved 1999), which rejects the common law rule, followed in earlier Restatements, requiring unanimity among the trustees of a private trust. *See* Restatement (Second) of Trusts Section 194 (1959). This section is consistent with the prior Restatement rule applicable to charitable trusts, which allowed for action by a majority of trustees. *See* Restatement (Second) of Trusts Section 383 (1959).

Under subsection (b), a majority of the remaining trustees may act for the trust when a vacancy occurs in a cotrusteeship. Section 704 provides that a vacancy in a cotrusteeship need be filled only if there is no trustee remaining in office.

Pursuant to subsection (c), a cotrustee must participate in the performance of a trustee function unless the cotrustee has properly delegated performance to another cotrustee, or the cotrustee is unable to participate due to temporary incapacity or disqualification under other law. Other laws under which a cotrustee might be disqualified include federal securities law and the ERISA prohibited transactions rules. Subsection (d) authorizes a cotrustee to assume some or all of the functions of another trustee who is unavailable to perform duties as provided in subsection (c).

Subsection (e) addresses the extent to which a trustee may delegate the performance of functions to a cotrustee. The standard differs from the standard for delegation to an agent as provided in Section 807 because the two situations are different. Section 807, which is identical to Section 9 of the Uniform Prudent Investor Act, recognizes that many trustees are not professionals. Consequently, trustees should be encouraged to delegate functions they are not competent to perform. Subsection (e) is premised on the assumption that the settlor selected cotrustees for a specific reason and that this reason ought to control the scope of a permitted delegation to a cotrustee. Subsection (e) prohibits a trustee from delegating to another trustee functions the settlor reasonably expected the trustees to perform jointly. The exact extent to which a trustee may delegate functions to another trustee in a particular case will vary depending on the reasons the settlor decided to appoint cotrustees. The better practice is to address the division of functions in the terms of the trust, as allowed by Section 105. Subsection (e) is based on language derived from Restatement (Second) of Trusts Section 171 (1959). This section of the Restatement Second, which applied to delegations to both agents and cotrustees, was superseded, as to delegation to agents, by Restatement (Third) of Trusts: Prudent Investor Rule Section 171 (1992).

By permitting the trustees to act by a majority, this section contemplates that there may be a trustee or trustees who might dissent. Trustees who dissent from the acts of a cotrustee are in general protected from liability. Subsection (f) protects trustees who refused to join in the action. Subsection (h) protects a dissenting trustee who joined the action at the direction of the majority, such as to satisfy a demand of the other side to a transaction, if the trustee expressed the dissent to a cotrustee at or before the time of the action in question...

NORTH CAROLINA COMMENT

Subsection (a) is generally consistent with former G.S. 36A-73(d). Subsection (a) was modified to clarify that unanimity is required if there are only two trustees acting.

Subsection (b) is generally consistent with former G.S. 36A-39 and with G.S. 41-3 in allowing remaining cotrustees to act for the trust, but subsection (b) modifies the Uniform Trust Code to bring forward the provisions of former G.S. 36A-39 excepting powers which the remaining trustees are prohibited from exercising under the terms of the trust or by law.

Subsection (e) differs from the Uniform Trust Code by including a list of functions, similar to those in former G.S. 36A-73(b), which may be delegated to a cotrustee as functions the settlor does not expect the trustees to perform jointly. However, subsection (e) as modified changes North Carolina law in two respects:

(i) Approval by the clerk of superior court of the delegation of the functions which are listed is no longer required; and

(ii) The list of functions which may be delegated includes investment of trust funds and is not exclusive, thus allowing a broader range of matters to be delegated which the settlor did not reasonably expect to the trustee to perform jointly.

Subsection (g)(1) of the Uniform Trust Code was modified to provide that a cotrustee shall use reasonable care to “avoid enabling a cotrustee to commit” a serious breach of trust rather than to “prevent” a cotrustee from “committing” such a breach as provided in the Uniform Trust Code. This modification recognizes the difficulty a cotrustee may have in preventing a cotrustee from committing such a breach and is more closely in accordance with Section 224(2)(d) of the Restatement (Second) of Trusts (1959).

Subsection (h) differs from the Uniform Trust Code in the following two respects:

(i) It brings forward the language in former G.S. 36A-73(d) that protects from liability a trustee who has not joined in an action approved by the majority.

(ii) It differs from the Uniform Trust Code with respect to the liability of a dissenting trustee who joins in the action at the direction of the majority and notifies any cotrustee in writing of the dissent. The Uniform Trust Code provides that such a trustee is not liable “unless the action is a serious breach of trust,” whereas subsection (h) provides that such a trustee is not liable “unless such trustee had knowledge that the action taken involved intentional misconduct or was taken with an intention to directly or indirectly provide an improper personal benefit to one or more trustees approving the action.” The drafters were concerned that the reference to “serious breach of trust” was too general in scope and did not expressly require actual knowledge or intentional misconduct or of an improper personal benefit. The drafters concluded that such knowledge was necessary to impose liability on a dissenting trustee who joins in the action at the direction of the majority.

Subsection (i) was added to bring forward the provisions of former G.S. 36A-73(c) with minor modifications. It does not appear in the Uniform Trust Code.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (f) is repealed and subsections (g) and (h) are amended in order to clarify the duty and liability of a co-trustee. As revised, a trustee must exercise reasonable care with respect to actions of a co-trustee with two exceptions. First, a trustee is not required to exercise reasonable care with respect to matters for which that trustee has no authority under the terms of the trust. Second, a trustee who does not join in an action of a majority of other trustees is not liable for that action, and a trustee who joins in the action of a majority of the other trustees (for example, by signing a deed the majority wants to sign) and who dissents will not be liable for the action *unless* the trustee knows the action involves intentional misconduct or improper benefits to other trustees.

Editor's Note. — Session Laws 2007-106, s. 55, provides: “The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate.”

Session Laws 2007-106, s. 56, provides: “This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, ss. 27 through 29, effective October 1, 2007, deleted subsection (f) which read: "Except as otherwise provided in subsection (g) of this section, a trustee who does not join in an action of another trustee is not liable for the action"; in the introductory paragraph of subsection (g), substituted "A" for "Each" at the beginning and inserted "in connection with matters for which the trustee is given authority under the terms of a trust"; rewrote the introductory paragraph of subsection (h); and added subdivisions (h)(1) and (h)(2). See Editor's note for applicability.

§ 36C-7-704. Vacancy in trusteeship; appointment of successor.

(a) A vacancy in a trusteeship occurs if:
  (1) A person designated as trustee rejects the trusteeship;
  (2) A person designated as trustee cannot be identified or does not exist;
  (3) A trustee resigns;
  (4) A trustee is disqualified or removed;
  (5) A trustee dies; or
  (6) A general guardian, guardian of the estate, or guardian of the person is appointed for an individual serving as trustee.

(b) If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

(c) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:
  (1) By a person designated in the terms of the trust or appointed under the terms of the trust to act as successor trustee;
  (2) By a person appointed by unanimous agreement of the qualified beneficiaries; or
  (3) By a person appointed by the court.

(d) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:
  (1) By a person designated in the terms of the trust or appointed under the terms of the trust to act as successor trustee;
  (2) By a person selected by majority agreement of the qualified beneficiaries, if the trust is a split-interest charitable trust;
  (2a) By a person selected by majority agreement of the charitable organizations expressly designated to receive distributions under the terms of the trust; or
  (3) By a person appointed by the court.

(e) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

(f) A successor trustee shall succeed to all the rights, powers, and privileges, and is subject to all the duties, liabilities, and responsibilities that were imposed upon the original trustee, unless a contrary intent appears from the governing instrument or unless the order appointing the successor trustee provides otherwise. (1911, c. 39, s. 8; C.S., s. 4032; 1977, c. 502, s. 2; 2001-413, s. 1; 2003-261, s. 6; 2005-192, s. 2; 2007-106, s. 30.)

OFFICIAL COMMENT

This section lists the ways in which a trusteeship becomes vacant and the rules on filling the vacancy. *See also* Sections 701 (accepting or declining trusteeship), 705 (resignation), and 706 (removal). Good drafting practice suggests that the terms of the trust deal expressly with the problem of vacancies, naming successors and specifying the procedure for filling vacancies. This section applies only if the terms of the trust fail to specify a procedure.

The disqualification of a trustee referred to in subsection (a)(4) would include a financial institution whose right to engage in trust business has been revoked or removed. Such disqualification might also occur if the trust's principal place of administration is transferred to a jurisdiction in which the trustee, whether an individual or institution, is not qualified to act.

Subsection (b) provides that a vacancy in the cotrusteeship must be filled only if the trust has no remaining trustee. If a vacancy in the cotrusteeship is not filled, Section 703 authorizes the remaining cotrustees to continue to administer the trust. However, as provided in subsection (e), the court, exercising its inherent equity authority, may always appoint additional trustees if the appointment would promote better administration of the trust. *See* Restatement (Third) of Trusts Section 34 cmt. a (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 108 cmt. a (1959).

Subsection (c) provides a procedure for filling a vacancy in the trusteeship of a noncharitable trust. Absent an effective provision in the terms of the trust, subsection (c)(2) permits a vacancy in the trusteeship to be filled, without the need for court approval, by a person selected by unanimous agreement of the qualified beneficiaries. An effective provision in the terms of the trust for the designation of a successor trustee includes a procedure under which the successor trustee is selected by a person designated in those terms. Pursuant to Section 705(a)(1), the qualified beneficiaries may also receive the trustee's resignation. If a trustee resigns following notice as provided in Section 705, the trust may be transferred to a successor appointed pursuant to subsection (c)(2) of this section, all without court involvement. A nonqualified beneficiary who is displeased with the choice of the qualified beneficiaries may petition the court for removal of the trustee under Section 706.

If the qualified beneficiaries fail to make an appointment, subsection (c)(3) authorizes the court to fill the vacancy. In making the appointment, the court should consider the objectives and probable intention of the settlor, the promotion of the proper administration of the trust, and the interests and wishes of the beneficiaries. *See* Restatement (Third) of Trusts Section 34 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 108 cmt. d (1959).

Subsection (d) specifies a procedure for filling a vacancy in the trusteeship of a charitable trust. Absent an effective designation in the terms of the trust, a successor trustee may be selected by the charitable organizations expressly designated to receive distributions in the terms of the trust ... or if the trust does not designate a charitable organization to receive distributions, the vacancy may be filled only by the court...

In the case of a revocable trust, the appointment of a successor will normally be made directly by the settlor. As to the duties of a successor trustee with respect to the actions of a predecessor, see Section 812.

2001 Amendment. Subsection (d), which creates a procedure for the filling of a vacancy in the trusteeship of a charitable trust, was added by a 2001 amendment.

...

NORTH CAROLINA COMMENT

Subdivision (a)(6) was modified to substitute the words "general guardian" and "guardian of the estate" for "conservator" and the words "guardian of the person" for "guardian". In the North Carolina context, references in the Official Comments to a "conservator" should be read to apply to a general guardian or a guardian of the estate and references to "guardian" should be read to apply to a guardian of the person.

Subdivision (c)(1) of the Uniform Trust Code was modified to clarify that a person designated in the terms of a noncharitable trust to act as successor trustee may also be a person appointed pursuant to the terms of the trust. This subdivision is consistent with North Carolina case law holding that if the terms of the trust provide a procedure for appointment of a successor trustee, court approval is not required. *Cutter v. American Trust Co.,* 213 N.C. 686, 197 S.E. 542 (1938).

Subdivision (c)(2) makes an important change in prior law by allowing a vacancy in the trusteeship of a noncharitable trust to be filled by the unanimous agreement of the qualified beneficiaries if no person could be designated pursuant to the terms of the trust. Under prior law it was necessary in this instance for the clerk of superior court to appoint a successor trustee.

Subdivision (d)(1) of the Uniform Trust Code was also modified to clarify that a person designated in the terms of a charitable trust to act as successor trustee may also be a person appointed pursuant to the terms of the trust.

Subdivision (d)(2) of the Uniform Trust Code was modified to clarify that a vacancy in the trusteeship of a charitable trust may be filled by "majority agreement" of the charitable organizations designated to receive trust distributions.

Subsection (e) is generally consistent with former G.S. 36A-36 in authorizing the clerk of superior court to appoint a special trustee.

Subsection (f) was added to bring forward the provisions of former G.S. 36A-32 with minor modifications. It does not appear in the Uniform Trust Code.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section is amended to clarify that if a trust is a split-interest trust, the qualified beneficiaries (both charitable beneficiaries and individual beneficiaries) have the right to appoint a successor trustee by majority vote.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 30, effective October 1, 2007, redesignated the existing provisions of subdivision (d)(2) as subdivisions (d)(2) and (d)(2a); in subdivision (d)(2), added "qualified beneficiaries, if the trust is a split-interest charitable trust" at the end; and in subdivision (d)(2a), added "By a person selected by majority agreement of the" at the beginning. See Editor's note for applicability.

CASE NOTES

Editor's Note. — *The cases cited below were decided under prior law.*

Appointment Prior to Effective Date of Section. — Prior to the enactment of former G.S. 36-18.1 (now this section) a clerk of the superior court had no power to appoint successor trustees of a charitable trust such authority being vested solely in the superior court under former G.S. 36-21 (now G.S. 36A-49) and not in the respective clerks thereof. Mast v. Blackburn, 248 N.C. 231, 102 S.E.2d 812 (1958), decided under prior law.

The appointment by the clerk of successor trustees of a charitable trust in ex parte proceeding prior to the effective date of former G.S. 36-18.1 (now this section) section is void, and such appointees may not maintain an action to restrain others from interfering with their asserted rights as trustees, but successor trustees may be appointed by the judge of the superior court nunc pro tunc under former G.S. 36-21 (now G.S. 36A-49) or by the clerk under this section. Mast v. Blackburn, 248 N.C. 231, 102 S.E.2d 812 (1958), decided under prior law.

Appointment of Trustee upon Occurrence of Vacancy. — Where land is conveyed to trustees and their successors for specified charitable purposes, the court may appoint trustees upon failure of the successors to the original trustees, since equity will not permit a trust to fail for want of a trustee, but said trustees should be appointed by the court upon proper application. Lassiter v. Jones, 215 N.C. 298, 1 S.E.2d 845 (1939).

§ 36C-7-705. Resignation of trustee.

(a) A trustee may resign:

(1) Upon at least 30 days' notice in writing to the qualified beneficiaries, the settlor, if living, and all cotrustees; or

(2) With the approval of the court.

(b) In approving a resignation, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(c) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation. (2005-192, s. 2.)

OFFICIAL COMMENT

This section rejects the common law rule that a trustee may resign only with permission of the court, and goes further than the Restatements, which allow a trustee to resign with the consent of the beneficiaries. *See* Restatement (Third) of Trusts Section 36 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 106 (1959). Concluding that the default rule ought to approximate standard drafting practice, the drafting committee provided in subsection (a) that a trustee may resign by giving notice to the qualified beneficiaries, a living settlor, and any cotrustee. A resigning trustee may also follow the traditional method and resign with approval of the court.

Restatement (Third) of Trusts Section 36 cmt. d (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 106 cmt. b (1959), provide, similar to subsection (c), that a resignation does not release the resigning trustee from potential liabilities for acts or omissions while in office. The act of resignation can give rise to liability if the trustee resigns for the purpose of facilitating a breach of trust by a cotrustee. *See Ream v. Frey,* 107 F.3d 147 (3rd Cir. 1997).

Regarding the residual responsibilities of a resigning trustee until the trust property is delivered to a successor trustee, see Section 707.

In the case of a revocable trust, because the rights of the qualified beneficiaries are subject to the settlor's control (see Section 603), resignation of the trustee is accomplished by giving notice to the settlor instead of the beneficiaries.

NORTH CAROLINA COMMENT

Subsection (a)(1) makes an important change in prior law by allowing the trustee to resign without court approval upon at least 30 days written notice to qualified beneficiaries, the settlor, if living, and all cotrustees. Former G.S. 36A-23.1(b) apparently allowed a resignation to be made in accordance with the terms of the trust without judicial intervention, but the trustee could not resign without the approval of the clerk of superior court absent authority to do so in the trust.

Subsection (a)(1) of the Uniform Trust Code was modified by adding the words "in writing" after the word "notice" because the use of a writing is a reasonable and customary choice for notification.

§ 36C-7-706. Removal of trustee.

(a) For the reasons set forth in subsection (b) of this section, the settlor of an irrevocable trust, a cotrustee of an irrevocable trust, or a beneficiary of an irrevocable trust may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.

(b) The court may remove a trustee if:

(1) The trustee has committed a serious breach of trust;

(2) Lack of cooperation among cotrustees substantially impairs the administration of the trust;

(3) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries; or

(4) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is consistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

(c) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order appropriate relief under G.S. 36C-10-1001(b) as may be necessary to protect the trust property or the interests of the beneficiaries. (2005-192, s. 2.)

OFFICIAL COMMENT

Subsection (a), contrary to the common law, grants the settlor of an irrevocable trust the right to petition for removal of a trustee. The right to petition for removal does not give the settlor of an irrevocable trust any other rights, such as the right to an annual report or to receive other information concerning administration of the trust. The right of a beneficiary to petition for removal does not apply to a revocable trust. Pursuant to Section 603(a), while a trust is revocable…, the rights of the beneficiaries are subject to the settlor's exclusive control.

Trustee removal may be regulated by the terms of the trust. *See* Section 105. In fashioning a removal provision for an irrevocable trust, the drafter should be cognizant of the danger that the trust may be included in the settlor's federal gross estate if the settlor retains the power to be appointed as trustee or to appoint someone who is not independent. *See* Rev. Rul. 95 58, 1995 2 C.B. 191.

Subsection (b) lists the grounds for removal of the trustee. The grounds for removal are similar to those found in Restatement (Third) of Trusts Section 37 cmt. a (Tentative Draft No. 2, approved 1999). A trustee may be removed for untoward action, such as for a serious breach of trust, but the section is not so limited. A trustee may also be removed under a variety of circumstances in which the court concludes that the trustee is not best serving the interests of the beneficiaries. The term "interests of the beneficiaries" means the beneficial interests as provided in the terms of the trust, not as defined by the beneficiaries. *See* Section 103(7). Removal for conduct detrimental to the interests of the beneficiaries is a well established standard for removal of a trustee. *See* Restatement (Third) of Trusts Section 37 cmt. d (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 107 cmt. a (1959).

Subsection (b)(1), consistent with Restatement (Third) of Trusts Section 37 cmt. a and g (Tentative Draft No. 2, approved 1999), makes clear that not every breach of trust justifies removal of the trustee. The breach must be "serious." A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together. A particularly appropriate circumstance justifying removal of the trustee is a serious breach of the trustee's duty to keep the beneficiaries reasonably informed of the administration of the trust or to comply with a beneficiary's request for information as required by Section 813. Failure to comply with this duty may make it impossible for the beneficiaries to protect their interests. It may also mask more serious violations by the trustee.

The lack of cooperation among trustees justifying removal under subsection (b)(2) need not involve a breach of trust. The key factor is whether the administration of the trust is significantly impaired by the trustees' failure to agree. Removal is particularly appropriate if the naming of an even number of trustees, combined with their failure to agree, has resulted in deadlock requiring court resolution. The court may remove one or more or all of the trustees. If a cotrustee remains in office following the removal, under Section 704 appointment of a successor trustee is not required.

Subsection (b)(2) deals only with lack of cooperation among cotrustees, not with friction between the trustee and beneficiaries. Friction between the trustee and beneficiaries is ordinarily not a basis for removal. However, removal might be justified if a communications breakdown is caused by the trustee or appears to be incurable. *See* Restatement (Third) of Trusts Section 37 cmt. a (Tentative Draft No. 2, approved 1999).

Subsection (b)(3) authorizes removal for a variety of grounds, including unfitness, unwillingness, or persistent failure to administer the trust effectively. Removal in any of these cases is allowed only if it best serves the interests of the beneficiaries. For the definition of "interests of the beneficiaries," *see* Section 103(7). "Unfitness" may include not only mental incapacity but also lack of basic ability to administer the trust. Before removing a trustee for unfitness the court should consider the extent to which the problem might be cured by a delegation of functions the trustee is personally incapable of performing. "Unwillingness" includes not only cases where the trustee refuses to act but also a pattern of indifference to some or all of the beneficiaries. *See* Restatement (Third) of Trusts Section 37 cmt. a (Tentative Draft No. 2, approved 1999). A "persistent failure to administer the trust effectively" might include a long-term pattern of mediocre performance, such as consistently poor investment results when compared to comparable trusts.

It has traditionally been more difficult to remove a trustee named by the settlor than a trustee named by the court, particularly if the settlor at the time of the appointment was aware of the trustee's failings. *See* Restatement (Third) of Trusts Section 37 cmt. f (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 107 cmt. f g (1959). Because of the discretion normally granted to a trustee, the settlor's confidence in the judgment of the particular person whom the settlor selected to act as trustee is entitled to considerable weight. This deference to the settlor's choice can weaken or dissolve if a substantial change in the trustee's circumstances occurs. To honor a settlor's reasonable expectations, subsection (b)(4) lists a substantial change of circumstances as a possible basis for removal of the trustee. Changed circumstances justifying removal of a trustee might include a substantial change in the character of the service or location of the trustee. A corporate reorganization of an institutional trustee is not itself a change of circumstances if it does not affect the service provided the individual trust account. Before removing a trustee on account of changed circumstances, the court must also conclude that removal is not inconsistent with a material purpose of the trust, that it will best serve the interests of the beneficiaries, and that a suitable cotrustee or successor trustee is available.

...

Subsection (c) authorizes the court to intervene pending a final decision on a request to remove a trustee. Among the relief that the court may order under Section 1001(b) is an injunction prohibiting the trustee from performing certain acts and the appointment of a special fiduciary to perform some or all of the trustee's functions. Pursuant to Section 1004, the court may also award attorney's fees as justice and equity may require.

NORTH CAROLINA COMMENT

Subsection (a) is generally consistent with former G.S. 36A 23.1(a)(1) which authorized interested parties, including beneficiaries and trustees, to invoke the jurisdiction of the clerk of superior court to remove a trustee. However, subsection (a) apparently changes former law in allowing the settlor to remove a trustee and in not expressly providing for removal by a creditor of the trust.

Subsection (a) of the Uniform Trust Code was modified for purposes of clarification in two respects:

(i) The language "For the reasons set forth in subsection (b)" was added to the beginning of the subsection.

(ii) The words "of an irrevocable trust" were added after the word "beneficiary".

Subsection (b) is generally consistent with North Carolina case law which allowed removal of a trustee for a breach of trust and other grounds of malfeasance. *See, e.g., In re Testamentary Trust of Charnock,* 158 N.C. App. 35, 579 S.E.2d 887 (2003), *aff'd,* 358 N.C. 523, 597 S.E.2d 706 (2004) listing grounds for removal recognized in North Carolina.

Subdivision (b)(4) broadens the grounds for removal of the trustee by providing for removal where there has been a substantial change in circumstance if removal is not inconsistent with a material purpose of the trust. A substantial change in circumstance was not recognized in prior law as grounds for removal of a trustee. not previously recognized in prior law by providing for removal where there has been a substantial change in circumstance if removal is not inconsistent with a material purpose of the trust.

Subdivision (b)(4) omits the provisions in the Uniform Trust Code permitting removal of the trustee at the request of beneficiaries if not inconsistent with a material purpose of the trust. The drafters were concerned that such a provision may provide grounds for removing a trustee contrary to the settlor's intent by beneficiaries who were merely dissatisfied with the trustee's administration of the trust and that it may be difficult to determine in a particular case whether or not the settlor's choice of the trustee was a material purpose of the trust.

§ 36C-7-707. Delivery of property by former trustee.

(a) Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(b) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it. A former trustee shall execute those documents transferring title to trust property as may be appropriate to facilitate administration of the trust, and in the event that the former trustee fails to do so, the clerk of superior court may order the former trustee to execute those documents, or the clerk of superior court may transfer title. (2005-192, s. 2.)

OFFICIAL COMMENT

This section addresses the continuing authority and duty of a resigning or removed trustee. Subject to the power of the court to make other arrangements or unless a cotrustee remains in office, a resigning or removed trustee has continuing authority until the trust property is delivered to a successor. If a cotrustee remains in office, there is no reason to grant a resigning or removed trustee any continuing authority, and none is granted under this section. In addition, if a cotrustee remains in office, the former trustee need not submit a final trustee's report. See Section 813(c).

There is ample authority in the Uniform Trust Code for the appointment of a special fiduciary, an appointment which can avoid the need for a resigning or removed trustee to exercise residual powers until a successor can take office. *See* Sections 704(e) (court may appoint additional trustee or special fiduciary whenever court considers appointment necessary for administration of trust), 705(b) (in approving resignation, court may impose conditions necessary for protection of trust property), 706(c) (pending decision on petition for removal, court may order appropriate relief), and 1001(b)(5) (to remedy breach of trust, court may appoint special fiduciary as necessary to protect trust property or interests of beneficiary).

If the former trustee has died, the Uniform Trust Code does not require that the trustee's personal representative windup the deceased trustee's administration. Nor is a trustee's conservator or guardian required to complete the former trustee's administration if the trustee's authority terminated due to an adjudication of incapacity. … [T]he former trustee remains liable for actions taken during the trustee's term of office until liability is otherwise barred.

NORTH CAROLINA COMMENT

Subsection (a) granting continuing powers to a trustee who has resigned or is removed has no statutory equivalent in prior law.

The second sentence of subsection (b) brings forward the provisions in former G.S. 36A 40 directing a former trustee to transfer title to trust property and, upon the trustee's failure to do so, authorizing the court to transfer title.

§ 36C-7-708. Compensation of trustee.

(a) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation determined in accordance with Article 6 of Chapter 32 of the General Statutes.

(b) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified. (2005-192, s. 2.)

OFFICAL COMMENT

…

Section 816(15) grants the trustee authority to fix and pay its compensation without the necessity of prior court review, subject to the right of a beneficiary to object to the compensation in a later judicial proceeding. Allowing the trustee to pay its compensation without prior court approval promotes efficient trust administration but does place a significant burden on a beneficiary who believes the compensation is unreasonable. …

Under Sections 501-502 of the Uniform Principal and Income Act (1997), one half of a trustee's regular compensation is charged to income and the other half to principal. Chargeable to principal are fees for acceptance, distribution, or termination of the trust, and fees charged on disbursements made to prepare property for sale.

NORTH CAROLINA COMMENT

Subsection (a) of the Uniform Trust Code, which provided for compensation that is "reasonable under the circumstances" when the compensation was not specified in the trust, was modified to refer to Article 6 of Chapter 32 which also provides for compensation that is "reasonable under the circumstances" when the trust is silent. However, unlike the Uniform Trust Code the provisions of Article 6 contain specific requirements for obtaining such compensation and, among other things, allows a beneficiary to initiate a proceeding for denial or approval of trustee fees by the clerk of court.

Subsection (b) differs from the Uniform Trust Code by omitting provisions allowing the court to adjust compensation specified by the terms of the trust. This is consistent with the deletion of the mandatory rule in Section 105(7) of the Uniform Trust Code that would have prevented the settlor from overriding the power of the court to adjust compensation specified in the terms of the trust. The drafters concluded that the settlor should have the right to compensate a trustee in whatever amount the settlor chooses, regardless of whether a court would find such compensation to be unreasonably high or low.

§ 36C-7-709. Reimbursement of expenses.

A trustee is entitled to be reimbursed out of the trust property for expenses properly incurred in the administration of the trust as provided in G.S. 32-58. (2005-192, s. 2.)

OFFICIAL COMMENT

A trustee has the authority to expend trust funds as necessary in the administration of the trust, including expenses incurred in the hiring of agents. See Sections 807 (delegation by trustee) and 816(15) (trustee to pay expenses of administration from trust).

NORTH CAROLINA COMMENT

Subsection (a)(1) of the Uniform Trust Code was modified to refer to G.S. 32 58 which also provides for reimbursement of expenses of a trustee properly incurred in the administration of the trust. The section omits:

(i) Subsection (a)(2) of Uniform Trust Code allowing reimbursement for expenses not properly incurred in the administration of the estate to the extent necessary to prevent unjust enrichment of the trust; and

(ii) Subsection (b) of the Uniform Trust Code which provided that an advance of money by the trustee for protection of the trust gives rise to a lien against the trust property to secure reimbursement with reasonable interest.

Article 8.

Duties and Powers of Trustee.

GENERAL COMMENT

This article states the fundamental duties of a trustee and lists the trustee's powers. The duties listed are not new, but how the particular duties are formulated and applied has changed over the years. This article was drafted where possible to conform with the 1994 Uniform Prudent Investor Act, which has been enacted in approximately two thirds of the States. The Uniform Prudent Investor Act prescribes a trustee's responsibilities with respect to the management and investment of trust property. The Uniform Trust Code also addresses a trustee's duties with respect to distribution to beneficiaries.

. . .

All of the provisions of this article may be overridden in the terms of the trust except for the trustee's fundamental obligation to act in good faith, in accordance with the purposes of the trust, and for the benefit of the beneficiaries (*see* Section 105(b)(2) (3)).

§ 36C-8-801. Duty to administer trust.

Upon acceptance of a trusteeship, a trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with this Chapter. (2005-192, s. 2.)

OFFICIAL COMMENT

This section confirms that a primary duty of a trustee is to follow the terms and purposes of the trust and to do so in good faith. Only if the terms of a trust are silent or for some reason invalid on a particular issue does this Code govern the trustee's duties. This section also confirms that a trustee does not have a duty to act until the trustee has accepted the trusteeship. For the procedure for accepting a trusteeship, see Section 701.

In administering the trust, the trustee must not only comply with this section but also with the other duties specified in this article, particularly the obligation not to place the interests of others above those of the beneficiaries (Section 802), the duty to act with prudence (Section 804), and the duty to keep the qualified beneficiaries reasonably informed about the administration of the trust (Section 813).

While a trustee generally must administer a trust in accordance with its terms and purposes, the purposes and particular terms of the trust can on occasion conflict. If such a conflict occurs because of circumstances not anticipated by the settlor, it may be appropriate for the trustee to petition under Section 412 to modify or terminate the trust. Pursuant to Section 404, the trustee is not required to perform a duty prescribed by the terms of the trust if performance would be impossible, illegal or contrary to public policy.

For background on the trustee's duty to administer the trust, see Restatement (Second) of Trusts Sections 164-169 (1959).

NORTH CAROLINA COMMENT

This section has no statutory equivalent in North Carolina although the duty to act in good faith is reflected in North Carolina case law. *See, e.g., Miller v. McLean,* 252 N.C. 171, 113 S.E.2d 359 (1960).

Editor's Note. — Session Laws 2005-192, which enacted Chapter 36C, in s. 6, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Official Comments, copyright © 2005, are reprinted in this Chapter with the permission of the National Conference of Commissioners on Uniform State Laws. It is believed that the Official Comments will prove of value to the practictioner in understanding and applying the text of this Chapter.

Effective Date and Applicability. — Session Laws 2005-192, which enacted Chapter 36C, in s. 7(a) provides: "Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

"Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded."

Official Comment on Effective Date and Applicability. — The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code Section 8 101.

North Carolina Comment on Effective Date and Applicability. — The drafters modified the provisions of the Uniform Trust Code relating to its application to trust instruments executed before its effective date by adding the phrase "or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary" to the end of the first sentence of the second paragraph. Although this Chapter is intended to have broad application, the drafters concluded that a rule of construction or presumption provided in this Chapter should not be applied to a trust instrument executed before the effective date of this Chapter if the application of such rule or presumption would impair the substantial rights of a beneficiary of a trust established under such a trust instrument.

§ 36C-8-802. Duty of loyalty.

(a) A trustee shall administer the trust solely in the interests of the beneficiaries.

(b) Subject to the rights of persons dealing with or assisting the trustee as provided in G.S. 36C-10-1012, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account, or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests, is voidable by a beneficiary affected by the transaction, without regard to whether the transaction is fair to the beneficiary, unless:

(1) The terms of the trust authorized the transaction;
(2) The court approved the transaction;
(3) The beneficiary did not commence a judicial proceeding within the time allowed by G.S. 36C-10-1005;
(4) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with G.S. 36C-10-1009; or
(5) The transaction involves a contract entered into, or claim acquired by, the trustee before the person became or contemplated becoming trustee.

(c) In determining whether a sale, encumbrance, or other transaction involving the investment or management of trust property is affected by a conflict of interest between the trustee's fiduciary and personal interests, the transaction is rebuttably presumed to be affected by a conflict of interest if the trustee enters into the transaction with:

(1) The trustee's spouse or a parent of the trustee's spouse;
(2) The trustee's descendants, siblings, ancestors, or their spouses;
(3) An agent, attorney, employee, officer, director, member, manager, or partner of the trustee, or an entity that controls, is controlled by, or is under common control with the trustee; or
(4) Any other person or entity in which the trustee, or a person that owns a significant interest in the trust, has an interest or relationship that might affect the trustee's best judgment.

(d) A transaction between a trustee and a beneficiary that does not concern trust property, but that occurs during the existence of the trust or while the trustee retains significant influence over the beneficiary, and from which the trustee obtains an advantage and which is outside the ordinary course of the trustee's business or on terms and conditions substantially less favorable than those the trustee generally offers similarly situated customers, is voidable by the beneficiary unless the trustee establishes that the transaction was fair to the beneficiary.

(e) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(f) Notwithstanding subsection (c) of this section:

(1) An investment by a trustee in securities of an investment company, investment trust, or pooled investment vehicle in which the trustee or its affiliate has an investment, or to which the trustee, or its affiliate, provides services for compensation, is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of Article 9 of this Chapter. The investment company, investment trust, or pooled investment vehicle may compensate the trustee for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under G.S. 36C-8-813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined; and

(2) Payment made by a trustee to an attorney, broker, accountant, or agent for services performed on behalf of the trust in the ordinary course of business is not considered to be affected by a conflict between the trustee's personal and fiduciary interests if the payment is consistent with payments generally made for the same or similar services.

(g) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect to appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(h) This section does not preclude any of the following transactions:

(1) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee.

(2) Payment of compensation to which the trustee is entitled under G.S. 36C-7-708.

(3) A transaction that is fair to the beneficiaries between a trust and another trust, decedent's estate, or guardianship, or similar relationship of which the trustee is a fiduciary or in which a beneficiary has an interest.

(4) A deposit of trust money in a regulated financial-service institution operated by the trustee or an affiliate of the trustee.

(5) An advance by the trustee of money for the protection of the trust.

(i) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee. (1999-215, s. 1; 2005-192, s. 2; 2007-106, ss. 31, 32, 33.)

OFFICIAL COMMENT

This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee. Subsection (a) states the general principle, which is copied from Restatement (Second) of Trusts Section 170(1) (1959). A trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation of the trustee not to place the trustee's own interests over those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions involving the trust property, but breaches of the duty can take other forms. For a discussion of the different types of violations, see George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section 543 (Rev. 2d ed. 1993); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts Sections 170 170.24 (4th ed. 1987). The "interests of the beneficiaries" to which the trustee must be loyal are the beneficial interests as provided in the terms of the trust. *See* Section 103(7).

The duty of loyalty applies to both charitable and noncharitable trusts, even though the beneficiaries of charitable trusts are indefinite. In the case of a charitable trust, the trustee must administer the trust solely in the interests of effectuating the trust's charitable purposes. *See* Restatement (Second) of Trusts Section 379 cmt. a (1959).

Duty of loyalty issues often arise in connection with the settlor's designation of the trustee. For example, it is not uncommon that the trustee will also be a beneficiary. Or the settlor will name a friend or family member who is an officer of a company in which the settlor owns stock. In such cases, settlors should be advised to consider addressing in the terms of the trust how such conflicts are to be handled. Section 105 authorizes a settlor to override an otherwise applicable duty of loyalty in the terms of the trust. Sometimes the override is implied. The grant to a trustee of authority to make a discretionary distribution to a class of beneficiaries that includes the trustee implicitly authorizes the trustee to make distributions for the trustee's own benefit.

Subsection (b) states the general rule with respect to transactions involving trust property that are affected by a conflict of interest. A transaction affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary who is affected by the transaction. Subsection (b) carries out the "no further inquiry" rule by making transactions involving trust property entered into by a trustee for the trustee's own personal account voidable without further proof. Such transactions are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration. *See* Restatement (Second) of Trusts Section 170 cmt. b (1959).

The rule is less severe with respect to transactions involving trust property entered into with persons who have close business or personal ties with the trustee. Under subsection (c), a transaction between a trustee and certain relatives and business associates is presumptively voidable, not void. Also presumptively voidable are transactions with corporations or other enterprises in which the trustee, or a person who owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment. The presumption is rebutted if the trustee establishes that the transaction was not affected by a conflict between personal and fiduciary interests. Among the factors tending to rebut the presumption are whether the consideration was fair and whether the other terms of the transaction are similar to those that would be transacted with an independent party.

Even where the presumption under subsection (c) does not apply, a transaction may still be voided by a beneficiary if the beneficiary proves that a conflict between personal and fiduciary interests existed and that the transaction was affected by the conflict. The right of a beneficiary to void a transaction affected by a conflict of interest is optional. If the transaction proves profitable to the trust and unprofitable to the trustee, the beneficiary will likely allow the transaction to stand. For a comparable provision regulating fiduciary investments by national banks, see 12 C.F.R. Section 9.12(a).

As provided in subsection (b), no breach of the duty of loyalty occurs if the transaction was authorized by the terms of the trust or approved by the court, or if the beneficiary failed to commence a judicial proceeding within the time allowed or chose to ratify the transaction, either prior to or subsequent to its occurrence. In determining whether a beneficiary has consented to a transaction, the principles of representation from Article 3 may be applied.

Subsection (b)(5), which is derived from Section 3 713(1) of the Uniform Probate Code, allows a trustee to implement a contract or pursue a claim that the trustee entered into or acquired before the person became or contemplated becoming trustee. While this subsection allows the transaction to proceed without automatically being voidable by a beneficiary, the transaction is not necessarily free from scrutiny. In implementing the contract or pursuing the claim, the trustee must still complete the transaction in a way that avoids a conflict between the trustee's fiduciary and personal interests. Because avoiding such a conflict will frequently be difficult, the trustee should consider petitioning the court to appoint a special fiduciary, as authorized by subsection (i), to work out the details and complete the transaction.

Subsection (d) creates a presumption that a transaction between a trustee and a beneficiary not involving trust property is an abuse by the trustee of a confidential relationship with the beneficiary. This subsection has limited scope. If the trust has terminated, there must be proof that the trustee's influence with the beneficiary remained. Furthermore, whether or not the trust has terminated, there must be proof that the trustee obtained an advantage from the relationship. The fact the trustee profited is insufficient to show an abuse if a third party would have similarly profited in an arm's length transaction. Subsection (d) is based on Cal. Prob. Code Section 16004(c). *See also* 2A Austin W. Scott & William F. Fratcher Section 170.25 (4th ed. 1987), which states the same principle in a slightly different form: "Where he deals directly with the beneficiaries, the transaction may stand, but only if the trustee makes full disclosure and takes no advantage of his position and the transaction is in all respects fair and reasonable."

Subsection (e), which allows a beneficiary to void a transaction entered into by the trustee that involved an opportunity belonging to the trust, is based on Restatement (Second) of Trusts Section 170 cmt. k (1959). While normally associated with corporations and with their directors and officers, what is usually referred to as the corporate opportunity doctrine also applies to other types of fiduciary. The doctrine prohibits the trustee's pursuit of certain business activities, such as entering into a business in direct competition with a business owned by the trust, or the purchasing of an investment that the facts suggest the trustee was expected to purchase for the trust. For discussion of the corporate opportunity doctrine, see Kenneth B. Davis, Jr., *Corporate Opportunity and Comparative Advantage,* 84 Iowa L. Rev. 211 (1999); and Richard A. Epstein, *Contract and Trust in Corporate Law: The Case of Corporate Opportunity,* 21 Del. J. Corp. L. 5 (1996). *See also* Principles of Corporate Governance: Analysis and Recommendations Section 5.05 (American Law Inst. 1994).

Subsection (f) creates an exception to the no further inquiry rule for trustee investment in mutual funds. This exception applies even though the mutual fund company pays the financial service institution trustee a fee for providing investment advice and other services, such as custody, transfer agent, and distribution, that would otherwise be provided by agents of the fund. Mutual funds offer several advantages for fiduciary investing. By comparison with common trust funds, mutual fund shares may be distributed in-kind when trust interests terminate, avoiding liquidation and the associated recognition of gain for tax purposes. Mutual funds commonly offer daily pricing, which gives trustees and beneficiaries better information about performance. Because mutual funds can combine fiduciary and nonfiduciary accounts, they can achieve larger size, which can enhance diversification and produce economies of scale that can lower investment costs.

Mutual fund investment also has a number of potential disadvantages. It adds another layer of expense to the trust, and it causes the trustee to lose control over the nature and timing of transactions in the fund. Trustee investment in mutual funds sponsored by the trustee, its affiliate, or from which the trustee receives extra fees has given rise to litigation implicating the trustee's duty of loyalty, the duty to invest with prudence, and the right to receive only reasonable compensation. Because financial institution trustees ordinarily provide advisory services to and receive compensation from the very funds in which they invest trust assets, the contention is made that investing the assets of individual trusts in these funds is imprudent and motivated by the effort to generate additional fee income. Because the financial institution trustee often will also charge its regular fee for administering the trust, the contention is made that the financial institution trustee's total compensation, both direct and indirect, is excessive.

Subsection (f) attempts to retain the advantages of mutual funds while at the same time making clear that such investments are subject to traditional fiduciary responsibilities. Nearly all of the States have enacted statutes authorizing trustees to invest in funds from which the trustee might derive additional compensation. Portions of subsection (f) are based on these statutes. Subsection (f) makes clear that such dual investment fee arrangements are not automatically presumed to involve a conflict between the trustee's personal and fiduciary interests, but subsection (f) does not otherwise waive or lessen a trustee's fiduciary obligations. The trustee, in deciding whether to invest in a mutual fund, must not place its own interests ahead of those of the beneficiaries. The investment decision must also comply with the enacting jurisdiction's prudent investor rule. To obtain the protection afforded by subsection (f), the trustee must disclose at least annually to the beneficiaries entitled to receive a copy of the trustee's annual report the rate and method by which the additional compensation was determined. ...

Subsection (f) applies whether the services to the fund are provided directly by the trustee or by an affiliate. While the term "affiliate" is not used in subsection (c), the individuals and entities listed there are examples of affiliates. The term is also used in the regulations under ERISA. An "affiliate" of a fiduciary includes (1) any person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the fiduciary; (2) any officer, director, partner, employee, or relative of the fiduciary, and any corporation or partnership of which the fiduciary is an officer, director or partner. *See* 29 C.F.R. Section 2510.3 21(e).

Subsection (g) addresses an overlap between trust and corporate law. It is based on Restatement of Trusts (Second) Section 193 cmt. a (1959), which provides that "[i]t is the duty of the trustee in voting shares of stock to use proper care to promote the interest of the beneficiary," and that the fiduciary responsibility of a trustee in voting a control block "is heavier than where he holds only a small fraction of the shares." Similarly, the Department of Labor construes ERISA's duty of loyalty to make share voting a fiduciary function. *See* 29 C.F.R. Section 2509.94 2. When the trust owns the entirety of the shares of a corporation, the corporate assets are in effect trust assets that the trustee determines to hold in corporate form. The trustee may not use the corporate form to escape the fiduciary duties of trust law. Thus, for example, a trustee whose duty of impartiality would require the trustee to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion of corporate directors to determine dividend policy. Rather, the trustee must vote for corporate directors who will follow a dividend policy consistent with the trustee's trust law duty of impartiality.

Subsection (h) contains several exceptions to the general duty of loyalty, which apply if the transaction was fair to the beneficiaries. Subsection (h)(1) (2) clarify that a trustee is free to contract about the terms of appointment and rate of compensation. Consistent with Restatement (Second) of Trusts Section 170 cmt. r (1959), subsection (h)(3) authorizes a trustee to engage in a transaction involving another trust of which the trustee is also trustee, a transaction with a decedent's estate or a conservatorship estate of which the trustee is personal representative or conservator, or a transaction with another trust or other fiduciary relationship in which a beneficiary of the trust has an interest. The authority of a trustee to deposit funds in a financial institution operated by the trustee, as provided in subsection (h)(4), is recognized as an exception to the duty of loyalty in a number of state statutes although deemed to be a breach of trust in Restatement (Second) of Trusts Section 170 cmt. m (1959). The power to deposit funds in its own institution does not negate the trustee's responsibility to invest prudently, including the obligation to earn a reasonable rate of interest on deposits. Subsection (h)(5) authorizes a trustee to advance money for the protection of the trust. Such advances usually are of small amounts and are made in emergencies or as a matter of convenience. . . .

2004 Amendment. Section 802(f) creates an exception to the prohibition on self-dealing for certain investments in mutual funds in which the trustee, or its affiliate, provides services in a capacity other than as trustee. As originally drafted, Section 802(f) provided that the exception applied only if the investment complied with the Uniform Prudent Investor Act and the trustee notified the qualified beneficiaries of the additional compensation received for providing the services. However, the Uniform Prudent Investor Act itself contains its own duty of loyalty provision (Section 5), thereby arguably limiting or undoing this exception to the UTC's loyalty provision. The amendment, by providing that the investment does not violate the duty of loyalty under the UTC if it "otherwise" complies with the Uniform Prudent Investor Act, is intended to negate the implication that the investment must also comply with the Uniform Prudent Investor Act's own duty of loyalty provision.

OFFICIAL COMMENT TO FORMER G.S. 36A-165 OF THE NORTH CAROLINA UNIFORM PRUDENT INVESTOR ACT

The duty of loyalty is perhaps the most characteristic rule of trust law, requiring the trustee to act exclusively for the beneficiaries, as opposed to acting for the trustee's own interest or that of third parties. The language of Section 4 of this Act derives from Restatement of Trusts 3d: Prudent Investor Rule § 170 (1992), which makes minute changes in Restatement of Trusts 2d § 170 (1959).

The concept that the duty of prudence in trust administration, especially in investing and managing trust assets, entails adherence to the duty of loyalty is familiar. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(l)(B), extracted in the Comment to Section 1 of this Act, effectively merges the requirements of prudence and loyalty. A fiduciary cannot be prudent in the conduct of investment functions if the fiduciary is sacrificing the interests of the beneficiaries.

The duty of loyalty is not limited to settings entailing self dealing or conflict of interest in which the trustee would benefit personally from the trust. "The trustee is under a duty to the beneficiary in administering the trust not to be guided by the interest of any third person. Thus, it is improper for the trustee to sell trust property to a third person for the purpose of benefitting the third person rather than the trust." Restatement of Trusts 2d § 170, comment q, at 371 (1959).

No form of so-called "social investing" is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries - for example, by accepting below-market returns - in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause. *See,* e.g., John H. Langbein & Richard Posner, Social Investing and the Law of Trusts, 79 Michigan L. Rev. 72, 96 97 (1980) (collecting authority). For pension trust assets, see generally Ian D. Lanoff, The Social Investment of Private Pension Plan Assets: May it Be Done Lawfully under ERISA?, 31 Labor L.J. 387 (1980). Commentators supporting social investing tend to concede the overriding force of the duty of loyalty. They argue instead that particular schemes of social investing may not result in below market returns. *See, e.g.,* Marcia O'Brien Hylton, "Socially Responsible" Investing: Doing Good Versus Doing Wall in an Inefficient Market, 42 American U.L. Rev. 1 (1992). In 1994 the Department of Labor issued an Interpretive Bulletin reviewing its prior analysis of social investing questions and reiterating that pension trust fiduciaries may invest only in conformity with the prudence and loyalty standards of ERISA § 403 404. Interpretive Bulletin 94 1, 59 Fed, Regis. 32606 (Jun. 22, 1994), to be codified as 29 CFR § 2509.94 1. The Bulletin reminds fiduciary investors that they are prohibited from "subordinat[ing] the interests of participants and beneficiaries in their retirement income to unrelated objectives."

NORTH CAROLINA COMMENT

Subsection (a) addresses the duty of loyalty in language similar to that in former G.S. 36A 165 of the North Carolina Prudent Investor Act with respect to the investment and management of trust assets but applies the duty to all actions of the trustee in the administration of the trust. For this reason the Official Comment to former G.S. 36A 165 of the North Carolina Uniform Prudent Investor Act is included in addition to the Official Comment to this section of the Uniform Trust Code.

The duty of loyalty is well recognized in North Carolina case law. *See, e.g., Wachovia Bank & Trust Co. v. Johnston,* 269 N.C. 701, 153 S.E.2d 449 (1967); *In re Testamentary Trust of Jacobs,* 91 N.C. App. 138, 370 S.E.2d 860 (1988), *disc. review denied,* 323 N.C. 476, 373 S.E.2d 863 (1988).

Subsection (b) represents the modernization of prior law in former Article 5 of Chapter 36A, the Uniform Trusts Act, with respect to the trustee's duty of loyalty and conflicts of interest. It changes prior North Carolina law by providing that any conflict of interest transaction can be waived by a beneficiary. Former G.S. 36A 79 permitted a beneficiary to waive restrictions imposed by the Uniform Trusts Act, except the prohibition against loaning trust funds to the trustee and against buying or selling trust property from or to the trustee and related parties. Such prohibition created difficulties in effecting legitimate financial transactions that the beneficiaries desired.

The application of the representation rules of Article 3 in obtaining the consent from beneficiaries to a conflict of interest transaction facilitates these matters. Under former law even if a conflict of interest could be consented to or waived, it was often difficult to obtain the consent or waiver if minor or unborn beneficiaries were involved.

Subsection (c) of the Uniform Trust Code was modified to clarify that transactions involving investment or management of the trust property and entered into by the trustee and the persons or the entities listed in paragraphs (1) through (4) are "rebuttably presumed" to be affected by a conflict of interest.

In addition, subsection (c) of the Uniform Trust Code was modified as follows:

(i) In paragraph (1) the words "or a parent of the trustee's spouse" were added at the end.

(ii) In paragraph (2) the word "ancestors" was substituted for "parents".

(iii) In paragraph (3) the words "employee, officer, director, member, manager or partner of the trustee, or an entity that controls, is controlled by, or is under the common control with the trustee" were inserted after the word "attorney".

(iv) In paragraph (4) the reference to "corporation" was deleted, and the word "entity" was substituted in place of the word "enterprise".

Subsection (f) was modified in two respects:

(i) A reference to pooled investment vehicles in which the trustee has an investment was added to paragraph (1).

(ii) Paragraph (2) was added to clarify that the presumption of a conflict of interest in subdivision (c)(3) does not include transactions involving payments made to business persons that regularly provide services to the trustee if payment is consistent with that made in the community for similar services.

Subsection (h) modifies the Uniform Trust Code by substituting the words "guardianship, or similar relationship" for "conservatorship" in paragraph (3) and by adding the words "or an affiliate of the trustee" after the word "trustee" in paragraph (4).

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (d) is amended to clarify that the rule allowing a beneficiary to void under the circumstances described in the subsection a transaction between the trustee and the beneficiary that does not concern trust property does not apply to a transaction with the trustee that is in the ordinary course of business and on terms and conditions as favorable as those the trustee generally offers similarity situated customers.

Effective October 1, 2007, subdivision (f)(1) is amended to clarify that an investment of trust assets by the trustee in investment vehicles in which an affiliate of the trustee, as well as the trustee, also invests or to which the trustee, or its affiliate, provides services for compensation is not presumed to be a conflict of interest if the investment otherwise complies with the prudent investor rules.

Also effective October 1, 2007, subdivision (f)(2) is amended to delete the requirement that in order for payment by the trustee for the services of those specified in the section not to be considered a conflict of interest, the payments must be consistent with payments for the same or similar services made "in the community." The drafters thought that the amendment deleting the reference to 'in the community' was necessary because the trust may be in a community or location where those services are not usually rendered.

Also effective October 1, 2007, subsection (h) is amended to clarify that it does not impose an additional "fairness" standard on the transactions described in the subsection, including payment of the trustee's compensation, that are not precluded by the conflict of interest rules of the section and are governed by other standards. Subdivision (h)(3), as amended, retains the fairness standard as to transactions between a trust and another fiduciary relationship of which the trustee is a fiduciary or in which the beneficiary has an interest.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, ss. 31 through 33, effective October 1, 2007, inserted "and which is outside the ordinary course of the trustee's business or on terms and conditions substantially less favorable than those the trustee generally offers similarly situated customers," in subsection (d); in the first sentence of subdivision (f)(1), inserted "or its affiliate" following "in which the trustee" and inserted "for compensation"; deleted "in the community" following "payments generally made" near the end of subdivision (f)(2); in the introductory paragraph of subsection (h), inserted "any of" and deleted "if fair to the beneficiaries" from the end; in subdivision (h)(2), deleted "reasonable" following "Payment of," inserted "which," and added "is entitled under G.S. 36C-7-708."; inserted "that is fair to the beneficiaries" in subdivision (h)(3); and made minor punctuation and stylistic changes. See Editor's note for applicability.

Legal Periodicals. — The Punctilio of An Honor the Most "Cents"-itive: Trustees, Broker-Dealers, and North Carolina's Self-Dealing Ban, 78 N.C.L. Rev. 1965 (2000).

CASE NOTES

Editor's Note. — *The cases below were decided under prior law.*

The purpose of this section is to clarify and strengthen rules regarding loyalty by a trustee to the interests of his cestuis que trust. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967), decided under prior law.

Court May Relieve Trustee of Restriction of This Section. — Section 36A-80, by allowing a court of competent jurisdiction to relieve the trustee of "any or all of the duties and restrictions" placed upon him by this Article, gives statutory authority to the court to relieve the trustee of the restriction that he cannot purchase property from the trust. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967), decided under prior law.

Recognizing and reaffirming the stern rule of equity that a trustee cannot be both vendor and vendee, there are rare and justifiable exceptions when the court, in the exercise of its inherent equitable powers, may authorize a purchase of trust property by the trustee, upon full findings of fact that (1) complete disclosure of all facts was made by the trustee, (2) the sale would materially promote the best interests of the trust and its beneficiaries, and (3) there are no other purchasers willing to pay the same or a greater price than offered by the trustee. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967), decided under prior law.

§ 36C-8-803. Impartiality.

If a trust has two or more beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests. (1999-215, s. 1; 2005-192, s. 2.)

OFFICIAL COMMENT

The duty of impartiality is an important aspect of the duty of loyalty. This section is identical to Section 6 of the Uniform Prudent Investor Act, except that this section also applies to all aspects of trust administration and to decisions by a trustee with respect to distributions. The Prudent Investor Act is limited to duties with respect to the investment and management of trust property. The differing beneficial interests for which the trustee must act impartially include those of the current beneficiaries versus those of beneficiaries holding interests in the remainder; and among those currently eligible to receive distributions. In fulfilling the duty to act impartially, the trustee should be particularly sensitive to allocation of receipts and disbursements between income and principal and should consider, in an appropriate case, a reallocation of income to the principal account and vice versa, if allowable under local law. For an example of such authority, see Uniform Principal and Income Act Section 104 (1997).

The duty to act impartially does not mean that the trustee must treat the beneficiaries equally. Rather, the trustee must treat the beneficiaries equitably in light of the purposes and terms of the trust. A settlor who prefers that the trustee, when making decisions, generally favor the interests of one beneficiary over those of others should provide appropriate guidance in the terms of the trust. *See* Restatement (Second) of Section 183 cmt. a (1959).

OFFICIAL COMMENT TO FORMER G.S. 36A-166 OF THE NORTH CAROLINA UNIFORMED PRUDENT INVESTORS ACT

The duty of impartiality derives from the duty of loyalty. When the trustee owes duties to more than one beneficiary, loyalty requires the trustee to respect the interests of all the beneficiaries. Prudence in investing and administration requires the trustee to take account of the interests of all the beneficiaries for whom the trustee is acting, especially the conflicts between the interests of beneficiaries interested in income and those interested in principal.

The language of Section 6 derives from Restatement of Trusts 2d § 183 (1959); see also id., § 232. Multiple beneficiaries may be beneficiaries in succession (such as life and remainder interests) or beneficiaries with simultaneous interests (as when the income interest in a trust is being divided among several beneficiaries).

The trustee's duty of impartiality commonly affects the conduct of investment and management functions in the sphere of principal and income allocations. This Act prescribes no regime for allocating receipts and expenses. The details of such allocations are commonly handled under specialized legislation, such as the Revised Uniform Principal and Income Act (1962).

NORTH CAROLINA COMMENT

This section addresses the duty of impartiality in language similar to that in former G.S. 36A-166 of the North Carolina Prudent Investor Act with respect to the investment and management of the trust assets but applies such duty to all actions of the trustee in the administration of the trust. For this reason the Official Comment to former G.S. 36A-166 of the North Carolina Uniform Prudent Investor Act is included above in addition to the Official Comment to this section of the Uniform Trust Code.

§ 36C-8-804. Prudent administration.

A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution. (2005-192, s. 2.)

OFFICIAL COMMENT

The duty to administer a trust with prudence is a fundamental duty of the trustee. This duty does not depend on whether the trustee receives compensation. The duty may be altered by the terms of the trust. *See* Section 105. This section is similar to Section 2(a) of the Uniform Prudent Investor Act and Restatement (Third) of Trusts: Prudent Investor Rule Section 227 (1992).

The language of this section diverges from the language of the previous Restatement. The prior Restatement can be read as applying the same standard - "man of ordinary prudence would exercise in dealing with his own property" - regardless of the type or purposes of the trust. *See* Restatement (Second) of Trusts Section 174 cmt. a (1959). This section appropriately bases the standard on the purposes and other circumstances of the particular trust.

A settlor who wishes to modify the standard of care specified in this section is free to do so, but there is a limit. Section 1008 prohibits a settlor from exculpating a trustee from liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or to the interests of the beneficiaries.

NORTH CAROLINA COMMENT

This section addresses the standard of care the trustee must use with respect to the administration of the trust in language similar to that in G.S. 36C 9 902(a) with respect to investment and management of trust assets but applies the same standard to all aspects of the trust administration.

§ 36C-8-805. Cost of administration.

In administering a trust, the trustee may incur only costs that are reasonable in relation to the trust property, the purposes of the trust, and the skills of the trustee. (1999-215, s. 1; 2005-192, s. 2.)

OFFICIAL COMMENT

This section is similar to Section 7 of the Uniform Prudent Investor Act and is consistent with the rules concerning costs in Restatement (Third) of Trusts: Prudent Investor Rule Section 227(c)(3) (1992). For related rules concerning compensation and reimbursement of trustees, see Sections 708 and 709. The duty not to incur unreasonable costs applies when a trustee decides whether and how to delegate to agents, as well as to other aspects of trust administration. In deciding whether and how to delegate, the trustee must be alert to balancing projected benefits against the likely costs. To protect the beneficiary against excessive costs, the trustee should also be alert to adjusting compensation for functions which the trustee has delegated to others. The obligation to incur only necessary or appropriate costs of administration has long been part of the law of trusts. *See* Restatement (Second) of Trusts Section 188 (1959).

OFFICIAL COMMENT TO FORMER G.S. 36A-167 OF THE NORTH CAROLINA UNIFORM PRUDENT INVESTOR ACT

Wasting beneficiaries' money is imprudent. In devising and implementing strategies for the investment and management of trust asset, trustees are obliged to minimize costs.

The language of Section 7 derives. from Restatement of Trusts 2d § 188 (1959). The Restatement of Trusts 3d says: "Concerns over compensation and other charges are not an obstacle to a reasonable course of action using mutual funds and other pooling arrangements, but they do require special attention by a trustee. . . . [I]t is important for trustees to make careful cost comparisons, particularly among similar products of a specific type being considered for a trust portfolio." Restatement of Trusts 3d: Prudent Investor Rule § 227, comment *m*, at 58 (1992).

NORTH CAROLINA COMMENT

This section addresses the trustee's duty with respect to the costs the trustee may incur in administering a trust in language similar to that in former G.S. 36A-167 of the North Carolina Prudent Investor Act with respect to the investment and management of trust assets but applies the duty to all aspects of trust administration. For this reason the Official Comment to former G.S. 36A-167 of the North Carolina Uniform Prudent Investor Act is included above in addition to the Official Comment to this section of the Uniform Trust Code.

§ 36C-8-806. Trustee's skills.

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise. (1999-215, s. 1; 2005-192, s. 2.)

OFFICIAL COMMENT

This section is similar to Section 7 302 of the Uniform Probate Code, Restatement (Second) of Trusts Section 174 (1959), and Section 2(f) of the Uniform Prudent Investor Act.

OFFICIAL COMMENT TO FORMER G.S. 36A-162(F) OF THE NORTH CAROLINA UNIFORM PRUDENT INVESTOR ACT

Professional Fiduciaries. The distinction taken in subsection (f) between amateur and professional trustees is familiar law. The prudent investor standard applies to a range of fiduciaries, from the most sophisticated professional investment management firms and corporate fiduciaries, to family members of minimal experience. Because the standard of prudence is relational, it follows that the standard for professional trustees is the standard of prudent professionals; for amateurs, it is the standard of prudent amateurs. Restatement of Trusts 2d § 174 (1959) provides: "The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, he is under a duty to exercise such skill." Case law strongly supports the concept of the higher standard of care for the trustee representing itself to be expert or professional. *See* Annot., Standard of Care Required of Trustee Representing Itself to Have Expert Knowledge or Skill, 91 A.L.R. 3d 904 (1979) & 1992 Supp. at 48 49.

NORTH CAROLINA COMMENT

This section addresses the duty of a trustee who has special skills in language similar to that in former G.S. 36A-162(f) of the North Carolina Prudent Investor Act with respect to the investment and management of trust assets but applies the duty to all aspects of trust administration. For this reason the Official Comment to former G.S. 36A-162(f) of the North Carolina Uniform Prudent Investor Act is included above in addition to the Official Comment to this section of the Uniform Trust Code. G.S.32-71(a), which recodifies former G.S. 36A-2(a), also addresses the duty of a trustee with special skills with respect to investment and management of trust property.

§ 36C-8-807. Delegation by trustee.

(a) A trustee may delegate duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. The trustee shall exercise reasonable care, skill, and caution in:

(1) Selecting an agent;
(2) Establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust; and
(3) Periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the terms of the delegation.

(b) In performing a delegated function, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(c) A trustee who complies with subsection (a) of this section is not liable to the beneficiaries or to the trust for an action of the agent to whom the function was delegated.

(d) By accepting a delegation of powers or duties from the trustee of a trust that is subject to the law of this State, an agent submits to the jurisdiction of the courts of this State. (2005-192, s. 2.)

OFFICIAL COMMENT

This section permits trustees to delegate various aspects of trust administration to agents, subject to the standards of the section. The language is derived from Section 9 of the Uniform Prudent Investor Act. *See also* John H. Langbein, *Reversing the Nondelegation Rule of Trust Investment Law,* 59 Mo. L. Rev. 105 (1994) (discussing prior law).

This section encourages and protects the trustee in making delegations appropriate to the facts and circumstances of the particular trust. Whether a particular function is delegable is based on whether it is a function that a prudent trustee might delegate under similar circumstances. For example, delegating some administrative and reporting duties might be prudent for a family trustee but unnecessary for a corporate trustee.

This section applies only to delegation to agents, not to delegation to a cotrustee. For the provision regulating delegation to a cotrustee, see Section 703(e).

OFFICIAL COMMENT TO FORMER G.S. 36A-169 OF THE NORTH CAROLINA UNIFORM PRUDENT INVESTOR ACT

This section of the Act reverses the much-criticized rule that forbad trustees to delegate investment and management functions. The language of this section is derived from Restatement of Trusts 3d: Prudent Investor Rule § 171 (1992), discussed infra, and from the 1991 Illinois act, 760 ILCS § 5/5.1(b), (c) (1992).

Former Law. The former nondelegation rule survived into the 1959 Restatement: "The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform." The rule put a premium on the frequently arbitrary task of distinguishing discretionary functions that were thought to be nondelegable from supposedly ministerial functions that the trustee was allowed to delegate. Restatement of Trusts 2d § 171 (1959).

The Restatement of Trusts 2d admitted in a comment that "There is not a clear-cut line dividing the acts which a trustee can properly delegate from those which he cannot properly delegate." Instead, the comment directed attention to a list of factors that "may be of importance; (1) the amount of discretion involved; (2) the value and character of the property involved; (3) whether the property is principal or income; (4) the proximity or remoteness of the subject matter of the trust; (5) the character of the act as one involving professional skill or facilities possessed or not possessed by the trustee himself." Restatement of Trusts 2d § 171, comment *d* (1969). The 1959 Restatement further said: "A trustee cannot properly delegate to another power to select investments." Restatement of Trusts 2d § 171, comment *h* (1959).

For discussion and criticism of the former rule see William L Cary & Craig B. Bright, The Delegation of Investment Responsibility for Endowment Funds, 74 Columbia L. Rev. 207 (1974); John H. Langbein & Richard A. Posner, Market Funds and Trust Investment Law, 1976 American Bar Foundation Research J. 1, 18 24.

The Modern Trend to Favor Delegation. The trend of subsequent legislation, culminating in the Restatement of Trusts 3d: Prudent Investor Rule, has been strongly hostile to the nondelegation rule. *See* John H. Langbein, Reversing the Nondelegation Rule of Trust Investment Law, 59 Missouri L. Rev, 105 (1994).

The Delegation Rule of the Uniform Trustee Powers Act. The Uniform Trustee Powers Act (1964) effectively abrogates the nondelegation rule. It authorizes trustees "to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary . . . ." Uniform Trustee Powers Act § 3(24), 7B Uniform Laws Ann. 743 (1985). The Act has been enacted in 16 states, see "Record of Passage of Uniform and Model Acts as of September 30, 1993," 1993-94 Reference Book of Uniform Law Commissioners (unpaginated, following page 111) (1998).

UMIFA's Delegation Rule. The Uniform Management of Institutional Funds Act (1972) (UMIFA), authorizes the governing boards of eleemosynary institutions, who are trustee like fiduciaries, to delegate investment matters either to a committee of the board or to outside investment advisors, investment counsel, managers, banks, or trust companies. UMIFA § 5, 7A Uniform Laws Ann. 708 (1985). UMIFA has been enacted in 38 states, see "Record of Passage of Uniform and Model Acts as of September 30, 1993," 1993-94 Reference Book of Uniform Law Commissioners (unpaginated, following page 111) (1998).

ERISA's Delegation Rule. The Employee Retirement Income Security Act of 1974, the federal statute that prescribes fiduciary standards for investing the assets of pension and employee benefit plans, allows a pension or employee benefit plan to provide that "authority to manage, acquire or dispose of assets of the plan is delegated to one or more investment managers. . . ." ERISA § 403(a)(2), 29 U.S.C. § 1103(a)(2). Commentators have explained the rationale for ERISA's encouragement of delegation:

> ERISA... invites the dissolution of unitary trusteeship... ERISA's fractionation of traditional trusteeship reflects the complexity of the modern pension trust. Because millions, even billions of dollars can be involved, great care is required in investing and safekeeping plan assets. Administering such plans computing and honoring benefit entitlements across decades of employment and retirement is also a complex business... Since, however, neither the sponsor nor any other single entity has a comparative advantage in performing all these functions, the tendency has been for pension plans to use a variety of specialized providers. A consulting actuary, a plan administration firm, or an insurance company may oversee the design of a plan and arrange for processing benefit claims. Investment industry professionals manage the portfolio (the largest plans spread their pension investments among dozens of money management firms).

John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law 496 (1990).

The Delegation Rule of the 1992 Restatement. The Restatement of Trusts 3d: Prudent Investor Rule (1992) repeals the nondelegation rule of Restatement of Trusts 2d § 171 (1969), extracted supra, and replaces it with substitute text that reads:

> § 171. Duty with Respect to Delegation. A trustee has a duty personally to perform the responsibilities of trusteeship except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising agents, the trustee is under a duty to the beneficiaries to exercise fiduciary discretion and to act as a prudent person would act in similar circumstances.

Restatement of Trusts 3d: Prudent Investor Rule § 171 (1992). The 1992 Restatement integrates this delegation standard into the prudent investor rule of section 227, providing that "the trustee must ... act with prudence in deciding whether and how to delegate to others..." Restatement of Trusts 3d: Prudent Investor Rule § 227(c) (1992).

Protecting the Beneficiary Against Unreasonable Delegation. There is an intrinsic tension in trust law between granting trustees broad powers that facilitate flexible and efficient trust administration, on the one hand, and protecting trust beneficiaries from the misuse of such powers on the other hand. A broad set of trustees' powers, such as those found in most lawyer-drafted instruments and exemplified in the Uniform Trustees' Powers Act, permits the trustee to act vigorously and expeditiously to maximize the interests of the beneficiaries in a variety of transactions and administrative settings. Trust law relies upon the duties of loyalty and prudent administration, and upon procedural safeguards such as periodic accounting and the availability of judicial oversight, to prevent the misuse of these powers. Delegation, which is a species of trustee power, raises the same tension. If the trustee delegates effectively, the beneficiaries obtain the advantage of the agent's specialized investment skills or whatever other attributes induced the trustee to delegate. But if the trustee delegates to a knave or an incompetent, the delegation can work harm upon the beneficiaries.

Section 9 of the Uniform Prudent Investor Act is designed to strike the appropriate balance between the advantages and the hazards of delegation. Section 9 authorizes delegation under the limitations of subsections (a) and (b). Section 9(a) imposes duties of care, skill, and caution on the trustee in selecting the agent, in establishing the terms of the delegation, and in reviewing the agent's compliance.

The trustee's duties of care, skill, and caution in framing the terms of the delegation should protect the beneficiary against overbroad delegation. For example, a trustee could not prudently agree to an investment management agreement containing an exculpation clause that leaves the trust without recourse against reckless mismanagement. Leaving one's beneficiaries remediless against willful wrongdoing is inconsistent with the duty to use care and caution in formulating the terms of the delegation. This sense that it is imprudent to expose beneficiaries to broad exculpation clauses underlies both federal and state legislation restricting exculpation clauses, e.g., ERISA § 404(a)(1)(D), 410(a), 29 U.S.C. § 1104(a)(1)(D), 1110(a); New York Est. Powers Trusts Law § 11 1.7 (McKinney 1967).

Although subsection (c) of the Act exonerates the trustee from personal responsibility for the agent's conduct when the delegation satisfies the standards of subsection 9(a), subsection 9(b) makes the agent responsible to the trust. The beneficiaries of the trust can, therefore, rely upon the trustee to enforce the terms of the delegation.

Costs. The duty to minimize costs that is articulated in Section 7 of this Act applies to delegation as well as to other aspects of fiduciary investing. In deciding whether to delegate, the trustee must balance the projected benefits against the likely costs. Similarly, in deciding how to delegate, the trustee must take costs into account. The trustee must be alert to protect the beneficiary from "double dipping." If, for example, the trustee's regular compensation schedule presupposes that the trustee will conduct the investment management function, it should ordinarily follow that the trustee will lower its fee when delegating the investment function to an outside manager.

NORTH CAROLINA COMMENT

This section permits the delegation of the trustee's duties and powers to agents in language similar to that in former G.S. 36A-169 of the North Carolina Prudent Investor Act with respect to investment and management functions but extends the authority to delegate in all aspects of trust administration. For this reason the Official Comment to former G.S. 36A 169 of the North Carolina Uniform Prudent Investor Act is included above in addition to the Official Comment to this section of the Uniform Trust Code. This section is somewhat consistent with prior law concerning delegation of duties and powers. *See Wachovia Bank & Trust Co. v. Morgan,* 279 N.C. 265, 182 S.E.2d 356 (1971).

§ 36C-8-808. Powers to direct.

(a) While a trust is revocable, the trustee may follow a direction of the settlor that is not authorized by or is contrary to the terms of the trust, even if by doing so (i) the trustee exceeds the authority granted to the trustee under the terms of the trust, or (ii) the trustee would otherwise violate a duty the trustee owes under the trust.

(b) If the terms of a trust confer upon a person other than the settlor of a revocable trust power to direct certain actions of the trustee, the trustee must act in accordance with an exercise of the power unless the attempted exercise is manifestly contrary to the terms of the trust, or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty that the person holding the power owes to the beneficiaries of the trust.

(c) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(d) A person, other than a beneficiary, who holds a power to direct is presumptively a fiduciary who, as such, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty. (2005-192, s. 2; 2007-106, s. 34.)

OFFICIAL COMMENT

Subsection (a) is an application of Section 603(a), which provides that a revocable trust is subject to the settlor's exclusive control. … Because of the settlor's degree of control, subsection (a) of this section authorizes a trustee to rely on a direction from the settlor even if it is contrary to the terms of the trust. The … direction of the settlor might be regarded as an amendment of the trust. … An agent, conservator, or guardian has, authority to give the trustee instructions contrary to the terms of the trust only if the agent, conservator, or guardian succeeds to the settlor's powers with respect to revocation, amendment, or distribution as provided in Section 602(e).

Subsections (b)-(d) ratify the use of trust protectors and advisers. Subsections (b) and (d) are based in part on Restatement (Second) of Trusts Section 185 (1959). Subsection (c) is similar to Restatement (Third) of Trusts Section 64(2) (Tentative Draft No. 3, approved 2001). "Advisers" have long been used for certain trustee functions, such as the power to direct investments or manage a closely-held business. "Trust protector," a term largely associated with offshore trust practice, is more recent and usually connotes the grant of greater powers, sometimes including the power to amend or terminate the trust. Subsection (c) ratifies the recent trend to grant third persons such broader powers.

A power to direct must be distinguished from a veto power. A power to direct involves action initiated and within the control of a third party. The trustee usually has no responsibility other than to carry out the direction when made. But if a third party holds a veto power, the trustee is responsible for initiating the decision, subject to the third party's approval. A trustee who administers a trust subject to a veto power occupies a position akin to that of a cotrustee and is responsible for taking appropriate action if the third party's refusal to consent would result in a serious breach of trust. *See* Restatement (Second) of Trusts Section 185 cmt. g (1959); Section 703(g) (duties of cotrustees).

Frequently, the person holding the power is directing the investment of the holder's own beneficial interest. Such self-directed accounts are particularly prevalent among trusts holding interests in employee benefit plans or individual retirement accounts. *See* ERISA Section 404(c) (29 U.S.C. Section 1104(c)). But for the type of donative trust which is the primary focus of this Code, the holder of the power to direct is frequently acting on behalf of others. In that event and as provided in subsection (d), the holder is presumptively acting in a fiduciary capacity with respect to the powers granted and can be held liable if the holder's conduct constitutes a breach of trust, whether through action or inaction. Like a trustee, liability cannot be imposed if the holder has not accepted the grant of the power either expressly or informally through exercise of the power. *See* Section 701.

Powers to direct are most effective when the trustee is not deterred from exercising the power by fear of possible liability. On the other hand, the trustee does have overall responsibility for seeing that the terms of the trust are honored. For this reason, subsection (b) imposes only minimal oversight responsibility on the trustee. A trustee must generally act in accordance with the direction. A trustee may refuse the direction only if the attempted exercise would be manifestly contrary to the terms of the trust or the trustee knows the attempted exercise would constitute a serious breach of a fiduciary duty owed by the holder of the power to the beneficiaries of the trust.

The provisions of this section may be altered in the terms of the trust. *See* Section 105. A settlor can provide that the trustee must accept the decision of the power holder without question. Or a settlor could provide that the holder of the power is not to be held to the standards of a fiduciary. A common technique for assuring that a settlor continues to be taxed on all of the income of an irrevocable trust is for the settlor to retain a nonfiduciary power of administration. *See* I.R.C. Section 675(4).

NORTH CAROLINA COMMENT

Subsection (a) introduces a concept that was not clear under prior North Carolina law in allowing a trustee to follow a direction of the settlor that is contrary to the terms of the trust even though such direction may constitute a breach of trust.

Subsections (b), (c) and (d) introduce a concept of the trust protector or advisor that has not been addressed by statute in prior North Carolina law but was being used by practitioners in drafting trust instruments.

Subsection (c) authorizing the terms of the trust to confer upon a trustee or other person the power to direct the modification or termination of the trust represents a nonjudicial alternative to the methods of modifying and terminating a trust under Article 4 of this Chapter.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (a) is amended to clarify that a direction of the settlor that the trustee of a revocable trust may follow includes a direction that is not authorized by the terms of the trust.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 34, effective October 1, 2007, in subsection (a), inserted "not authorized by or" following "settlor that is" and inserted "by" preceding "doing so (i)." See Editor's note for applicability.

§ 36C-8-809. Control and protection of trust property.

A trustee shall take reasonable steps to take control of and protect the trust property. (2005-192, s. 2.)

OFFICIAL COMMENT

This section codifies the substance of Sections 175 and 176 of the Restatement (Second) of Trusts (1959). The duty to take control of and safeguard trust property is an aspect of the trustee's duty of prudent administration as provided in Section 804. *See also* Sections 816(1) (power to collect trust property), 816(11) (power to insure trust property), and 816(12) (power to abandon trust property). The duty to take control normally means that the trustee must take physical possession of tangible personal property and securities belonging to the trust, and must secure payment of any choses in action. *See* Restatement (Second) of Trusts Section 175 cmt. a, c & d (1959). This section, like the other sections in this article, is subject to alteration by the terms of the trust. *See* Section 105. For example, the settlor may provide that the spouse may occupy the settlor's former residence rent free, in which event the spouse's occupancy would prevent the trustee from taking possession.

NORTH CAROLINA COMMENT

This section codifies the duties to control and protect trust property that have been implicit in the prudent person rule of former G.S. 36A-162(a) of the North Carolina Uniform Prudent Investor Act and G.S. 32-71(a), which recodifies former G.S. 36A-2(a).

§ 36C-8-810. Record keeping and identification of trust property.

(a) A trustee shall keep adequate records of the administration of the trust.

(b) A trustee shall keep trust property separate from the trustee's own property.

(c) Except as otherwise provided in subsection (d) of this section, a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(d) If the trustee maintains records clearly indicating the respective interests, a trustee may invest and administer as a whole the property of two or more separate trusts. (2005-192, s. 2; 2007-106, s. 34.1.)

OFFICIAL COMMENT

The duty to keep adequate records stated in subsection (a) is implicit in the duty to act with prudence (Section 804) and the duty to report to beneficiaries (Section 813). For an application, see *Green v. Lombard,* 343 A. 2d 905, 911 (Md. Ct. Spec. App. 1975). *See also* Restatement (Second) of Trusts Sections 172, 174 (1959).

The duty to earmark trust assets and the duty of a trustee not to mingle the assets of the trust with the trustee's own are closely related. Subsection (b), which addresses the duty not to mingle, is derived from Section 179 of the Restatement (Second) of Trusts (1959). Subsection (c) makes the requirement that assets be earmarked more precise than that articulated in Restatement (Second) Section 179 by requiring that the interest of the trust must appear in the records of a third party, such as a bank, brokerage firm, or transfer agent. Because of the serious risk of mistake or misappropriation even if disclosure is made to the beneficiaries, showing the interest of the trust solely in the trustee's own internal records is insufficient. Section 816(7)..., which allows a trustee to hold securities in nominee form, is not inconsistent with this requirement. While securities held in nominee form are not specifically registered in the name of the trustee, they are properly earmarked because the trustee's holdings are indicated in the records maintained by an independent party, such as in an account at a brokerage firm.

Earmarking is not practical for all types of assets. With respect to assets not subject to registration, such as tangible personal property and bearer bonds, arranging for the trust's ownership interest to be reflected on the records of a third-party custodian would not be feasible. For this reason, subsection (c) waives separate record keeping for these types of assets. Under subsection (b), however, the duty of the trustee not to mingle these or any other trust assets with the trustee's own remains absolute.

Subsection (d), following the lead of a number of state statutes, allows a trustee to use the property of two or more trusts to make joint investments, even though under traditional principles a joint investment would violate the duty to earmark. A joint investment frequently is more economical than attempting to invest the funds of each trust separately. Also, the risk of misappropriation or mistake is less when the trust property is invested jointly with the property of another trust than when pooled with the property of the trustee or other person.

NORTH CAROLINA COMMENT

Subsections (a) and (b) are generally consistent with former G.S. 36A-71 requiring a trust company to keep trust assets separate from its own assets and to keep records showing proper ownership of trust assets but apply these requirements to all trustees.

Subsection (d) has no express corresponding provision in prior law that would operate as a default provision. G.S. 32-27(25) authorizes a trustee to hold property of two or more separate trusts undivided but only if the power is incorporated by reference.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (d), which provides that a trustee may invest as a whole the property of multiple trusts if the trustee maintains records clearly indicating the respective interests, is amended to add that a trustee may also administer as a whole the property of multiple trusts under such circumstances. For example, a trustee may insure properties of multiple trusts in a master insurance policy so long as the trustee keeps separate records of the interest of each trust.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 34.1, effective October 1, 2007, inserted "and administer" in subsection (d). See Editor's note for applicability.

§ 36C-8-811. Enforcement and defense of claims.

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust. (2005-192, s. 2.)

OFFICIAL COMMENT

This section codifies the substance of Sections 177 and 178 of the Restatement (Second) of Trusts (1959). It may not be reasonable to enforce a claim depending upon the likelihood of recovery and the cost of suit and enforcement. It might also be reasonable to settle an action or suffer a default rather than to defend an action. *See also* Section 816(14) (power to pay, contest, settle, or release claims).

NORTH CAROLINA COMMENT

Although this section applies a reasonableness standard in enforcing and defending claims that has not been expressly stated in prior North Carolina law, our courts have approved a trustee's compromise of a claim in the best interest of the trust estate where "bad faith was not suggested". *See Wachovia Bank & Trust Co. v. Buchan,* 261 N.C. 595, 135 S.E.2d 559 (1964).

§ 36C-8-812. Collecting trust property.

A trustee shall take reasonable steps to compel a former trustee or other person to deliver trust property to the trustee and to redress a breach of trust known to the trustee to have been committed by a former trustee. (2005-192, s. 2.)

OFFICIAL COMMENT

This section is a specific application of Section 811 on the duty to enforce claims, which includes a claim for trust property held by a former trustee or others, and a claim against a predecessor trustee for breach of trust. The duty imposed by this section is not absolute. Pursuit of a claim is not required if the amount of the claim, costs of suit and enforcement, and likelihood of recovery, make such action uneconomic. Unlike Restatement (Second) of Trusts Section 223 (1959), this section only requires a successor trustee to redress breaches of trust "known" to have been committed by the predecessor. For the definition of "know," see Section 104. Limiting the successor's obligation to known breaches is a common feature of state trust statutes. *See, e.g.,* Mo. Rev. Stat. Section 456.187.2.

As authorized by Section 1009, the beneficiaries may relieve the trustee from potential liability for failing to pursue a claim against a predecessor trustee or other person holding trust property. The obligation to pursue a predecessor trustee can also be addressed in the terms of the trust. *See* Section 105.

NORTH CAROLINA COMMENT

This section has no counterpart in North Carolina statutes.

§ 36C-8-813. Duty to inform and report.

(a) The trustee is under a duty to do all of the following:

(1) Provide reasonably complete and accurate information as to the nature and amount of the trust property, at reasonable intervals, to any qualified beneficiary who is a distributee or permissible distributee of trust income or principal.

(2) In response to a reasonable request of any qualified beneficiary:

a. Provide a copy of the trust instrument.

b. Provide reasonably complete and accurate information as to the nature and amount of the trust property.

c. Allow reasonable inspections of the subject matter of the trust and the accounts and other documents relating to the trust.

(b) Notwithstanding subsection (a) of this section:

(1) The duty of the trustee under subsection (a) of this section shall not include informing any beneficiary in advance of transactions relating to the trust property.

(2) A trustee is considered to have discharged the trustee's duty under subdivision (1) of subsection (a) of this section as to a qualified beneficiary for matters disclosed by a report sent at least annually and at termination of the trust to the beneficiary that describes the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, and lists the trust assets and their respective market values, including estimated values of assets with uncertain values. No presumption shall arise that a trustee who does not comply with this subdivision failed to discharge the trustee's duty under subdivision (1) of subsection (a) of this section.

(c) A qualified beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. With respect to future reports and other information, a beneficiary may withdraw a waiver previously given.

(d) Repealed by Session Laws 2007-106, s. 35, effective October 1, 2007. (2005-192, s. 2; 2007-106, s. 35.)

OFFICIAL COMMENT

The duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee. For the common law duty to keep the beneficiaries informed, see Restatement (Second) of Trusts Section 173 (1959). This section makes the duty to keep the beneficiaries informed more precise by limiting it to the qualified beneficiaries. For the definition of qualified beneficiary, see Section 103... The result of this limitation is that the information need not be furnished to beneficiaries with remote remainder interests...

...

... This may include a duty to communicate to a qualified beneficiary information about the administration of the trust that is reasonably necessary to enable the beneficiary to enforce the beneficiary's rights and to prevent or redress a breach of trust. *See* Restatement (Second) of Trusts Section 173 cmt. c (1959). Ordinarily, the trustee is not under a duty to furnish information to a beneficiary in the absence of a specific request for the information. See Restatement (Second) of Trusts Section 173 cmt. d (1959). Thus, the duty articulated in subsection (a) is ordinarily satisfied by providing the beneficiary with a copy of the annual report ... However, special circumstances may require that the trustee provide additional information. For example, if the trustee is dealing with the beneficiary on the trustee's own account, the trustee must communicate material facts relating to the transaction that the trustee knows or should know. *See* Restatement (Second) of Trusts Section 173 cmt. d (1959)...

...

The drafters of this Code decided to leave open for further consideration by the courts the extent to which a trustee may claim attorney-client privilege against a beneficiary seeking discovery of attorney-client communications between the trustee and the trustee's attorney. The courts are split because of the important values that are in tension on this question.

"The [attorney-client] privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States,* 449 U.S. 383 (1981). ... There is authority for the view that the trustee is estopped from pleading attorney-client privilege. ... In the leading case, *Riggs National Bank v. Zimmer,* 355 A.2d 709, 713 (Del. Ch. 1976), the court reasoned that the beneficiary, not the trustee, is the attorney's client: "As a representative for the beneficiaries of the trust which he is administering, the trustee is not the real client. ..." This beneficiary-as-client theory has been criticized on the ground that it conflicts with the trustee's fiduciary duty to implement the intentions of the settlor, which are sometimes in tension with the wishes of one or more beneficiaries. *See* Louis H. Hamel, Jr., *Trustee's Privileged Counsel: A Rebuttal,* 21 ACTEC Notes 156 (1995); Charles F. Gibbs & Cindy D. Hanson, *The Fiduciary Exception to a Trustee's Attorney/Client Privilege,* 21 ACTEC Notes 236 (1995). Prominent decisions in California and Texas have refused to follow Delaware in recognizing an exception for the beneficiary against the trustee's attorney-client privilege. *Wells Fargo Bank v. Superior Court (Boltwood),* 990 P.2d 591 (Cal. 2000); *Huie v. De Shazo,* 922 S.W. 2d 920 (Tex. 1996). The beneficiary-as-client theory continues to be applied to ERISA trusts. *See, e.g., United States v. Mett,* 178 F.3d 1058, 1062-64 (9th Cir. 1999). However, in a pension trust the beneficiaries are the settlors of their own trust because the trust is funded with their own earnings. Accordingly, in ERISA attorney-client cases "[t]here are no competing interests such as other stockholders or the intentions of the Settlor." Gibbs & Hanson, 21 ACTEC Notes at 238. For further discussion of the attorney-client privilege and whether there is a duty to disclose to the beneficiaries, see ACTEC Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.2 (3d ed. 1999); Rust E. Reid et al., *Privilege and Confidentiality Issues When a Lawyer Represents a Fiduciary,* 30 Real Prop. Prob. & Tr. J. 541 (1996).

...

The Uniform Trust Code employs the term "report" instead of "accounting" in order to negate any inference that the report must be prepared in any particular format or with a high degree of formality. The reporting requirement might even be satisfied by providing the beneficiaries with copies of the trust's income tax returns and monthly brokerage account statements if the information on those returns and statements is complete and sufficiently clear. ... For model account forms, together with practical advice on how to prepare reports, see Robert Whitman, Fiduciary Accounting Guide (2d ed. 1998).

Subsection (d) allows trustee reports and other required information to be waived by a beneficiary. A beneficiary may also withdraw a consent. However, a waiver of a trustee's report or other information does not relieve the trustee from accountability and potential liability for matters that the report or other information would have disclosed.

...

NORTH CAROLINA COMMENTS

This section departs significantly from the Uniform Trust Code.

The drafters omitted subsection (a) of the Uniform Trust Code requiring the trustee to keep qualified beneficiaries reasonably informed about the trust administration and the material facts necessary for the beneficiaries to protect their interests and, unless unreasonable under the circumstances, to respond to a beneficiary's request for information. The drafters thought this duty was too general in its scope and raised a number of questions. The drafters preferred, and inserted in place of the provisions of the Uniform Trust Code, the rule in section 173 of the Restatement (Second) of Trusts (1959) requiring the trustees to give beneficiaries certain information upon request and to permit the beneficiaries to inspect trust documents. This rule was recognized and quoted with approval in *Taylor v. NationsBank Corp.,* 125 N.C. App. 515, 481 S.E.2d 358 (1997). The rule was modified in this subsection to apply only to qualified beneficiaries.

The drafters also omitted subsection (b) of the Uniform Trust Code consisting of four paragraphs for the following reasons:

(i) The drafters concluded that paragraphs (2) and (3) of subsection (b) of the Code would impose new and unnecessary burdens on the trustee not previously recognized in North Carolina. Paragraph (2) required the trustee to notify the qualified beneficiaries within 60 days of the acceptance of the trust and the trustee's identity and address. Paragraph (3) required the trustee to notify the beneficiary within 60 days after acquiring knowledge that the trust is irrevocable of the trust's existence, the identity of the settlor, the right to request a copy of the trust and the right to a report described in subsection (c) of the Uniform Trust Code.

(ii) The drafters concluded that the requirements in paragraph (1) to furnish a copy of the trust to the beneficiary upon request and in paragraph (4) to notify the beneficiary in advance of the change in the trustee's compensation were not necessary. The duty to furnish information imposed by subsection (a) was deemed to be sufficient.

In place of paragraphs (1)-(4) of subsection (b) of the Uniform Trust Code, the drafters inserted paragraph (1) clarifying that the duty of the trustee does not include advance notice of transactions and paragraph (2) concerning the trustee's report the contents of which are described in language similar to that in subsection (c) of the Uniform Trust Code which the drafters also omitted. Unlike subsection (c) of the Uniform Trust Code, subsection (b) provides that the report would be deemed to discharge the trustee's duty in subsection (a) and does not require a former trustee to send the report to the beneficiaries.

The settlor is free to override the provisions of subsections (a) and (b) regarding the information to be furnished to the beneficiaries by directing the trustee not to provide a beneficiary with any of the information otherwise required. This approach is consistent with the statement in the *Taylor* decision where the court said that "trust beneficiaries are entitled to view the trust instrument from which their interest is derived" so long as that right is not waived by the settlor through "an explicit provision in the trust instrument to the contrary". The mandatory rules in Section 105(b)(8) and (9) of the Uniform Trust Code would have prevented a settlor from overriding the provisions of Section 813(a) and (b)(2) and (3) of the Uniform Trust Code. The drafters omitted these mandatory rules and decided not to apply any such rule to the provisions of subsections (a) and (b) of this section. *See* the North Carolina Comment to G.S. 36C-1-105.

The reference in the Official Comment to "subsection (d)" should be understood to refer to subsection (c) of this section.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (a) is amended to provide that a trustee is under a duty (i) to provide accounting information to a qualified beneficiary to whom the trust property is or may be currently distributable and (ii) upon request by any qualified beneficiary, whether a current beneficiary or remainderman, to provide accounting information and a copy of the trust instrument and, in addition, to allow reasonable inspection of matters relating to the trust. Former subsection (a) was interpreted as requiring an affirmative duty of the trustee to provide information to all qualified beneficiaries not dependent upon a request by the beneficiary. Under subsection (a), as amended, the trustee has a duty to provide information to a remainder beneficiary only upon request by the beneficiary.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 35, effective October 1, 2007, rewrote the introductory paragraph of subsection (a); added subdivisions (a)(1) and (a)(2); inserted "subdivision (1) of" both times it appears in subdivision (b)(2); inserted "qualified" near the beginning of subsection (c); and deleted subsection (d), which read: "Subsection (b) of this section applies only to a trust created under a trust instrument executed on or after the effective date of this Chapter." See Editor's note for applicability.

§ 36C-8-814. Discretionary powers; tax savings.

(a) Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of terms such as "absolute", "sole", or "uncontrolled", a trustee abuses the trustee's discretion in exercising or failing to exercise a discretionary power if the trustee acts with bad faith, acts dishonestly, acts with an improper motive, even though not a dishonest motive, or if the trustee fails to use the trustee's judgment in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

(b) Subject to subsection (d) of this section, and unless the terms of the trust indicate by an express reference to this subsection that a rule in this subsection does not apply:

(1) A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power that would, except for this subsection, constitute in whole or in part a general power of appointment may not exercise that power in favor of the trustee/beneficiary, the trustee/beneficiary's estate, the trustee/beneficiary's creditors, or the creditors of the trustee/beneficiary's estate.

(2) Notwithstanding subdivision (1) of this subsection, if the trust confers on the trustee the power to make discretionary distributions to or for the trustee's personal benefit that would, except for this subsection, constitute in whole or in part a general power of appointment, the trustee may exercise the power in accordance with an ascertainable standard.

(3) The trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(4) Any power conferred upon the trustee in the trustee's capacity as a trustee to allocate receipts and expenses as between income and principal in the trustee's own favor must be exercised in accordance with the provisions of Chapter 37A of the General Statutes, the Uniform Principal and Income Act of 2003.

For purposes of this subsection, a "general power of appointment" means any power that would cause the income to be taxed to the trustee in his individual capacity under section 678 of the Internal Revenue Code and any power that would be a general power of appointment, in whole or in part, under section 2041(b)(1) or section 2514(c) of the Internal Revenue Code.

(c) A power whose exercise is limited or prohibited by subsection (b) of this section may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(d) Subsection (b) of this section does not apply to:

(1) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in section 2056(b)(5) or section 2523(e) of the Internal Revenue Code, was previously allowed;

(2) Any trust during any period that the trust may be revoked or amended by its settlor; or

(3) A trust, if contributions to the trust qualify for the annual exclusion under section 2503(c) of the Internal Revenue Code.

(e) If a trust created under a will or trust instrument for the benefit of the spouse of the settlor of the trust, other than a trust that provides that upon the termination of the income interest that the entire remaining trust estate be paid to the estate of the spouse, requires that all the income of the trust be paid not less frequently than annually to the spouse and a federal estate or gift tax marital deduction is claimed with respect to the trust, then, unless the trust instrument specifically provides otherwise by reference to this section, any investment in or retention of unproductive property as an asset of the trust is subject to the power of the spouse to require either that the asset be made productive of income, or that it be converted to assets productive of income, within a reasonable period of time. (1991, c. 736, s. 2; 2003-232, s. 5a; 2005-192, s. 2; 2007-106, s. 36.)

OFFICIAL COMMENT

Despite the breadth of discretion purportedly granted by the wording of a trust, no grant of discretion to a trustee, whether with respect to management or distribution, is ever absolute. A grant of discretion establishes a range within which the trustee may act. The greater the grant of discretion, the broader the range. Pursuant to subsection (a), a trustee's action must always be in good faith, with regard to the purposes of the trust, and in accordance with the trustee's other duties, including the obligation to exercise reasonable skill, care and caution. *See* Sections 801 (duty to administer trust) and 804 (duty to act with prudence). The standard stated in subsection (a) applies only to powers which are to be exercised in a fiduciary as opposed to a nonfiduciary capacity. Regarding the standards for exercising discretion and construing particular language of discretion, see Restatement (Third) of Trusts Section 50 (Tentative Draft No. 2, approved 1999); Restatement (Second) of Trusts Section 187 (1959). *See also* Edward C. Halbach, Jr., *Problems of Discretion in Discretionary Trusts,* 61 Colum. L. Rev. 1425 (1961). Under these standards, whether the trustee has a duty in a given situation to make a distribution depends on the exact language used, whether the standard grants discretion and its breadth, whether this discretion is coupled with a standard, whether the beneficiary has other available resources, and, more broadly, the overriding purposes of the trust. For example, distilling the results of scores of cases, the Restatement (Third) of Trusts concludes that there is a presumption that the "trustee's discretion should be exercised in a manner that will avoid either disqualifying the beneficiary for other benefits or expending trust funds for purposes for which public funds would otherwise be available." Restatement (Third) of Trusts Section 50 cmt. e & Reporter's Notes (Tentative Draft No. 2, 1999).

...

Subsections (b) through (d) rewrite the terms of a trust that might otherwise result in adverse estate and gift tax consequences to a beneficiary-trustee. This Code does not generally address the subject of tax curative provisions. These are provisions that automatically rewrite the terms of trusts that might otherwise fail to qualify for probable intended tax benefits. Such provisions, because they apply to all trusts using or failing to use specified language, are often overbroad, applying not only to trusts intended to qualify for tax benefits but also to smaller trust situations where taxes are not a concern. Enacting tax-curative provisions also requires special diligence by state legislatures to make certain that these provisions are periodically amended to account for the frequent changes in federal tax law. Furthermore, many failures to draft with sufficient care may be correctable by including a tax savings clause in the terms of the trust or by seeking modification of the trust using one or more of the methods authorized by Sections 411-417. Notwithstanding these reasons, the unintended inclusion of the trust in the beneficiary-trustee's gross estate is a frequent enough occurrence that the drafters concluded that it is a topic that this Code should address. It is also a topic on which numerous States have enacted corrective statutes.

A tax curative provision differs from a statute such as Section 416 of this Code, which allows a court to modify a trust to achieve an intended tax benefit. Absent Congressional or regulatory authority authorizing the specific modification, a lower court decree in state court modifying a trust is controlling for federal estate tax purposes only if the decree was issued before the taxing event, which in the case of the estate tax would be the decedent's death. *See* Rev. Rul. 73-142, 1973-1 C.B. 405. There is specific federal authority authorizing modification of trusts for a number of reasons (*see* Comment to Section 416) but not on the specific issues addressed in this section. Subsections (b) through (d), by interpreting the original language of the trust instrument in a way that qualifies for intended tax benefits, obviates the need to seek a later modification of the trust.

Subsection (b) ... states the main rule. Unless the terms of the trust expressly indicate that the rule in this subsection is not to apply, the power to make discretionary distributions to a beneficiary-trustee is automatically limited by the requisite ascertainable standard necessary to avoid inclusion of the trust in the trustee's gross estate or result in a taxable gift upon the trustee's release or exercise of the power. Trusts of which the trustee-beneficiary is also a settlor are not subject to this subsection. In such a case, limiting the discretion of a settlor-trustee to an ascertainable standard would not be sufficient to avoid inclusion of the trust in the settlor's gross estate. *See generally* John J. Regan, Rebecca C. Morgan & David M. English, Tax, Estate and Financial Planning for the Elderly Section 17.07[2][h]. Furthermore, the inadvertent inclusion of a trust in a settlor-trustee's gross estate is a far less frequent and better understood occurrence than is the inadvertent inclusion of the trust in the estate of a nonsettlor trustee-beneficiary.

Subsection (b) ... addresses a common trap, the trustee who is not a beneficiary but who has power to make discretionary distributions to those to whom the trustee owes a legal obligation of support. Discretion to make distributions to those to whom the trustee owes a legal obligation of support, such as to the trustee's minor children, results in inclusion of the trust in the trustee's gross estate even if the power is limited by an ascertainable standard. The applicable regulation provides that the ascertainable standard exception applies only to distributions for the benefit of the decedent, not to distributions to those to whom the decedent owes a legal obligation of support. *See* Treas. Reg. Section 20.2041-1(c)(2).

Subsection (c) deals with cotrustees and adopts the common planning technique of granting the broader discretion only to the independent trustee. Cotrustees who are beneficiaries of the trust or who have a legal obligation to support a beneficiary may exercise the power only as limited by subsection (b). If all trustees are so limited, the court may appoint a special fiduciary to make a decision as to whether a broader exercise is appropriate.

Subsection (d) excludes certain trusts from the operation of this section. Trusts qualifying for the marital deduction will be includable in the surviving spouse's gross estate regardless of whether this section applies. Consequently, if the spouse is acting as trustee, there is no need to limit the power of the spouse-trustee to make, discretionary distributions for the spouse's benefit. Similar reasoning applies to the revocable trust, which, because of the settlor's power to revoke, is automatically includable in the settlor's gross estate even if the settlor is not named as a beneficiary.

QTIP marital trusts are subject to this section, however. QTIP trusts qualify for the marital deduction only if so elected on the federal estate tax return. Excluding a QTIP for which an election has been made from the operation of this section would allow the terms of the trust to be modified after the settlor's death. By not making the QTIP election, an otherwise unascertainable standard would be limited. By making the QTIP election, the trustee's discretion would not be curtailed. This ability to modify a trust depending on elections made on the federal estate tax return could itself constitute a taxable power of appointment resulting in inclusion of the trust in the surviving spouse's gross estate.

The exclusion of the Section 2503(c) minors trust is necessary to avoid loss of gift tax benefits. While preventing a trustee from distributing trust funds in discharge of a legal obligation of support would keep the trust out of the trustee's gross estate, such a restriction might result in loss of the gift tax annual exclusion for contributions to the trust, even if the trustee were otherwise granted unlimited discretion. *See* Rev. Rul. 69-345, 1969-1 C.B. 226.

2004 Amendment. The amendment substitutes "ascertainable standard" which is now a defined term in Section 103(2), for the former and identical definition in this section. No substantive change is intended.

NORTH CAROLINA COMMENT

Subsection (a) of the Uniform Trust Code was modified to omit the provisions requiring a trustee to exercise a discretionary power "in good faith" and to substitute, instead, the common law rule expressed in case law regarding the actions of the trustee that constitute an abuse of discretion. *See Woodard v. Mordecai,* 234 N.C. 463, 67 S.E.2d 639 (1951); *Lineback v. Stout,* 79 N.C. App. 292, 339 S.E.2d 103 (1986).

Subsection (b) modifies the provisions of the Uniform Trust Code by referring in paragraph (1) to the power conferred on the trustee as a "general power of appointment" and to bring forward the language in former G.S. 32-34 defining a "general power of appointment".

Subsection (b) changes North Carolina law by permitting the trustee to exercise a power to make discretionary distributions to or for the trustee's personal benefit as if the power were limited by an ascertainable standard, a familiar federal tax concept.

Subsection (c) is consistent with former G.S. 32-34 allowing a prohibited power to be exercised by a majority of the nondisqualified trustees, or if all are disqualified, authorizing the court to appoint a special trustee.

Subsection (e) was added to the Uniform Trust Code to bring forward the provisions of former G.S. 36A-130(a) intended to save the marital deduction treatment for estate and gift tax purposes with regard to trusts that would otherwise qualify for the marital deduction but do not expressly provide that the spouse may require that the assets be made productive of income or be converted within a reasonable period of time.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, subsection (b) is amended (i) to clarify that an express reference to this subsection must be made for its rules not to apply, (ii) to clarify in subdivision (a) (2) that the power of the trustee to make distributions to the trustee must constitute a general power of appointment and (iii) to bring forward in subdivision (a) (4) the provisions in former G.S.

32-34 requiring a trustee who has the power to allocate receipts and disbursements in the trustee's own favor to exercise such power in accordance with the provisions of Chapter 37A.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 36, effective October 1, 2007, in the introductory paragraph of subsection (b), deleted "expressly" following "terms of the trust" and inserted "by an express reference to this subsection"; inserted "that would, except for this subsection, constitute in whole or in part a general power of appointment" in subdivision (b)(2); and added subdivision (b)(4). See Editor's note for applicability.

CASE NOTES

Editor's Note. — *The case below was decided under prior law.*

Withdrawal of Money for Legal Fees Held Proper. — Where lawyer placed settlement proceeds into an account and later withdrew money for services rendered by law firm, lawyer did not violate subsection (a) of this section which prohibits fiduciaries from making distributions to themselves; plaintiff's argument that the definition of fiduciary in G.S. 32-2 applies to subsection (a) was not supported by the statute and the payment by a lawyer to himself of the legal fee for services rendered in a piece of litigation out of the proceeds of settlement of that litigation is not the discretionary disbursement of principal or income to oneself prohibited by this section. Williams v. Randolph, 94 N.C. App. 413, 380 S.E.2d 553, cert. denied,; 325 N.C. 437, 384 S.E.2d 547 (1989).

§ 36C-8-815. General powers of trustee.

(a) A trustee, without authorization by the court, may exercise any of the following:

(1) Powers conferred by the terms of the trust.

(2) Except as limited by the terms of the trust:

a. All powers over the trust property that an unmarried competent owner has over individually owned property;

b. Any other powers appropriate to achieve the proper investment, management, administration, or distribution of the trust property; and

c. Any other powers conferred by this Chapter.

(b) No provision of this section shall relieve a trustee of the fiduciary duties under this Article. (2005-192, s. 2; 2006-259, s. 13(k).)

OFFICIAL COMMENT

This section is intended to grant trustees the broadest possible powers, but to be exercised always in accordance with the duties of the trustee and any limitations stated in the terms of the trust. This broad authority is denoted by granting the trustee the powers of an unmarried competent owner of individually owned property, unlimited by restrictions that might be placed on it by marriage, disability, or cotenancy.

The powers conferred elsewhere in this Code that are subsumed under this section include all of the specific powers listed in Section 816 as well as other powers described elsewhere in this Code. *See* Sections 108 ... (transfer of principal place of administration), 414(a) (termination of uneconomic trust with value less than $50,000), 417 (combination and division of trusts), 703(e) (delegation to cotrustee), 802(h) (exception to duty of loyalty), 807 (delegation to agent of powers and duties), 810(d) (joint investments), and Article 9 (Uniform Prudent Investor Act). The powers conferred by this Code may be exercised without court approval. If court approval of the exercise of a power is desired, a petition for court approval should be filed.

A power differs from a duty. A duty imposes an obligation or a mandatory prohibition. A power, on the other hand, is a discretion, the exercise of which is not obligatory. The existence of a power, however created or granted, does not speak to the question of whether it is prudent under the circumstances to exercise the power.

NORTH CAROLINA COMMENT

Subsection (a) is similar to former G.S. 36A-136 but is broader in scope. Former G.S. 36A-136 granted powers that a reasonable and prudent person would perform "incident to the collection, preservation, management, use and distribution of the trust to accomplish the best desired result of administering the trust estate legally and in the best interest of the trust beneficiaries". In contrast, subsection (a) not only grants powers to achieve proper management and distribution of the trust, but also all powers "that an unmarried competent owner has over individually owned property".

Subsection (a)(2)b. of the Uniform Trust Code was modified by adding the words "administration, or" following the word "management".

SUPPLEMENTAL NORTH CAROLINA COMMENT (2006)

Effective October 1, 2006, subsection (a) is amended to clarify that a trustee may exercise any of the powers described in subsections (a)(1) and (2). In addition, subsection (b) is amended to clarify that, consistent with the provisions of G.S. 36C-10-1012, third parties may rely upon the trustee's exercise of power without confirming that the trustee exercised the powers in accordance with the trustee's fiduciary duties.

Editor's Note. — Session Laws 2006-259, s. 13(r), provides: "The Revisor of Statutes is authorized to cause to be printed any amendments to the explanatory comments of the drafters of S.L. 2005-192 that are prepared by the drafters of this section, as the Revisor deems appropriate."

Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(k), effective October 1, 2006, in subsection (a), added "any of the following" at the end of the introductory language, and made a punctuation change in subdivision (a)(1); and rewrote subsection (b), which read: "The exercise of a power is subject to the fiduciary duties prescribed by this Article." See Editor's note for applicability.

§ 36C-8-816. Specific powers of trustee.

Without limiting the authority conferred by G.S. 36C-8-815, a trustee may:

(1) Collect and control trust property and accept or reject additions to the trust property from a settlor or any other person;

(2) Invest and reinvest trust property as the trustee considers advisable in accordance with the trust, and to acquire or sell property, for cash or on credit, at public or private sale;

(3) Exchange, partition, or otherwise change the character of trust property;

(4) Deposit trust money in an account in a regulated financial services institution, including an institution operated by the trustee or an affiliate of the trustee upon compliance with any applicable requirements for the deposit;

(5) Borrow money, with or without security, including from a corporate trustee's lending department, renew or modify loans, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

(6) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, venture, agricultural operation, or other form of business or enterprise, form and transfer, assign, and convey to that form of business or enterprise all or any part of the trust property in exchange for the stock, securities, or obligations of that form of business or enterprise, continue any business or other enterprise, and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization, or contributing additional capital;

(7) With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to:
   a. Vote, or give general or limited proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement, or execute waivers, consents, or objections with respect to those securities;
   b. Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;
   c. Pay calls, assessments, and other sums chargeable or accruing against the securities, and sell or exercise stock subscription or conversion rights;
   d. Deposit the securities with a depositary or other regulated financial service institution; and
   e. Consent, directly or through a committee or other agent, to the merger, consolidation, reorganization, readjustment of capital or financial structure, lease, sale, dissolution, or liquidation of a business enterprise, and elect whether to participate as a member of a class in any litigation involving the securities;

(8) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing party walls or buildings or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries, make contracts, licenses, leases, conveyances, or grants of every nature and kind with respect to crops, gravel, sand, oil, gas, timber and forest products, other usufructs or natural resources, and other benefits or incidents of the real property;

(9) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;

(10) Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

(11) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust at the expense of the trust;

(12) Abandon, relinquish any or all rights to, or decline to administer property of no value or of insufficient benefit or value to the trust to justify its collection or continued administration;

(13) With respect to possible liability for violation of environmental law:

a. Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;

b. Take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;

c. Decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;

d. Compromise claims against the trust that may be asserted for an alleged violation of environmental law; and

e. Pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law;

(14) Pay or contest any claim, compromise, adjust or otherwise settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;

(15) Pay from the trust property taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust and the protection of the trust property;

(16) Exercise elections with respect to federal, state, and local taxes;

(17) Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance payable to the trustee, exercise rights under that plan, annuity, or life insurance, including exercise of the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;

(18) Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and acquire a lien on future distributions for repayment of those loans;

(19) Pledge trust property to guarantee loans made by others to any beneficiary;

(19a) Guarantee loans made by others to any beneficiary;

(19b) Pledge trust property to guarantee loans made by others to any proprietorship, partnership, limited liability company, business trust, corporation, venture, agricultural operation, or other form of business or enterprise in which the trust or any beneficiary has an ownership interest.

(19c) Guarantee loans made by others to a proprietorship, partnership, limited liability company, business trust, corporation, venture, agricultural operation, or other form of business or enterprise in which the trust or any beneficiary has an ownership interest.

(20) Appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, limit those powers the appointed trustee may exercise and the duties for which the appointed trustee is responsible, require that the appointed trustee furnish security, and remove any trustee so appointed;

(21) Pay an amount distributable to a beneficiary regardless of whether the beneficiary is a minor or incompetent or whether the trustee reasonably believes the beneficiary to be incompetent, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or if the beneficiary is a minor or incompetent or a person the trustee reasonably believes to be incompetent, by:
  a. Paying it to the beneficiary's general guardian or the guardian of the beneficiary's estate;
  b. Paying it to a custodian under a uniform transfer to minors act or custodial trustee under a uniform custodial trust act and, for that purpose, creating a custodianship or custodial trust for the benefit of the beneficiary;
  c. Paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf; or
  d. Managing it as a separate fund on the beneficiary's behalf.

  A trustee making payments under this subdivision does not have any duty to see to the application of the payments so made, if the trustee exercised due care in the selection of the person, including a minor or incompetent, to whom the payments were made, and the receipt of that person shall be full acquittance to the trustee. Notwithstanding the foregoing, if a mandatory distribution is to be paid to a beneficiary who is not a minor or incompetent or a person the trustee reasonably believes to be incompetent, the distribution may be applied for the beneficiary's benefit only with the beneficiary's consent;

(22) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares without regard to the income tax basis or other special tax attributes of the assets, as the trustee finds to be most practicable and for the best interests of the distributees, value the trust property for those purposes, and adjust for resulting differences in valuation; and to distribute trust property in kind or in cash, or partially in kind and partially in cash, in divided or undivided interests;

(23) Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;

(24) Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;

(25) Make, execute, and deliver contracts and other instruments, including instruments under seal, that are useful to achieve or facilitate the exercise of the trustee's powers;

(26) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it;

(27) Employ as advisors or assistants in the performance of administrative duties, or delegate administrative duties in the manner provided in G.S. 36C-8-807, to persons, firms, and corporations, including agents, auditors, accountants, brokers, attorneys-at-law, attorneys-in-fact, investment advisors, appraisers, custodians, rental agents, realtors, and tax specialists;

(28) Bid on property at a foreclosure sale, or acquire property from a mortgagor or obligor without foreclosure, and retain the property so bid on or taken over without foreclosure;

(29) Divide one trust into several trusts and make distributions from those trusts in the manner provided in G.S. 36C-4-417;

(30) Request an order from the court for the sale of real or personal property under Article 29A of Chapter 1 of the General Statutes, or for the exchange, partition, or other disposition or change in the character of, or for the grant of options or other rights in or to, such property; and

(31) Distribute the assets of an inoperative trust consistent with the authority granted under G.S. 28A-22-10. (2005-192, s. 2; 2007-106, s. 37.)

OFFICIAL COMMENT

This section enumerates specific powers commonly included in trust instruments and in trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust. *See* Section 105. The powers listed are also subsumed under the general authority granted in Section 815(a)(2) to exercise all powers over the trust property which an unmarried competent owner has over individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. The powers listed add little of substance not already granted by Section 815 and powers conferred elsewhere in the Code, which are listed in the Comment to Section 815. While the Committee drafting this Code discussed dropping the list of specific powers, it concluded that the demand of third parties to see language expressly authorizing specific transactions justified retention of a detailed list.

As provided in Section 815(b), the exercise of a power is subject to fiduciary duties except as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised.

Many of the powers listed in this section are similar to the powers listed in Section 3 of the Uniform Trustees' Powers Act (1964). Several are new, however, and other powers drawn from that Act have been updated. The powers enumerated in this section may be divided into categories. Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real estate, securities, and business interests, are powers that any individual can exercise. Other powers, such as the power to collect trust property, are by their very nature only applicable to trustees. Other specific powers, particularly those listed in other sections of the Uniform Trust Code, modify a trustee duty that would otherwise apply. *See, e.g.,* Sections 802(h) (exceptions to duty of loyalty) and 810(d) (joint investments as exception to earmarking requirement).

Paragraph (1) authorizes a trustee to collect trust property and collect or decline additions to the trust property. The power to collect trust property is an incident of the trustee's duty to administer the trust as provided in Section 801. The trustee has a duty to enforce claims as provided in Section 811, the successful prosecution of which can result in collection of trust property. Pursuant to Section 812, the trustee also has a duty to collect trust property from a former trustee or other person holding trust property. For an application of the power to reject additions to the trust property, see Section 816(13) (power to decline property with possible environmental liability).

Paragraph (2) authorizes a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the trust. Restatement (Third) of Trusts: Prudent Investor Rule Section 190 (1992). In arranging a sale, a trustee must comply with the duty to act prudently as provided in Section 804. This duty may dictate that the sale be made with security.

Paragraph (4) authorizes a trustee to deposit funds in an account in a regulated financial-service institution. This includes the right of a financial institution trustee to deposit funds in its own banking department as authorized by Section 802(h)(4).

Paragraph (5) authorizes a trustee to borrow money. Under the Restatement, the sole limitation on such borrowing is the general obligation to invest prudently. *See* Restatement (Third) of Trusts: Prudent Investor Rule Section 191 (1992). Language clarifying that the loan may extend beyond the duration of the trust was added to negate an older view that the trustee only had power to encumber the trust property for the period that the trust was in existence.

Paragraph (6) authorizes the trustee to continue, contribute additional capital to, or change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in Article 9.

Paragraph (7), regarding powers with respect to securities, codifies and amplifies the principles of Restatement (Second) of Trusts Section 193 (1959).

Paragraph (9), authorizing the leasing of property, negates the older view, reflected in Restatement (Second) of Trusts Section 189 cmt. c (1959), that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable to all investments.

Paragraph (10), authorizing a trustee to grant options with respect to sales, leases or other dispositions of property, negates the older view, reflected in Restatement (Second) of Trusts Section 190 cmt. k (1959), that a trustee could not grant another person an option to purchase trust property. Like any other investment decision, whether the granting of an option is appropriate is a question of prudence under the standards of Article 9.

Paragraph (11), authorizing a trustee to purchase insurance, empowers a trustee to implement the duty to protect trust property. *See* Section 809. The trustee may also insure beneficiaries, agents, and the trustee against liability, including liability for breach of trust.

Paragraph (13) is one of several provisions in the Uniform Trust Code designed to address trustee concerns about possible liability for violations of environmental law. This paragraph collects all the powers relating to environmental concerns in one place even though some of the powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with other paragraphs of this section (decline property, paragraph (1); compromise claims, paragraph (14); pay expenses, paragraph (15)). Numerous States have legislated on the subject of environmental liability of fiduciaries. For a representative state statute, see Tex. Prop. Code Ann. Section 113.025. *See also* Sections 701(c)(2) (designated trustee may inspect property to determine potential violation of environmental or other law or for any purpose) and 1010(b) (trustee not personally liable for violation of environmental law arising from ownership or control of trust property).

Paragraph (14) authorizes a trustee to pay, contest, settle, or release claims. Section 811 requires that a trustee need take only "reasonable" steps to enforce claims, meaning that a trustee may release a claim not only when it is uncollectible, but also when collection would be uneconomic. *See* Restatement (Second) of Trusts Section 192 (1959) (power to compromise, arbitrate and abandon claims).

Paragraph (15), among other things, authorizes a trustee to pay compensation to the trustee and agents. ... Regarding ... trustee compensation, see Section 708. *See also* Section 709 (repayment of trustee expenditures). ...

Paragraph (16) authorizes a trustee to make elections with respect to taxes. The Uniform Trust Code leaves to other law the issue of whether the trustee, in making such elections, must make compensating adjustments in the beneficiaries' interests.

Paragraph (17) authorizes a trustee to take action with respect to employee benefit or retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be beneficiary designations which the settlor has made payable to the trustee, but this Code also allows the trustee to acquire ownership of annuities or life insurance.

Paragraphs (18) and (19) allow a trustee to make loans to a beneficiary or to guarantee loans of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and the purposes of the trust. Frequently, a trustee will make loans to a beneficiary which might be considered less than prudent in an ordinary commercial sense although of great benefit to the beneficiary and which help carry out the trust purposes. If the trustee requires security for the loan to the beneficiary, adequate security under this paragraph may consist of a charge on the beneficiary's interest in the trust. *See* Restatement (Second) of Trusts Section 255 (1959). However, the interest of a beneficiary subject to a spendthrift restraint may not be pledged as security for a loan. *See* Section 502.

Paragraph (20) authorizes the appointment of ancillary trustees in jurisdictions in which the regularly appointed trustee is unable or unwilling to act. Normally, an ancillary trustee will be appointed only when there is a need to manage real estate located in another jurisdiction. This paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer on the ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees is a topic which a settlor may wish to address in the terms of the trust.

Paragraph (21) authorizes a trustee to make payments to another person for the use or benefit of a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated. Although an adult relative or other person receiving funds is required to spend it on the beneficiary's behalf, it is preferable that the trustee make the distribution to a person having more formal fiduciary responsibilities. For this reason, payment may be made to an adult relative only if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable of acting for the beneficiary.

Paragraph (22) authorizes a trustee to make non-pro-rata distributions and allocate particular assets in proportionate or disproportionate shares. This power provides needed flexibility and lessens the risk that a non-pro-rata distribution will be treated as a taxable sale.

Paragraph (23) authorizes a trustee to resolve disputes through mediation, arbitration or other methods of alternate dispute resolution. The drafters of this Code encourage the use of such alternate methods for resolving disputes. Arbitration is a form of nonjudicial settlement agreement authorized by Section 111. In representing beneficiaries and others in connection with arbitration or in approving settlements obtained through mediation or other methods of ADR, the representation principles of Article 3 may be applied. Settlors wishing to encourage use of alternate dispute resolution may draft to provide it. For sample language, see American Arbitration Association, Arbitration Rules for Wills and Trusts (1995).

Paragraph (24) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section 709 and Comment. *See also* Section 811 (duty to defend actions).

Paragraph (26), which is similar to Section 344 of the Restatement (Second) of Trusts (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property.

NORTH CAROLINA COMMENT

The specific powers of the Uniform Trust Code were modified (i) to ensure inclusion of the substance of all of the powers in G.S. 32-27 and former G.S. 36A-136, (ii) to add a few specific powers not in current or former law, and (iii) to make other clarifying changes.

Two notable changes in the specific powers in former G.S. 36A-136 include the following:

(i) If the terms of the will did not provide otherwise, under former G.S. 36A-136(8) a trustee could dispose of real property only pursuant to court order or without court order as provided in Article 28A of Chapter 1 of the General Statutes entitled "Judicial Sales", whereas under paragraph (2) of this section the disposition of real property is not so restricted.

(ii) The specific power in former G.S. 36A-136(20) authorized the trustee to borrow money for the sole purpose of paying debts, taxes and other claims against the trust property whereas paragraph (5) of this section does not restrict borrowing to these purposes.

Some of the more significant changes and additions made in the Uniform Trust Code are:

(i) Subparagraph e. was added to paragraph (7) concerning the exercise of rights to consent to mergers, consolidation or other adjustment or disposition of a business enterprise and to elect to participate as a member of a class in any litigation involving securities.

(ii) Paragraphs (19a), (19b) and (19c) were added to clarify and expand provisions concerning the pledge of trust property and guaranty of loans to a beneficiary and to an entity in which the trust has an ownership interest.

(iii) Paragraph (22) was amended to permit dispositions of trust property without regard to the income tax basis and other tax attributes as provided in G.S. 32-27(27).

(iv) Paragraph (27) was added to bring forward the substance of provisions of G.S. 32-27(24) and former G.S. 36A-136(14).

(v) Paragraph (28) was added to bring forward provisions in former G.S. 36A-136(19).

(vi) Paragraph (29) was added to refer to G.S. 36C-4-417 bringing forward the substance of provisions of G.S. 32-27(25b) and former G.S. 36A-136(24) with modifications.

(vii) Paragraph (30) was added to authorize but not require the trustee to request an order from the court for the sale or other disposition of real or personal property as provided in former G.S. 36A-138 and former G.S. 36A-140.

(viii) Paragraph (31) was added to bring forward the provisions of former G.S. 36A-141.

SUPPLEMENTAL NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, paragraphs (19b) and (19c) are amended to clarify that a trustee may guarantee loans and pledge property to guarantee loans made by others to an entity in which the beneficiary has an ownership interest.

In addition, also effective October 1, 2007, paragraph (21) is amended to grant to a trustee the power to apply distributions for a beneficiary's benefit even though the beneficiary may not be under a legal disability, except that a beneficiary must consent to the application for the beneficiary's benefit of any amount required to be paid to the beneficiary.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing

explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 37, effective October 1, 2007, substituted "any beneficiary" for "a beneficiary" in subdivisions (19) and (19a); substituted "any proprietorship" for "a proprietorship" in subdivision (19a); inserted "or any beneficiary" in subdivisions (19b) and (19c); and in subdivision (21), rewrote the introductory paragraph, deleted "or, if the beneficiary does not have a general guardian or guardian of the beneficiary's estate, the guardian of the beneficiary's person" at the end of subdivision (21)a., and in the last paragraph, substituted "including a minor" for "including the minor" in the first sentence, and added the last sentence. See Editor's note for applicability.

§ 36C-8-817. Distribution upon termination.

Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes. (2005-192, s. 2.)

OFFICIAL COMMENT

This section contains ... provisions governing distribution upon termination. Other provisions of the Uniform Trust Code relevant to distribution upon termination include Section 816(26) (powers upon termination to windup administration and distribution), and 1005 (limitation of action against trustee).

...

... [This section] recognizes that upon an event terminating or partially terminating a trust, expeditious distribution should be encouraged to the extent reasonable under the circumstances. However, a trustee is entitled to retain a reasonable reserve for payment of debts, expenses, and taxes. Sometimes these reserves must be quite large, for example, upon the death of the beneficiary of a QTIP trust that is subject to federal estate tax in the beneficiary's estate. Not infrequently, a substantial reserve must be retained until the estate tax audit is concluded several years after the beneficiary's death.

...

NORTH CAROLINA COMMENT

This section, which incorporates the provisions of subsection (b) of the Uniform Trust Code, is generally consistent with prior North Carolina law. *See First-Citizens Bank & Trust Co. v. Carr,* 279 N.C. 539, 184 S.E.2d 269 (1971) where the court said that upon termination of a trust "it is the duty of the trustee to distribute, with reasonable care and prudence, the corpus of the trust to those entitled to such property by virtue of the trust instrument".

The drafters omitted subsection (a) of the Uniform Trust Code providing that upon termination of a trust the trustee may send to the beneficiaries a proposal for distribution and that the right of the beneficiary to object to the proposed distribution terminates if no objection is made within 30 days but only if the report informed the beneficiary of the right to object and of the time allowed to object. The drafters thought this provision would rarely, if ever, be used and was therefore unnecessary.

Subsection (c) of the Uniform Trust Code was also omitted because the drafters considered it to be a duplication of the provisions contained in G.S. 36C-10-1009.

ARTICLE 9.

Uniform Prudent Investor Act.

NORTH CAROLINA COMMENT

In accordance with the recommendation of the Commissioners on Uniform State Laws, this Article recodifies the North Carolina Uniform Prudent Investor Act as a part of this Chapter. The Official Comments to this Article bring forward the Official Comments to the North Carolina Uniform Prudent Investor Act.

The provisions in the North Carolina Uniform Prudent Investor Act listed below were not included in this Article because similar provisions appear in Article 8 of this Chapter that are applicable generally to trust administration, including the investment and management of trust property.

Subject Matter	Former Section in the North Carolina Uniform Prudent Investor Act	Corresponding Section in Chapter 36C
Duty of loyalty	36A-165	36C-8-802
Duty of impartiality	36A-166	36C-8-803
Investment costs	36A-167	36C-8-805
Duty of trustee with special skills	36A-162(f)	36C-8-806
Delegation to agents	36A-169	36C-8-807

Provisions identical to those in former G.S. 36A-173 concerning the severability of valid from invalid provisions applicable to the North Carolina Uniform Prudent Investor Act appear in G.S. 36C-11-1103 applicable to this Chapter.

§ 36C-9-901. Prudent investor rule; applicability.

(a) Except as otherwise provided in subsection (b) of this section, a trustee who invests and manages trust assets owes a duty to the beneficiaries of the trust to comply with the prudent investor rule set forth in this Article.

(b) The prudent investor rule is a default rule and may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust that govern or direct investments in a manner inconsistent with this Article. A trustee is not liable to a beneficiary to the extent that the trustee acted in reasonable reliance on the terms of the trust.

(c) The following terms or comparable language in a trust, unless otherwise limited or modified, authorize any investment or strategy permitted under this Article: "Chapter 36A", "investments in accordance with Article 15 of Chapter 36A", "investments in accordance with Article 9 of Chapter 36C", "investments permissible by law for investment of trust funds", "legal investments", "authorized investments", "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital", "prudent man rule", "prudent trustee rule", "prudent person rule", and "prudent investor rule". This Article also applies where a trust contains no investment standard.

(d) This Article does not apply to:

(1) Unless the trust provides otherwise by specific reference to this Article:

a. Trusts under any federal employee retirement income security statute or other retirement or pension trusts;

b. Trusts that are created by legislative act;

c. Trusts that are created by or under premarital or postmarital agreements, divorce settlements, settlements of other proceedings or disputes;

d. Transfers under a Uniform Transfers to Minors Act;
e. Transfers under a Uniform Custodial Trust Act; or
f. Honorary trusts, trusts for pets, and trusts for cemetery lots.

(2) Trusts imposed or required under another Chapter of the General Statutes or by rule in which the investment of the trust funds is regulated by the other Chapter or by rule, unless a provision of the other chapter or the rule provides otherwise by a specific reference to this Article. (1999-215, s. 1; 2001-267, s. 7; 2005-192, s. 2.)

OFFICIAL COMMENT

This section imposes the obligation of prudence in the conduct of investment functions and identifies further sections of the Act that specify the attributes of prudent conduct.

Origins. The prudence standard for trust investing traces back to *Harvard College v. Amory,* 26 Mass. (9 Pick.) 446 (1830). Trustees should "observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." *Id.* at 461.

Prior Legislation. The Model Prudent Man Rule Statute (1942), sponsored by the American Bankers Association, undertook to codify the language of the Amory case. *See* Mayo A. Shattuck, The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century, *12 Ohio State L.J. 491, at 501 (1951)*; for the text of the model act, which inspired many state statutes, see *id.* at 508-09. Another prominent codification of the Amory standard is Uniform Probate Code § 7-302 (1969), which provides that "the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another..."

Congress has imposed a comparable prudence standard for the administration of pension and employee benefit trusts in the Employee Retirement Income Security Act (ERISA), enacted in 1974. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a), provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and ... with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims..."

Prior Restatement. The Restatement of Trusts 2d (1959) also tracked the language of the Amory case: "In making investments of trust funds the trustee is under a duty to the beneficiary ... to make such investments and only such investments as a prudent man would make of his own property having in view the preservation of the estate and the amount and regularity of the income to be derived..." Restatement of Trusts 2d § 227 (1959).

Objective Standard. The concept of prudence in the judicial opinions and legislation is essentially relational or comparative. It resembles in this respect the "reasonable person" rule of tort law. A prudent trustee behaves as other trustees similarly situated would behave. The standard is, therefore, objective rather than subjective. Sections 2 through 9 of this Act identify the main factors that bear on prudent investment behavior.

Variation. Almost all of the rules of trust law are default rules, that is, rules that the settlor may alter or abrogate. Subsection (b) carries forward this traditional attribute of trust law. Traditional trust law also allows the beneficiaries of the trust to excuse its performance, when they are all capable and not misinformed. Restatement of Trusts 2d § 216 (1959).

NORTH CAROLINA COMMENT

This section recodifies with minor modifications the provisions of former G.S. 36A-161 except for former G.S. 36A-161(b)(3) which excluded from the operation of the North Carolina Uniform Prudent Investor Act certain trusts that are excluded from the operation of this Chapter by G.S. 36C-1-102.

Editor's Note. — Session Laws 2005-192, which enacted Chapter 36C, in s. 6, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Official Comments, copyright © 2005, are reprinted in this Chapter with the permission of the National Conference of Commissioners on Uniform State Laws. It is believed that the Official Comments will prove of value to the practictioner in understanding and applying the text of this Chapter.

Effective Date and Applicability. — Session Laws 2005-192, which enacted Chapter 36C, in s. 7(a) provides: "Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

"Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded."

Official Comment on Effective Date and Applicability. — The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code Section 8 101.

North Carolina Comment on Effective Date and Applicability. — The drafters modified the provisions of the Uniform Trust Code relating to its application to trust instruments executed before its effective date by adding the phrase "or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary" to the end of the first sentence of the second paragraph. Although this Chapter is intended to have broad application, the drafters concluded that a rule of construction or presumption provided in this Chapter should not be applied to a trust instrument executed before the effective date of this Chapter if the application of such rule or presumption would impair the substantial rights of a beneficiary of a trust established under such a trust instrument.

§ 36C-9-902. Standard of care; portfolio strategy; risk and return objectives.

(a) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

(b) A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(c) Among circumstances that a trustee shall consider in investing and managing trust assets are any of the following that are relevant to the trust or its beneficiaries:

(1) General economic conditions;
(2) The possible effect of inflation or deflation;
(3) The expected tax consequences of investment decisions or strategies;
(4) The role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;
(5) The expected total return from income and the appreciation of capital;
(6) Other resources of the beneficiaries known to the trustee;
(7) Needs for liquidity, regularity of income, and preservation or appreciation of capital; and
(8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

(d) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(e) A trustee may invest in any kind of property or type of investment consistent with the standards of this Article. (1999-215, s. 1; 2005-192, s. 2.)

OFFICIAL COMMENT

Section 2 is the heart of the Act. Subsections (a), (b), and (c) are patterned loosely on the language of the Restatement of Trusts 3d: Prudent Investor Rule § 227 (1992), and on the 1991 Illinois statute, 760 § ILCS 5/5a (1992). ...

Objective Standard. Subsection (a) of this Act carries forward the relational and objective standard made familiar in the Amory case, in earlier prudent investor legislation, and in the Restatements. Early formulations of the prudent person rule were sometimes troubled by the effort to distinguish between the standard of a prudent person investing for another and investing on his or her own account. The language of subsection (a), by relating the trustee's duty to "the purposes, terms, distribution requirements, and other circumstances of the trust," should put such questions to rest. The standard is the standard of the prudent investor similarly situated.

Portfolio Standard. Subsection (b) emphasizes the consolidated portfolio standard for evaluating investment decisions. An investment that might be imprudent standing alone can become prudent if undertaken in sensible relation to other trust assets, or to other nontrust assets. In the trust setting the term "portfolio" embraces the entire trust estate.

Risk and Return. Subsection (b) also sounds the main theme of modern investment practice, sensitivity to the risk/return curve. *See* generally the works cited in the Prefatory Note to this Act, under "Literature." Returns correlate strongly with risk, but tolerance for risk varies greatly with the financial and other circumstances of the investor, or in the case of a trust, with the purposes of the trust and the relevant circumstances of the beneficiaries. A trust whose main purpose is to support an elderly widow of modest means will have a lower risk tolerance than a trust to accumulate for a young scion of great wealth.

Subsection (b) of this Act follows Restatement of Trusts 3d: Prudent Investor Rule § 227(a), which provides that the standard of prudent investing "requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust."

Factors Affecting Investment. Subsection (c) points to certain of the factors that commonly bear on risk/return preferences in fiduciary investing. This listing is nonexclusive. Tax considerations, such as preserving the stepped up basis on death under Internal Revenue Code § 1014 for low-basis assets, have traditionally been exceptionally important in estate planning for affluent persons. Under the present recognition rules of the federal income tax, taxable investors, including trust beneficiaries, are in general best served by an investment strategy that minimizes the taxation incident to portfolio turnover. *See* generally Robert H. Jeffrey & Robert D. Arnott, Is Your Alpha Big Enough to Cover Its Taxes?, Journal of Portfolio Management 15 (Spring 1993).

Another familiar example of how tax considerations bear upon trust investing: In a regime of pass-through taxation, it may be prudent for the trust to buy lower yielding tax-exempt securities for high-bracket taxpayers, whereas it would ordinarily be imprudent for the trustees of a charitable trust, whose income is tax exempt, to accept the lowered yields associated with tax-exempt securities.

When tax considerations affect beneficiaries differently, the trustee's duty of impartiality requires attention to the competing interests of each of them.

Subsection (c)(8), allowing the trustee to take into account any preferences of the beneficiaries respecting heirlooms or other prized assets, derives from the Illinois act, 760 ILCS § 515(a)(4) (1992).

Duty to Monitor. Subsections (a) through (d) apply both to investing and managing trust assets. "Managing" embraces monitoring, that is, the trustee's continuing responsibility for oversight of the suitability of investments already made as well as the trustee's decisions respecting new investments.

Duty to Investigate. Subsection (d) carries forward the traditional responsibility of the fiduciary investor to examine information likely to bear importantly on the value or the security of an investment -- for example, audit reports or records of title. *E.g., Estate of Collins,* 72 Cal. App. 3d 663, 139 Cal. Rptr. 644 (1977) (trustees lent on a junior mortgage on unimproved real estate, failed to have land appraised, and accepted an unaudited financial statement; held liable for losses).

Abrogating Categoric Restrictions. Subsection 2(e) clarifies that no particular kind of property or type of investment is inherently imprudent. Traditional trust law was encumbered with a variety of categoric exclusions, such as prohibitions on junior mortgages or new ventures. In some states legislation created so-called "legal lists" of approved trust investments. The universe of investment products changes incessantly. Investments that were at one time thought too risky, such as equities, or more recently, futures, are now used in fiduciary portfolios. By contrast, the investment that was at one time thought ideal for trusts, the long-term bond, has been discovered to import a level of risk and volatility -- in this case, inflation risk -- that had not been anticipated. Accordingly, section 2(e) of this Act follows Restatement of Trusts 3d: Prudent Investor Rule in abrogating categoric restrictions. The Restatement says: "Specific investments or techniques are not per se prudent or imprudent. The riskiness of a specific property, and thus the propriety of its inclusion in the trust estate, is not judged in the abstract but in terms of its anticipated effect on the particular trust's portfolio." Restatement of Trusts 3d: Prudent Investor Rule § 227, Comment *f*, at 24 (1992). The premise of subsection 2(e) is that trust beneficiaries are better protected by the Act's emphasis on close attention to risk/return objectives as prescribed in subsection 2(b) than in attempts to identify categories of investment that are per se prudent or imprudent.

The Act impliedly disavows the emphasis in older law on avoiding "speculative" or "risky" investments. Low levels of risk may be appropriate in some trust settings but inappropriate in others. It is the trustee's task to invest at a risk level that is suitable to the purposes of the trust.

The abolition of categoric restrictions against types of investment in no way alters the trustee's conventional duty of loyalty, which is reiterated for the purposes of this Act in Section 5. For example, were the trustee to invest in a second mortgage on a piece of real property owned by the trustee, the investment would be wrongful on account of the trustee's breach of the duty to abstain from self-dealing, even though the investment would no longer automatically offend the former categoric restriction against fiduciary investments in junior mortgages.

The Drafting Committee declined the suggestion that the Act should create an exception to the prudent investor rule (or to the diversification requirement of Section 3) in the case of smaller trusts. The Committee believes that subsections (b) and (c) of the Act emphasize factors that are sensitive to the traits of small trusts; and that subsection (f) adjusts helpfully for the distinction between professional and amateur trusteeship. Furthermore, it is always open to the settlor of a trust under Section 1(b) of the Act to reduce the trustee's standard of care if the settlor deems such a step appropriate. The official comments to the 1992 Restatement observe that pooled investments, such as mutual funds and bank common trust funds, are especially suitable for small trusts. Restatement of Trusts 3d: Prudent Investor Rule § 227, Comments *h, m,* at 28, 51; reporter's note to Comment *g, id.* at 83.

Matters of Proof. Although virtually all express trusts are created by written instrument, oral trusts are known, and accordingly, this Act presupposes no formal requirement that trust terms be in writing. When there is a written trust instrument, modern authority strongly favors allowing evidence extrinsic to the instrument to be consulted for the purpose of ascertaining the settlor's intent. *See* Uniform Probate Code § 2-601 (1990), Comment; Restatement (Third) of Property: Donative Transfers (Preliminary Draft No. 2, ch. 11, Sept. 11, 1992).

NORTH CAROLINA COMMENTS

This section recodifies the provisions of former G.S. 36A-162 except for former G.S. 36A-162(f) concerning the duty of a trustee with special skills which under G.S. 36C-8-806 is applicable to all matters of trust administration, including the investment and management of trust property.

§ 36C-9-903. Diversification.

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying. (1999-215, s. 1; 2005-192, s. 2.)

OFFICIAL COMMENT

The language of this section derives from Restatement of Trusts 2d § 228 (1959). ERISA insists upon a comparable rule for pension trusts. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C). Case law overwhelmingly supports the duty to diversify. *See* Annot., Duty of Trustee to Diversify Investments, and Liability for Failure to Do So, 24 A.L.R. 3d 730 (1969) & 1992 Supp. at 78-79.

The 1992 Restatement of Trusts takes the significant step of integrating the diversification requirement into the concept of prudent investing. Section 227(b) of the 1992 Restatement treats diversification as one of the fundamental elements of prudent investing, replacing the separate section 228 of the Restatement of Trusts 2d. The message of the 1992 Restatement, carried forward in Section 3 of this Act, is that prudent investing ordinarily requires diversification.

Circumstances can, however, overcome the duty to diversify. For example, if a tax-sensitive trust owns an underdiversified block of low-basis securities, the tax costs of recognizing the gain may outweigh the advantages of diversifying the holding. The wish to retain a family business is another situation in which the purposes of the trust sometimes override the conventional duty to diversify.

Rationale for Diversification. "Diversification reduces risk ... [because] stock price movements are not uniform. They are imperfectly correlated. This means that if one holds a well diversified portfolio, the gains in one investment will cancel out the losses in another." Jonathan R. Macey, An Introduction to Modern Financial Theory 20 (American College of Trust and Estate Counsel Foundation, 1991). For example, during the Arab oil embargo of 1973, international oil stocks suffered declines, but the shares of domestic oil producers and coal companies benefitted. Holding a broad enough portfolio allowed the investor to set off, to some extent, the losses associated with the embargo.

Modern portfolio theory divides risk into the categories of "compensated" and "uncompensated" risk. The risk of owning shares in a mature and well-managed company in a settled industry is less than the risk of owning shares in a start-up high-technology venture. The investor requires a higher expected return to induce the investor to bear the greater risk of disappointment associated with the start-up firm. This is compensated risk -- the firm pays the investor for bearing the risk. By contrast, nobody pays the investor for owning too few stocks. The investor who owned only international oils in 1973 was running a risk that could have been reduced by having configured the portfolio differently -- to include investments in different industries. This is uncompensated risk - nobody pays the investor for owning shares in too few industries and too few companies. Risk that can be eliminated by adding different stocks (or bonds) is uncompensated risk. The object of diversification is to minimize this uncompensated risk of having too few investments. "As long as stock prices do not move exactly together, the risk of a diversified portfolio will be less than the average risk of the separate holdings." R.A. Brealey, An Introduction to Risk and Return from Common Stocks 103 (2d ed. 1983).

There is no automatic rule for identifying how much diversification is enough. The 1992 Restatement says: "Significant diversification advantages can be achieved with a small number of well-selected securities representing different industries... Broader diversification is usually to be preferred in trust investing," and pooled investment vehicles "make thorough diversification practical for most trustees." Restatement of Trusts 3d: Prudent Investor Rule § 227, General Note on Comments e-h, at 77 (1992). *See* also Macey, supra, at 23-24; Brealey, supra, at 111-13.

Diversifying by Pooling. It is difficult for a small trust fund to diversify thoroughly by constructing its own portfolio of individually selected investments. Transaction costs such as the round-lot (100 share) trading economies make it relatively expensive for a small investor to assemble a broad enough portfolio to minimize uncompensated risk. For this reason, pooled investment vehicles have become the main mechanism for facilitating diversification for the investment needs of smaller trusts.

Most states have legislation authorizing common trust funds; see 3 Austin W. Scott & William F. Fratcher, The Law of Trusts § 227.9, at 463-65 n.26 (4th ed. 1988) (collecting citations to state statutes). As of 1992, 35 states and the District of Columbia had enacted the Uniform Common Trust Fund Act (UCTFA) (1938), overcoming the rule against commingling trust assets and expressly enabling banks and trust companies to establish common trust funds. 7 Uniform Laws Ann. 1992 Supp. at 130 (schedule of adopting states). The Prefatory Note to the UCTFA explains: "The purposes of such a common or joint investment fund are to diversify the investment of the several trusts and thus spread the risk of loss, and to make it easy to invest any amount of trust funds quickly and with a small amount of trouble." 7 Uniform Laws Ann. 402 (1985).

Fiduciary Investing in Mutual Funds. Trusts can also achieve diversification by investing in mutual funds. *See* Restatement of Trusts 3d: Prudent Investor Rule, § 227, Comment *m*, at 99-100 (1992) (endorsing trust investment in mutual funds). ERISA § 401(b)(1), 29 U.S.C. § 1101(b)(1), expressly authorizes pension trusts to invest in mutual funds, identified as securities "issued by an investment company registered under the Investment Company Act of 1940..."

NORTH CAROLINA COMMENT

This section recodifies the provisions of former G.S. 36A-163 of the North Carolina Uniform Prudent Investor Act.

§ 36C-9-903.1. Duties as to life insurance.

(a) Notwithstanding the provisions of this Article, the duties of a trustee with respect to acquiring or retaining a contract of insurance upon the life of the settlor, or the lives of the settlor and the settlor's spouse, do not include a duty (i) to determine whether any such contract is or remains a proper investment; (ii) to exercise policy options, including investment options, available under any such contract; or (iii) to diversify any such contract. A trustee is not liable to the beneficiaries of the trust or to any party for any loss arising from the absence of those duties upon the trustee.

(b) The trustee of a trust described under subsection (a) of this section established prior to October 1, 1995, shall notify the settlor in writing that, unless the settlor provides written notice to the contrary to the trustee within 60 days of the trustee's notice, the provisions of subsection (a) of this section shall apply to the trust. Subsection (a) of this section shall not apply if, within 60 days of the trustee's notice, the settlor notifies the trustee that subsection (a) of this section shall not apply. (2007-106, s. 37.1.)

NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section, which is not a part of the Uniform Trust Code, brings forward and incorporates into the Uniform Prudent Investor Act the provisions of former G.S. 32-71(c) and (d) relieving a trustee from certain duties with respect to investment in a contract of life insurance on the life of the settlor or on the lives of the settlor and the settlor's spouse.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing

explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

§ 36C-9-904. Duties at inception of trusteeship.

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of this Chapter. (1999-215, s. 1; 2005-192, s. 2.)

OFFICIAL COMMENT

Section 4, requiring the trustee to dispose of unsuitable assets within a reasonable time, is old law, codified in Restatement of Trusts 3d: Prudent Investor Rule § 229 (1992), lightly revising Restatement of Trusts 2d § 230 (1959). The duty extends as well to investments that were proper when purchased but subsequently become improper. Restatement of Trusts 2d § 231 (1959). The same standards apply to successor trustees, see Restatement of Trusts 2d § 196 (1959).

The question of what period of time is reasonable turns on the totality of factors affecting the asset and the trust. The 1959 Restatement took the view that "[o]rdinarily any time within a year is reasonable, but under some circumstances a year may be too long a time and under other circumstances a trustee is not liable although he fails to effect the conversion for more than a year." Restatement of Trusts 2d § 230, comment *b* (1959). The 1992 Restatement retreated from this rule of thumb, saying, "No positive rule can be stated with respect to what constitutes a reasonable time for the sale or exchange of securities." Restatement of Trusts 3d: Prudent Investor Rule § 229, comment *b* (1992).

The criteria and circumstances identified in Section 2 of this Act as bearing upon the prudence of decisions to invest and manage trust assets also pertain to the prudence of decisions to retain or dispose of inception assets under this section.

NORTH CAROLINA COMMENT

This section recodifies the provisions of former G.S. 36A 164 of the North Carolina Uniform Prudent Investor Act.

§ 36C-9-905. Reviewing compliance.

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight. (1999-215, s. 1; 2005-192, s. 2.)

OFFICIAL COMMENT

This section derives from the 1991 Illinois act, 760 ILCS 5/5(a)(2) (1992), which draws upon Restatement of Trusts 3d: Prudent Investor Rule § 227, comment *b*, at 11 (1992). Trustees are not insurers. Not every investment or management decision will turn out in the light of hindsight to have been successful. Hindsight is not the relevant standard. In the language of law and economics, the standard is ex ante, not ex post.

NORTH CAROLINA COMMENT

This section recodifies the provisions of former G.S. 36A 168 of the North Carolina Uniform Prudent Investor Act.

§ 36C-9-906. Effect on charitable remainder trusts.

Nothing in this Article shall prevent the application of Article 4B of this Chapter to a "charitable remainder trust" as defined in G.S. 36C-4B-3(1). (1999-215, s. 1; 2005-192, s. 2.)

NORTH CAROLINA COMMENT

This section recodifies the provisions of former G.S. 36A-170 of the North Carolina Uniform Prudent Investor Act.

§ 36C-9-907. Short title.

This Article may be cited as the "North Carolina Uniform Prudent Investor Act." (1999-215, s. 1; 2005-192, s. 2.)

ARTICLE 10.

Liability of Trustees and Rights of Persons Dealing with Trustees.

GENERAL COMMENT

Sections 1001 through 1009 identify the remedies for breach of trust, describe how money damages are to be determined, and specify potential defenses. Section 1001 lists the remedies for breach of trust and specifies when a breach of trust occurs. A breach of trust occurs when the trustee breaches one of the duties contained in Article 8 or elsewhere in the Code. The remedies for breach of trust in Section 1001 are broad and flexible. Section 1002 provides how money damages for breach of trust are to be determined. The standard for determining money damages rests on two principles: (1) the trust should be restored to the position it would have been in had the harm not occurred; and (2) the trustee should not be permitted to profit from the trustee's own wrong. Section 1003 holds a trustee accountable for profits made from the trust even in the absence of a breach of trust. Section 1004 reaffirms the court's power in equity to award costs and attorney's fees as justice requires.

Sections 1005 through 1009 deal with potential defenses. Section 1005 provides a statute of limitations on actions against a trustee. Section 1006 protects a trustee who acts in reasonable reliance on the terms of a written trust instrument. Section 1007 protects a trustee who has exercised reasonable care to ascertain the happening of events that might affect distribution, such as a beneficiary's marriage or death. Section 1008 describes the effect and limits on the use of an exculpatory clause. Section 1009 deals with the standards for recognizing beneficiary approval of acts of the trustee that might otherwise constitute a breach of trust.

Sections 1010 through 1013 address trustee relations with persons other than beneficiaries. The emphasis is on encouraging third parties to engage in commercial transactions to the same extent as if the property were not held in trust. Section 1010 negates personal liability on contracts entered into by the trustee if the fiduciary capacity was properly disclosed. The trustee is also relieved from liability for torts committed in the course of administration unless the trustee was personally at fault. Section 1011 negates personal liability for contracts entered into by partnerships in which the trustee is a general partner as long as the fiduciary capacity was disclosed in the contract or partnership certificate. Section 1012 protects persons other than beneficiaries who deal with a trustee in good faith and without knowledge that the trustee is exceeding or improperly exercising a power. Section 1013 permits a third party to rely on a certification of trust, thereby reducing the need for a third party to request a copy of the complete trust instrument.

Much of this article is not subject to override in the terms of the trust. The settlor may not limit the rights of persons other than beneficiaries as provided in Sections 1010 through 1013, nor interfere with the court's ability to take such action to remedy a breach of trust as m[a]y be necessary in the interests of justice. *See* Section 105.

NORTH CAROLINA COMMENT

The drafters made one change in this Article of the Uniform Trust Code common to several sections. In G.S. 36C-10-1001(a), -1002(a), -1003(a) and -1006 the reference to a "beneficiary" to whom the trustee is liable or accountable was omitted because the trustee's duty is generally to the trust rather than to the beneficiary.

§ 36C-10-1001. Remedies for breach of trust.

(a) A violation by a trustee of a duty the trustee owes under a trust is a breach of trust.

(b) To remedy a breach of trust that has occurred or may occur, the court may:

(1) Compel the trustee to perform the trustee's duties;
(2) Enjoin the trustee from committing a breach of trust;
(3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
(4) Order a trustee to account;
(5) Appoint a special fiduciary to take possession of the trust property and administer the trust;
(6) Suspend the trustee;
(7) Remove the trustee as provided in G.S. 36C-7-706;
(8) Reduce or deny compensation to the trustee;
(9) Subject to G.S. 36C-10-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
(10) Order any other appropriate relief.

(c) The court may, for cause shown, relieve a trustee from liability for any breach of trust, or wholly or partly excuse a trustee who has acted honestly and reasonably from liability for a breach of trust. (2005-192, s. 2.)

OFFICIAL COMMENT

This section codifies the remedies available to rectify or to prevent a breach of trust for violation of a duty owed to a beneficiary. The duties that a trustee might breach include those contained in Article 8 in addition to those specified elsewhere in the Code.

This section identifies the available remedies but does not attempt to cover the refinements and exceptions developed in case law. The availability of a remedy in a particular circumstance will be determined not only by this Code but also by the common law of trusts and principles of equity. *See* Section 106.

Beneficiaries and cotrustees have standing to bring a petition to remedy a breach of trust. Following a successor trustee's acceptance of office, a successor trustee has standing to sue a predecessor for breach of trust. *See* Restatement (Second) of Trusts Section 200 (1959). A person who may represent a beneficiary's interest under Article 3 would have standing to bring a petition on behalf of the person represented. In the case of a charitable trust, those with standing include the state attorney general, a charitable organization expressly designated to receive distributions under the terms of the trust, and other persons with a special interest. *See* Section 110 & Restatement (Second) of Trusts Section 391 (1959). A person appointed to enforce a trust for an animal or a trust for a noncharitable purpose would have standing to sue for a breach of trust. *See* Sections 110(b), 408, 409.

Traditionally, remedies for breach of trust at law were limited to suits to enforce unconditional obligations to pay money or deliver chattels. *See* Restatement (Second) of Trusts Section 198 (1959). Otherwise, remedies for breach of trust were exclusively equitable, and as such, punitive damages were not available and findings of fact were made by the judge and not a jury. *See* Restatement (Second) of Trusts Section 197 (1959). The Uniform Trust Code does not preclude the possibility that a particular enacting jurisdiction might not follow these norms.

The remedies identified in this section are derived from Restatement (Second) of Trusts Section 199 (1959). The reference to payment of money in subsection (b)(3) includes liability that might be characterized as damages, restitution, or surcharge. For the measure of liability, see Section 1002. Subsection (b)(5) makes explicit the court's authority to appoint a special fiduciary, also sometimes referred to as a receiver. *See* Restatement (Second) of Trusts Section 199(d) (1959). The authority of the court to appoint a special fiduciary is not limited to actions alleging breach of trust but is available whenever the court, exercising its equitable jurisdiction, concludes that an appointment would promote administration of the trust. *See* Section 704(d) (special fiduciary may be appointed whenever court considers such appointment necessary for administration).

Subsection (b)(8), which allows the court to reduce or deny compensation, is in accord with Restatement (Second) of Trusts Section 243 (1959). ... In deciding whether to reduce or deny a trustee compensation, the court may wish to consider (1) whether the trustee acted in good faith; (2) whether the breach of trust was intentional; (3) the nature of the breach and the extent of the loss; (4) whether the trustee has restored the loss; and (5) the value of the trustee's services to the trust. *See* Restatement (Second) of Trusts Section 243 cmt. c (1959).

The authority under subsection (b)(9) to set aside wrongful acts of the trustee is a corollary of the power to enjoin a threatened breach as provided in subsection (b)(2). However, in setting aside the wrongful acts of the trustee the court may not impair the rights of bona fide purchasers protected under Section 1012. *See* Restatement (Second) of Trusts Section 284 (1959).

NORTH CAROLINA COMMENT

Section 1001 includes the remedies provided in former G.S. 36A-81 and those allowed in *Matter of Will of Jacobs,* 91 N.C. App. 138, 370 S.E.2d 860, *review denied,* 323 N.C. 476, 373 S.E.2d 863 (1988).

Subsection (e) was added to the section to bring forward the substance of former G.S. 36A-80 which allowed a court to relieve a trustee from liability for violating the provisions of the former Article 5 of Chapter 36A, the Uniform Trusts Act, if the trustee acted honestly and in good faith. Subsection (e) authorizes such relief for any breach of trust.

Editor's Note. — Session Laws 2005-192, which enacted Chapter 36C, in s. 6, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Official Comments, copyright © 2005, are reprinted in this Chapter with the permission of the National Conference of Commissioners on Uniform State Laws. It is believed that the Official Comments will prove of value to the practictioner in understanding and applying the text of this Chapter.

Effective Date and Applicability. — Session Laws 2005-192, which enacted Chapter 36C, in s. 7(a) provides: "Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

"Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded."

Official Comment on Effective Date and Applicability. — The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code Section 8 101.

North Carolina Comment on Effective Date and Applicability. — The drafters modified the provisions of the Uniform Trust Code relating to its application to trust instruments executed before its effective date by adding the phrase "or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary" to the end of the first sentence of the second paragraph. Although this Chapter is intended to have broad application, the drafters concluded that a rule of construction or presumption provided in this Chapter should not be applied to a trust instrument executed before the effective date of this Chapter if the application of such rule or presumption would impair the substantial rights of a beneficiary of a trust established under such a trust instrument.

CASE NOTES

Editor's Note. *— The case below was decided under prior law.*

Court May Relieve Trustee of Restriction on Purchasing Trust Property. — This section, by allowing a court of competent jurisdiction to relieve the trustee of "any or all of the duties and restrictions" placed upon him by this Article, gives statutory authority to the court to relieve the trustee of the restriction that he cannot purchase property from the trust. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967), decided under prior law.

§ 36C-10-1002. Damages for breach of trust.

(a) A trustee who commits a breach of trust is liable for the greater of:

(1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or

(2) The profit the trustee made by reason of the breach.

(b) Except as otherwise provided in this subsection, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received. (2005-192, s. 2.)

OFFICIAL COMMENT

Subsection (a) is based on Restatement (Third) of Trusts: Prudent Investor Rule Section 205 (1992). If a trustee commits a breach of trust, the beneficiaries may either affirm the transaction or, if a loss has occurred, hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach. This may include recovery of lost income, capital gain, or appreciation that would have resulted from proper administration. Even if a loss has not occurred, the trustee may not benefit from the improper action and is accountable for any profit the trustee made by reason of the breach.

For extensive commentary on the determination of damages, traditionally known as trustee surcharge, with numerous specific applications, see Restatement (Third) of Trusts: Prudent Investor Rule Sections 205-213 (1992). For the use of benchmark portfolios to determine damages, see Restatement (Third) of Trusts: Prudent Investor Rule Reporter's Notes to Sections 205 and 208-211 (1992). On the authority of a court of equity to reduce or excuse damages for breach of trust, see Restatement (Second) of Trusts Section 205 cmt. g (1959).

For purposes of this section and Section 1003, "profit" does not include the trustee's compensation. A trustee who has committed a breach of trust is entitled to reasonable compensation for administering the trust unless the court reduces or denies the trustee compensation pursuant to Section 1001(b)(8).

Subsection (b) is based on Restatement (Second) of Trusts Section 258 (1959). Cotrustees are jointly and severally liable for a breach of trust if there was joint participation in the breach. Joint and several liability also is imposed on a nonparticipating cotrustee who, as provided in Section 703(g), failed to exercise reasonable care (1) to prevent a cotrustee from committing a serious breach of trust, or (2) to compel a cotrustee to redress a serious breach of trust. Joint and several liability normally carries with it a right in any trustee to seek contribution from a cotrustee to the extent the trustee has paid more than the trustee's proportionate share of the liability. Subsection (b), consistent with Restatement (Second) of Trusts Section 258 (1959), creates an exception. A trustee who was substantially more at fault or committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries is not entitled to contribution from the other trustees.

Determining degrees of comparative fault is a question of fact. The fact that one trustee was more culpable or more active than another does not necessarily establish that this trustee was substantially more at fault. Nor is a trustee substantially less at fault because the trustee did not actively participate in the breach. *See* Restatement (Second) of Trusts Section 258 cmt. e (195). Among the factors to consider: (1) Did the trustee fraudulently induce the other trustee to join in the breach? (2) Did the trustee commit the breach intentionally while the other trustee was at most negligent? (3) Did the trustee, because of greater experience or expertise, control the actions of the other trustee? (4) Did the trustee alone commit the breach with liability imposed on the other trustee only because of an improper delegation or failure to properly monitor the actions of the cotrustee? *See* Restatement (Second) of Trusts Section 258 cmt. d (1959).

NORTH CAROLINA COMMENT

Subsection (a) is generally consistent with North Carolina case law. *See Freeman v. Cook,* 41 N.C. 373 (1849).

Subsection (b) establishes an equitable rule of contribution among cotrustees. General North Carolina contribution provisions do not apply to breaches of trust or fiduciary obligations. G.S. 1B-1(g).

§ 36C-10-1003. Liability in absence of breach.

(a) A trustee is accountable for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust. Nothing in this section limits a trustee's right to compensation under G.S. 36C-7-708 or payments allowed under G.S. 36C-8-802(f).

(b) Absent a breach of trust, a trustee is not liable for a loss or depreciation in the value of trust property or for not having made a profit. (2005-192, s. 2.)

OFFICIAL COMMENT

The principle on which a trustee's duty of loyalty is premised is that a trustee should not be allowed to use the trust as a means for personal profit other than for routine compensation earned. While most instances of personal profit involve situations where the trustee has breached the duty of loyalty, not all cases of personal profit involve a breach of trust. Subsection (a), which holds a trustee accountable for any profit made, even absent a breach of trust, is based on Restatement (Second) of Trusts Section 203 (1959). A typical example of a profit is receipt by the trustee of a commission or bonus from a third party for actions relating to the trust's administration. *See* Restatement (Second) of Trusts Section 203 cmt. a (1959).

A trustee is not an insurer. Similar to Restatement (Second) of Trusts Section 204 (1959), subsection (b) provides that absent a breach of trust a trustee is not liable for a loss or depreciation in the value of the trust property or for failure to make a profit.

NORTH CAROLINA COMMENT

The title to Section 1003 of the Uniform Trust Code was changed from "Damages in Absence of Breach" to "Liability in Absence of Breach" because there are generally no damages in the absence of a breach.

Subsection (a) of the Uniform Trust Code was modified to add the second sentence to clarify that allowable compensation of the trustee would not be considered "profits" for which a trustee is accountable.

Subsection (b) is consistent with North Carolina case law. *See, e.g., Lichtenfels v. North Carolina National Bank,* 268 N.C. 467, 151 S.E.2d 78 (1966); *Cheshire v. First Presbyterian Church,* 225 N.C. 165, 33 S.E.2d 866 (1945).

§ 36C-10-1004. Attorneys' fees and costs.

In a judicial proceeding involving the administration of a trust, the court may award costs and expenses, including reasonable attorneys' fees, as provided in the General Statutes. (2005-192, s. 2.)

OFFICIAL COMMENT

This section, which is based on Massachusetts General Laws chapter 215, Section 45, codifies the court's historic authority to award costs and fees, including reasonable attorney's fees, in judicial proceedings grounded in equity. The court may award a party its own fees and costs from the trust. The court may also charge a party's costs and fees against another party to the litigation. Generally, litigation expenses were at common law chargeable against another party only in the case of egregious conduct such as bad faith or fraud. With respect to a party's own fees, Section 709 authorizes a trustee to recover expenditures properly incurred in the administration of the trust. The court may award a beneficiary litigation costs if the litigation is deemed beneficial to the trust. Sometimes, litigation brought by a beneficiary involves an allegation that the trustee has committed a breach of trust. On other occasions, the suit by the beneficiary is brought because of the trustee's failure to take action against a third party, such as to recover property properly belonging to the trust. For the authority of a beneficiary to bring an action when the trustee fails to take action against a third party, see Restatement (Second) of Trusts Sections 281-282 (1959). For the case law on the award of attorney's fees and other litigation costs, see 3 Austin W. Scott & William F. Fratcher, The Law of Trusts Sections 188.4 (4th ed. 1988).

NORTH CAROLINA COMMENT

This section of the Uniform Trust Code was modified to refer to existing North Carolina law with respect to awarding costs and expenses, including attorney's fees, in place of the provisions of the Uniform Trust Code which allowed the court "as justice and equity may require" to award such costs "to any party, to be paid by another party or from the trust that is the subject of the controversy." G.S. 6-21(2) provides substantially the same result as the Uniform Trust Code with respect to proceedings for the construction of a trust or to fix the rights and duties of the parties.

§ 36C-10-1005. Limitation of action against trustee.

(a) No proceeding against a trustee for breach of trust may be commenced more than five years after the first to occur of: (i) the removal, resignation, or death of the trustee; (ii) the termination of the beneficiary's interest in the trust; or (iii) the termination of the trust.

(b) Except as provided in subsection (a) of this section, Chapter 1 of the General Statutes governs the limitations of actions on judicial proceedings involving trusts. (2005-192, s. 2.)

OFFICIAL COMMENT

The ... limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in Section 1009. Claims may also be barred by principles such as estoppel and laches arising in equity under the common law of trusts. *See* Section 106.

...

... While the five year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution.

If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though the statutory period prescribed by this section has not yet expired.

This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the State.

NORTH CAROLINA COMMENT

The drafters omitted subsections (a) and (b) of the Uniform Trust Code which provided for a one year limitation of action for breach of trust after the beneficiary was sent a report adequately disclosing the existence of a potential claim for breach of trust and informing the beneficiary of the time allowed for commencing a proceeding. The drafters were concerned that these provisions would have greatly expanded residual liability of trustees.

This section modified subsection (c) of the Uniform Trust Code to refer to existing North Carolina law in Chapter 1 of the General Statutes regarding limitation of actions involving trusts. Under existing North Carolina law the statute of limitations applicable to an action for breach of fiduciary duty by a trustee is the same as an action for breach of contract, i.e., three years. *See Pittman v. Barker,* 117 N.C. App. 580, 452 S.E.2d 326 (1995), *review denied,* 340 N.C. 261, 456 S.E.2d 833 (1995). The statute of limitations begins to run when the claimant knew or, by due diligence, should have known of the facts constituting the basis for the claim. *Id.*

However, this section changes North Carolina law by retaining the Uniform Trust Code provision that in no event may an action be commenced for breach of trust more than five years after the first to occur of the trustee ceasing to act as trustee, the termination of the beneficiary's interest, or the termination of the trust.

§ 36C-10-1006. Reliance on trust instrument.

A trustee who acts in reasonable reliance on the terms of the trust as expressed in a trust instrument is not liable for a breach of trust to the extent that the breach resulted from the reliance. (2005-192, s. 2.)

OFFICIAL COMMENT

It sometimes happens that the intended terms of the trust differ from the apparent meaning of the trust instrument. This can occur because the court, in determining the terms of the trust, is allowed to consider evidence extrinsic to the trust instrument. *See* Section 103 ... (definition of "terms of a trust"). Furthermore, if a trust is reformed on account of mistake of fact or law, as authorized by Section 415, provisions of a trust instrument can be deleted or contradicted and provisions not in the trust instrument may be added. The concept of the "terms of a trust," both as defined in this Code and as used in the doctrine of reformation, is intended to effectuate the principle that a trust should be administered and distributed in accordance with the settlor's intent. However, a trustee should also be able to administer a trust with some dispatch and without concern that a reasonable reliance on the terms of the trust instrument is misplaced. This section protects a trustee who so relies on a trust instrument but only to the extent the breach of trust resulted from such reliance. This section is similar to Section 1(b) of the Uniform Prudent Investor Act, which protects a trustee from liability to the extent that the trustee acted in reasonable reliance on the provisions of the trust.

This section protects a trustee only if the trustee's reliance is reasonable. For example, a trustee's reliance on the trust instrument would not be justified if the trustee is aware of a prior court decree or binding nonjudicial settlement agreement clarifying or changing the terms of the trust.

NORTH CAROLINA COMMENT

This section is consistent with G.S. 36C-9-901(b) of the North Carolina Uniform Prudent Investor Act formerly codified at G.S. 36A-161(b). This section also is consistent with North Carolina case law. *See, e.g., Lichtenfels v. North Carolina National Bank,* 268 N.C. 467, 151 S.E.2d 78 (1966).

§ 36C-10-1007. Event affecting administration or distribution.

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge. (2005-192, s. 2.)

OFFICIAL COMMENT

This section, which is based on Washington Revised Code Section 11.98.100, is designed to encourage trustees to administer trusts expeditiously and without undue concern about liability for failure to ascertain external facts, often of a personal nature, that might affect administration or distribution of the trust. The common law, contrary to this section, imposed absolute liability against a trustee for misdelivery regardless of the trustee's level of care. *See* Restatement (Second) of Trusts Section 226 (1959). The events listed in this section are not exclusive. A trustee who has exercised reasonable care to ascertain the occurrence of other events, such as the attainment by a beneficiary of a certain age, is also protected from liability.

NORTH CAROLINA COMMENT

This section appears to have no counterpart in prior North Carolina law.

§ 36C-10-1008. Exculpation of trustee.

A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. (2005-192, s. 2.)

OFFICIAL COMMENT

Even if the terms of the trust attempt to completely exculpate a trustee for the trustee's acts, the trustee must always comply with a certain minimum standard. As provided in subsection (a), a trustee must always act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. Subsection (a) is consistent with the standards expressed in Sections 105 and 814(a), which, similar to this section, place limits on the power of a settlor to negate trustee duties. This section is also similar to Section 222 of the Restatement (Second) of Trusts (1959), except that this Code, unlike the Restatement, allows a settlor to exculpate a trustee for a profit that the trustee made from the trust.

. . .

NORTH CAROLINA COMMENT

This section changes prior North Carolina law with respect to the limitations on the enforceability of exculpatory provisions in the trust. Former G.S. 36A-78 authorized a settlor to relieve a trustee from liability otherwise imposed by former Article 5 of Chapter 36A, the Uniform Trusts Act, except the prohibition against making loans to the trustee, holding funds uninvested for an unreasonable length of time, and buying from and selling to the trustee. These specific limitations on the validity of trust terms relieving a trustee from liability are no longer necessary in light of the more comprehensive provisions of this section. *See also* G.S. 36C-8-802 providing that the terms of a trust may authorize any transaction involving a conflict of interest.

The drafters omitted subdivision (a)(2) of the Uniform Trust Code which provides that an exculpatory provision was invalid if inserted as a result of the abuse by the trustee of a fiduciary or confidential relationship to the settlor. The drafters also omitted subsection (b) of the Uniform Trust Code which provides that an exculpatory term of a trust drafted by the trustee is invalid unless the trustee proves the exculpatory term is fair and that its existence and content was adequately communicated to the settlor. The drafters were concerned that these provisions would unnecessarily complicate the use of legitimate limitations of liability in trust documents that trustees customarily rely on.

§ 36C-10-1009. Beneficiary's consent, release, or ratification.

(a) A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) At the time of the consent, release, or ratification, the beneficiary did not have knowledge of the beneficiary's rights or of the material facts relating to the breach.

(b) No consideration is required for the consent, release, or ratification to be valid. (2005-192, s. 2.)

OFFICIAL COMMENT

This section is based on Sections 216 through 218 of the Restatement (Second) of Trusts (1959). A consent, release, or affirmance under this section may occur either before or after the approved conduct. This section requires an affirmative act by the beneficiary. A failure to object is not sufficient. *See* Restatement (Second) of Trusts Section 216 cmt. a (1959). A consent is binding on a consenting beneficiary although other beneficiaries have not consented. *See* Restatement (Second) of Trusts Section 216 cmt. g (1959). To constitute a valid consent, the beneficiary must know of the beneficiary's rights and of the material facts relating to the breach. *See* Restatement (Second) of Trusts Section 216 cmt. k (1959). If the beneficiary's approval involves a self dealing transaction, the approval is binding only if the transaction was fair and reasonable. *See* Restatement (Second) of Trusts Sections 170(2), 216(3) & cmt. n (1959).

An approval by the settlor of a revocable trust ... binds all the beneficiaries. *See* Section 603. A beneficiary is also bound to the extent an approval is given by a person authorized to represent the beneficiary as provided in Article 3.

NORTH CAROLINA COMMENT

Subsection (a) changes North Carolina law by providing that a beneficiary may relieve a trustee from liability for any breach of trust subject to the provisions of subdivisions (a)(1) and (2). Former G.S. 36A-79 permitted a beneficiary to release a trustee from liability otherwise imposed by former Article 5 of Chapter 36A, the Uniform Trusts Act, except the prohibition against making loans to the trustee, holding funds invested for an unreasonable length of time, and buying from and selling to the trustee. These specific limitations on the beneficiary's ability to relieve a trustee from liability are no longer necessary in light of the more comprehensive provisions of this section. *See also* G.S. 36C-8-802(b) which allows a beneficiary to relieve a trustee from liability for breach of trust involving any conflict of interest.

Subsection (b) was added to this section to clarify that no consideration is required for the validity of a consent, release or ratification.

§ 36C-10-1010. Limitation on personal liability of trustee.

(a) Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in making the contract disclosed the fiduciary capacity. The addition of the phrase "trustee" or "as trustee" or a similar designation to the signature of a trustee on a written contract is considered prima facie evidence of a disclosure of fiduciary capacity.

(b) A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(c) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim. Any judgment rendered in favor of a claimant in such a judicial proceeding against a trust may be recovered from the trust property without proof that the trustee could have obtained reimbursement from the trust if the trustee had paid the claim.

(d) A trustee is entitled to indemnity from the trust for any claim, other than a breach of trust, for which the trustee is liable:

(1) If the claim arose from a common incident of activity in which the trustee was properly engaged for the trust;
(2) If the trustee was not personally at fault; or
(3) To the extent that the trustee's actions increased the value of trust property.

(e) A decision by a trustee not to inspect property, or to decline to accept property, shall not create any inference as to liability, under any environmental law, with respect to that property. A trustee shall have no liability for a decrease in value of property in a trust by reason of the trustee's compliance with any environmental law, including reporting requirements. (2005-192, s. 2.)

OFFICIAL COMMENT

This section is based on Section 7-306 of the Uniform Probate Code. However, unlike the Uniform Probate Code, which requires that the contract both disclose the representative capacity and identify the trust, subsection (a) protects a trustee who reveals the fiduciary relationship either by indicating a signature as trustee or by simply referring to the trust. The protection afforded the trustee by this section applies only to contracts that are properly entered into in the trustee's fiduciary capacity, meaning that the trustee is exercising an available power and is not violating a duty. This section does not excuse any liability the trustee may have for breach of trust.

Subsection (b) addresses trustee liability arising from ownership or control of trust property and for torts occurring incident to the administration of the trust. Liability in such situations is imposed on the trustee personally only if the trustee was personally at fault, either intentionally or negligently. This is contrary to Restatement (Second) of Trusts Section 264 (1959), which imposes liability on a trustee regardless of fault, including liability for acts of agents under respondeat superior. Responding to a particular concern of trustees, subsection (b) specifically protects a trustee from personal liability for violations of environmental law such as CERCLA (42 U.S.C. Section 9607) or its state law counterparts, unless the trustee was personally at fault. *See* also Sections 701(c)(2) (nominated trustee may investigate trust property to determine potential violation of environmental law without having accepted trusteeship) and 816(13) (trustee powers with respect to possible liability for violation of environmental law).

Subsection (c) alters the common law rule that a trustee could not be sued in a representative capacity if the trust estate was not liable.

NORTH CAROLINA COMMENT

Subsection (a) is generally consistent with former G.S. 36A-74(c) and North Carolina case law. See *Church v. First Union National Bank,* 63 N.C. App. 359, 304 S.E.2d 633, *review denied and appeal dismissed,* 309 N.C. 460, 307 S.E.2d 363 (1983); *see also Scott v. United Carolina Bank,* 130 N.C. App. 426, 503 S.E.2d 149, *review denied,* 350 N.C. 99, 528 S.E.2d 584 (1999). Subsection (a) of the Uniform Trust Code was modified by adding the second sentence bringing forward the provisions of former G.S. 36A-74(c) regarding prima facie evidence of disclosure of fiduciary capacity on written contracts.

Subsection (b) is broader, simpler and more effective than former G.S. 36A-76(a) which provided for tort liability of trusts.

Subsection (c) is generally consistent with former G.S. 36A-74(a) with respect to judicial proceedings against a trustee in the trustee's fiduciary capacity based on contract, but changes prior law in former G.S 36A-76(a) by allowing the trustee to be sued on a tort in a representative capacity, whether or not personally at fault. Former G.S. 36A-76(a) allowed the personal representative to be sued in a representative capacity on a tort only if the court found certain alternative conditions were met, one of which was that the trustee was not personally at fault. The second sentence of subsection (c) was added to bring forward the substance of the provisions of former G.S. 36A-74(a) and former G.S. 36A-76(b).

Subsection (c) changes prior law in not bringing forward provisions in former G.S. 36A-74(b) and former G.S. 36A-76(b) requiring notice to beneficiaries of suits against the personal representative based on a contract or on a tort. The drafters concluded that these provisions may be a "trap for the unwary"and were unnecessary because the trustee is charged with the duty to defend actions and beneficiaries could sue the trustee for breach of trust if the trustee failed to properly defend a claim.

The provisions in former G.S. 36A-75(c) and former G.S. 36A-77(e) that those sections did not change existing law as to liability of trustees of charitable trusts were not brought forward because the drafters concluded that no different standard for liability of charitable trustees appeared to be in effect in North Carolina.

Subsection (d) was added to the section to bring forward the provisions of former G.S. 36A-75(a) and (b) regarding exoneration or reimbursement for torts but applies such provisions to any claim other than a breach of trust.

Subsection (e) was added to the section to bring forward the substance of provisions in G.S. 32-27(8)(a) which would not otherwise be applicable unless incorporated by reference.

CASE NOTES

Editor's Note. — *The cases below were decided under prior law.*

Protection of Beneficiaries of Charitable Trusts. — The State as parens patriae, through its Attorney General, has the common-law right and power to protect the beneficiaries of charitable trusts and the property to which they are or may be entitled. Sigmund Sternberger Found. v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968), decided under prior law.

Enforcement of Gift or Trust. — Because of the public interest necessarily involved in a charitable trust or gift to charity and essential to its legal classification as a charity, it is generally recognized that the Attorney General, in his capacity as representative of the State and of the public, is the, or at least a, proper party to institute and maintain proceedings for the enforcement of such a gift or trust. Sigmund Sternberger Found. v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968), decided under prior law.

Court May Relieve Trustee of Restric-

tion on Purchasing Trust Property. — This section, by allowing a court of competent jurisdiction to relieve the trustee of "any or all of the duties and restrictions" placed upon him by this Article, gives statutory authority to the court to relieve the trustee of the restriction that he cannot purchase property from the trust. Wachovia Bank & Trust Co. v. Johnston, 269 N.C. 701, 153 S.E.2d 449 (1967), decided under prior law.

§ 36C-10-1011. Interest as general partner.

(a) Except as otherwise provided in subsection (c) of this section or unless personal liability is imposed in the contract, a trustee who holds, in a fiduciary capacity, an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership if the fiduciary capacity was disclosed. The addition of the phrase "trustee" or "as trustee" or a similar designation to the signature of a trustee on a written partnership document is considered prima facie evidence of a disclosure of fiduciary capacity.

(b) A trustee who holds, in a fiduciary capacity, an interest as a general partner is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault. This subsection does not apply to additional ownership interests of the trustee held in a nonfiduciary capacity.

(c) If the settlor transfers an existing general partnership interest to a revocable trust, the settlor remains personally liable for partnership obligations as if the settlor were a general partner. (2005-192, s. 2.)

OFFICIAL COMMENT

Section 1010 protects a trustee from personal liability on contracts that the trustee enters into on behalf of the trust. Section 1010 also absolves a trustee from liability for torts committed in administering the trust unless the trustee was personally at fault. It does not protect a trustee from personal liability for contracts entered into or torts committed by a general or limited partnership of which the trustee was a general partner. That is the purpose of this section, which is modeled after Ohio Revised Code Section 1339.65. Subsection (a) protects the trustee from personal liability for such partnership obligations whether the trustee signed the contract or it was signed by another general partner. Subsection (b) protects a trustee from personal liability for torts committed by the partnership unless the trustee was personally at fault. Protection from the partnership's contractual obligations is available under subsection (a) only if the other party is on notice of the fiduciary relationship, either in the contract itself or in the partnership certificate on file.

Special protection is not needed for other business interests that the trustee may own, such as an interest as a limited partner, a membership interest in an LLC, or an interest as a corporate shareholder. In these cases the nature of the entity or the interest owned by the trustee carries with it its own limitation on liability.

Certain exceptions apply. The section is not intended to be used as a device for individuals ... to shield assets from creditor claims. Consequently, subsection (c) excludes from the protections provided by this section trustees who own an interest in the partnership in another capacity. ...

This section has been placed in brackets to alert enacting jurisdictions to consider modifying the section to conform it to the State's specific laws on partnerships and other forms of unincorporated businesses.

NORTH CAROLINA COMMENT

The drafters found no prior North Carolina law specifically addressing liability of a trust that is a general partner.

Subsection (a) of the Uniform Trust Code was modified to provide that the trustee must hold an interest in a general partnership "in a fiduciary capacity" to be immune from personal liability on a contract entered into by the parties. The drafters further modified subsection (a) by adding the last sentence bringing forward the second sentence of the provisions of former G.S. 36A-74(c) regarding prima facie evidence of fiduciary capacity on contracts but applying it to partnership documents.

Subsection (b) of the Uniform Trust Code was modified to provide that the trustee must hold the interest as a general partner "in a fiduciary capacity" to be immune from personal liability for torts committed by the partnership and that the section does not apply to additional interests in the partnership held by the trustee in a nonfiduciary capacity.

Subsection (c) of the Uniform Trust Code was omitted. It provided that the immunity from personal liability on contracts entered into by the partnership or for torts committed by the partnership did not apply if any member of the trustee's family holds an interest in the partnership.

Subsection (c) modifies subsection (d) of the Uniform Trust Code to provide that the settlor of a revocable trust is liable as a general partner for contracts and other obligations only when the settlor transfers an existing partnership interest to the trust, whereas subsection (d) of the Uniform Trust Code holds a settlor liable as a general partner whenever the trustee holds a partnership interest. The drafters concluded that there is little potential for abuse if the trust itself acquires a general partnership interest because other partners must agree to admit the revocable trust and any person dealing with the partnership can inquire about the general partner.

§ 36C-10-1012. Protection of person dealing with trustee.

(a) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers, is protected from liability as if the trustee properly exercised the power.

(b) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(c) A person who in good faith delivers assets to a trustee need not ensure their proper application.

(d) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(e) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

(f) A person is not required to obtain a certification under G.S. 36C-10-1013 in order to be entitled to the protections of this section. (2005-192, s. 2.)

OFFICIAL COMMENT

This section is derived from Section 7 of the Uniform Trustee Powers Act.

Subsection (a) protects two different classes; persons other than beneficiaries who assist a trustee with a transaction, and persons other than beneficiaries who deal with the trustee for value. As long as the assistance was provided or the transaction was entered into in good faith and without knowledge, third persons in either category are protected in the transaction even if the trustee was exceeding or improperly exercising the power. For the definition of "know," see Section 104. This Code does not define "good faith" for purposes of this and the next section. Defining good faith with reference to the definition used in the State's commercial statutes would be consistent with the purpose of this section, which is to treat commercial transactions with trustees similar to other commercial transactions.

Subsection (b) confirms that a third party who is acting in good faith is not charged with a duty to inquire into the extent of a trustee's powers or the propriety of their exercise. The third party may assume that the trustee has the necessary power. Consequently, there is no need to request or examine a copy of the trust instrument. A third party who wishes assurance that the trustee has the necessary authority instead should request a certification of trust as provided in Section 1013. Subsection (b), and the comparable provisions enacted in numerous States, are intended to negate the rule, followed by some courts, that a third party is charged with constructive notice of the trust instrument and its contents. The cases are collected in George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section 897 (Rev. 2d ed. 1995); and 4 Austin W. Scott & William F. Fratcher, The Law of Trusts Section 297 (4th ed. 1989).

Subsection (c) protects any person, including a beneficiary, who in good faith delivers property to a trustee. The standard of protection in the Restatement is phrased differently although the result is similar. Under Restatement (Second) of Trusts Section 321 (1959), the person delivering property to a trustee is liable if at the time of the delivery the person had notice that the trustee was misapplying or intending to misapply the property.

Subsection (d) extends the protections afforded by the section to assistance provided to or dealings for value with a former trustee. The third party is protected the same as if the former trustee still held the office.

Subsection (e) clarifies that a statute relating to commercial transactions controls whenever both it and this section could apply to a transaction. Consequently, the protections provided by this section are superseded by comparable protective provisions of these other laws. The principal statutes in question are the various articles of the Uniform Commercial Code, including Article 8 on the transfer of securities, as well as the Uniform Simplification of Fiduciary Securities Transfer Act.

NORTH CAROLINA COMMENT

Subsection (a) is consistent with the rule in North Carolina that a third party who assists a trustee with knowledge of the trustee's misconduct is directly accountable to the person injured. *See, e.g., Abbitt v. Gregory,* 201 N.C. 577, 596 99, 160 S.E.2d 896, 906 7 (1931); *FNB Southeast v. Lane,* 160 N.C. App. 535, 586 S.E.2d 530 (2003), *review denied,* 358 N.C. 152, 592 S.E.2d 588 (2004).

Subsection (b), however, changes the common law rule recognized in North Carolina to the effect that a person who deals with another is charged with knowledge of facts which a reasonable investigation would disclose and must examine the trust instrument and other sources of information in order to be satisfied that the trustee has authority to enter into the transaction. *See Kaplan v. First Union Nat'l. Bank,* 99 N.C. App. 570, 573, 393 S.E.2d 344, 346 (1990). The Official Comments state that third party may assume the trustee has the necessary power and does not have to request or examine a copy of the instrument.

Subsection (f) was added to this section to clarify that a certification under G.S. 36C-10-1013 is not a requirement for protection of third persons afforded by this section.

§ 36C-10-1013. Certification of trust.

(a) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing the following information:

(1) The existence of the trust and the date the trust instrument was executed;
(2) The identity of the settlor, unless withheld under a provision in the trust instrument;
(3) The identity and address of the currently acting trustee;
(4) The powers of the trustee;
(5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
(6) The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
(7) The trust's taxpayer identification number; and
(8) The manner of taking title to trust property.

(b) Any trustee may sign or otherwise authenticate a certification of trust.

(c) A certification of trust must state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(d) A certification of trust need not contain the dispositive terms of a trust.

(e) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.

(f) A person who acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that the person relying upon the certification holds a copy of all or part of the trust instrument.

(g) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(h) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(i) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

(j) In transactions involving real property, a person who acts in reliance upon a certification of trust may require that the certification of trust be executed and acknowledged in a manner that will permit its registration in the office of the register of deeds in the county where the real property is located. The certification of trust need not contain the trust's taxpayer identification number if that taxpayer identification number is also the social security number of a grantor. However, the trust's taxpayer identification number shall be certified by the trustee to the person acting in reliance upon the certification of trust in a manner reasonably satisfactory to that person. (2005-192, s. 2.)

OFFICIAL COMMENT

This section, derived from California Probate Code Section 18100.5, is designed to protect the privacy of a trust instrument by discouraging requests from persons other than beneficiaries for complete copies of the instrument in order to verify a trustee's authority. Even absent this section, such requests are usually unnecessary. Pursuant to Section 1012(b), a third person proceeding in good faith is not required to inquire into the extent of the trustee's powers or the propriety of their exercise. This section adds another layer of protection.

Third persons frequently insist on receiving a copy of the complete trust instrument solely to verify a specific and narrow authority of the trustee to engage in a particular transaction. While a testamentary trust, because it is created under a will, is a matter of public record, an inter vivos trust instrument is private. Such privacy is compromised, however, if the trust instrument must be distributed to third persons. A certification of trust is a document signed by a currently acting trustee that may include excerpts from the trust instrument necessary to facilitate the particular transaction. A certification provides the third party with an assurance of authority without having to disclose the trust's dispositive provisions. Nor is there a need for third persons who may already have a copy of the instrument to pry into its provisions. Persons acting in reliance on a certification may assume the truth of the certification even if they have a complete copy of the trust instrument in their possession.

Subsections (a) through (c) specify the required contents of a certification. Subsection (d) clarifies that the certification need not include the trust's dispositive terms. A certification, however, normally will contain the administrative terms of the trust relevant to the transaction. Subsection (e) provides that the third party may make this a condition of acceptance. Subsections (f) and (g) protect a third party who relies on the certification. The third party may assume that the certification is true, and is not charged with constructive knowledge of the terms of the trust instrument even if the third party has a copy.

To encourage compliance with this section, a person demanding a trust instrument after already being offered a certification may be liable under subsection (h) for damages if the refusal to accept the certification is determined not to have been in good faith. A person acting in good faith would include a person required to examine a complete copy of the trust instrument pursuant to due diligence standards or as required by other law. Examples of such due diligence and legal requirements include (1) in connection with transactions to be executed in the capital markets where documentary standards have been established in connection with underwriting concerns; (2) to satisfy documentary requirements established by state or local government or regulatory agency; (3) to satisfy documentary requirements established by a state or local government or regulatory agency; and (4) where the insurance rates or premiums or other expenses of the party would be higher absent the availability of the documentation.

The Uniform Trust Code leaves to other law the issue of how damages for a bad faith refusal are to be computed and whether attorney's fees might be recoverable. For a discussion of the meaning of "good faith," see Section 1012 Comment.

NORTH CAROLINA COMMENT

This section has no counterpart in prior North Carolina law.

Subsection (a)(2) of the Uniform Trust Code was modified to allow the withholding of the settlor's identity pursuant to a provision in the trust instrument.

Subsection (f) was added to the section to (i) require that the certification be executed and acknowledged with the formalities of deeds because it is important that the public record identify the trustee and the trustee's authority to act with respect to real property, and (ii) to prevent the settlor's social security number from being placed on the public record.

ARTICLE 11.

Miscellaneous Provisions.

§ 36C-11-1101. Uniformity of application and construction.

In applying and construing this Chapter, consideration may be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. (2005-192, s. 2.)

Editor's Note. — Session Laws 2005-192, which enacted Chapter 36C, in s. 6, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform Trust Code and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Official Comments, copyright © 2005, are reprinted in this Chapter with the permission of the National Conference of Commissioners on Uniform State Laws. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

Effective Date and Applicability. — Session Laws 2005-192, which enacted Chapter 36C, in s. 7(a) provides: "Section 2 of this act becomes effective January 1, 2006, and except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of Chapter 36C of the General Statutes would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of Chapter 36C of the General Statutes does not apply and the superseded law applies.

"Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, any rule of construction or presumption provided in Chapter 36C of the General Statutes applies to trust instruments executed before the effective date of Section 2 of this act unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in Chapter 36C of the General Statutes, as enacted by Section 2 of this act, an act done before the effective date of Section 2 of this act is not affected by Chapter 36C of the General Statutes. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Section 2 of this act, that statute continues to apply to the right even if it has been repealed or superseded."

Official Comment on Effective Date and Applicability. — The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code Section 8 101.

North Carolina Comment on Effective Date and Applicability. — The drafters modified the provisions of the Uniform Trust Code relating to its application to trust instruments executed before its effective date by adding the phrase "or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary" to the end of the first sentence of the second paragraph. Although this Chapter is intended to have broad application, the drafters concluded that a rule of construction or presumption provided in this Chapter should not be applied to a trust instrument executed before the effective date of this Chapter if the application of such rule or presumption would impair the substantial rights of a beneficiary of a trust established under such a trust instrument.

§ 36C-11-1102. Electronic records and signatures.

The provisions of this Chapter governing the legal effect, validity, or enforceability of electronic records or electronic signatures, and of contracts formed or performed with the use of those records or signatures, conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7002) and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act. (2005-192, s. 2.)

OFFICIAL COMMENT

This section, which is being inserted in all Uniform Acts approved in 2000 or later, preempts the federal Electronic Signatures in Global and National Commerce Act. Section 102(a)(2)(B) of that Act provides that the federal law can be preempted by a later statute of the State that specifically refers to the federal law. The effect of this section, when enacted as part of this Code, is to leave to state law the procedures for obtaining and validating an electronic signature. The Uniform Trust Code does not require that any document be in paper form, allowing all documents under this Code to be transmitted in electronic form. A properly directed electronic message is a valid method of notice under the Code as long as it is reasonably suitable under the circumstances and likely to result in receipt of the notice or document. *See* Section 109(a).

§ 36C-11-1103. Severability clause.

If any provision of this Chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this Chapter that can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable. (2005-192, s. 2.)

§ 36C-11-1104. Trustee signatures.

The signature of a trustee of a trust who signs a document for or on behalf of the trust shall be deemed to be the signature of the trustee as such. A document which identifies a trust shall be deemed to include the trustee or the trustees as such. (2007-106, s. 54.)

NORTH CAROLINA COMMENT (2007)

Effective October 1, 2007, this section, which is not a part of the Uniform Trust Code, provides a rule of construction that the signature of a trustee who signs a document on behalf of a trust shall be deemed to be the signature of the trustee and that a document identifying a trust shall be deemed to include the trustee as such. This section coordinates with G.S. 39-6.7, also effective October 1, 2007, construing conveyances that purport to be to or by a trust to be conveyances to or by the trustees of that trust. The drafters thought that these provisions were necessary because, although trustees have legal title to the trust assets, sometimes documents are executed in the name of the trust itself as a party or refer to the trust itself rather than to the trustee.

Editor's Note. — Session Laws 2007-106, s. 55, provides: "The Revisor of Statutes shall cause to be printed all explanatory comments of the drafters of this act, or revisions to existing explanatory comments of the drafters of this act, as the Revisor may deem appropriate."

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations,or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

§ 36C-11-1105: Reserved for future codification purposes.

§ 36C-11-1106. Application to existing relationships.

(a) Except as otherwise provided in this Chapter, this Chapter applies to (i) all trusts created before, on, or after January 1, 2006; (ii) all judicial proceedings concerning trusts commenced on or after January 1, 2006; and (iii) judicial proceedings concerning trusts commenced before January 1, 2006, unless the court finds that application of a particular provision of this Chapter would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision of this Chapter does not apply and the superseded law applies.

(b) Except as otherwise provided in this Chapter, any rule of construction or presumption provided in this Chapter applies to trust instruments executed before January 1, 2006, unless there is a clear indication of a contrary intent in the terms of the trust or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary. Except as otherwise provided in this Chapter, an act done before January 1, 2006, is not affected by this Chapter. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before January 1, 2006, that statute continues to apply to the right even if it has been repealed or superseded. (2005-192, ss. 7(a), (b); 2006-226, ss. 31(a), (b).)

Editor's Note. — Session Laws 2006-226, s. 31(c), provides: "The Revisor of Statutes is authorized to cause to be printed along with G.S. 36C-11-1106, as enacted by this section, all relevant portions of the Official Commentary to this section of the Uniform Trust Code and all explanatory comments of the drafters as the Revisor deems appropriate."

Official Comment on Effective Date and Applicability. — The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform Probate Code Section 8 101.

North Carolina Comment on Effective Date and Applicability. — The drafters modified the provisions of the Uniform Trust Code relating to its application to trust instruments executed before its effective date by adding the phrase "or unless application of that rule of construction or presumption would impair substantial rights of a beneficiary" to the end of the first sentence of the second paragraph. Although this Chapter is intended to have broad application, the drafters concluded that a rule of construction or presumption provided in this Chapter should not be applied to a trust instrument executed before the effective date of this Chapter if the application of such rule or presumption would impair the substantial rights of a beneficiary of a trust established under such a trust instrument.

Effect of Amendments. — Session Laws 2005-192, s. 7(a), as codified by Session Laws 2006-226, s. 31(a), effective August 10, 2006, rewrote the section.

Chapter 36D.

North Carolina Community Trust for Persons with Severe Chronic Disabilities.

Sec.
36D-1. Title; findings.
36D-2. Definitions.
36D-3. Scope.
36D-4. Administration; powers and duties.
36D-5. Accountability.
36D-6. Gifts, surplus trust funds.
36D-7. Special requests on behalf of beneficiary.
36D-8. Irrevocability; impossibility of fulfillment.
36D-9. Beneficiary's interest in trust not asset for income eligibility determination.
36D-10. Trust not subject to law against perpetuities; restraints on alienation.
36D-11. Settlement; trustee limitations.

§ 36D-1. Title; findings.

(a) This Article shall be known and may be cited as the "North Carolina Community Trust for Persons With Severe Chronic Disabilities Act".

(b) The General Assembly finds that it is in the public interest to encourage activities by voluntary associations and private citizens that will supplement and augment those services provided by local, State, and federal government agencies in discharge of their responsibilities toward individuals with severe chronic disabilities. The General Assembly further finds that, as a result of changing social, economic, and demographic trends, families of persons with severe chronic disabilities are increasingly aware of the need for a vehicle by which they can assure ongoing individualized personal concern for a severely disabled family member who may survive that disabled person's parents or other family members, and provide for the efficient management of small legacies or trust funds to be used for the benefit of that disabled person. In a number of other states, voluntary associations have established foundations or trusts intended to be responsive to these concerns. Therefore, the General Assembly finds that North Carolina will benefit by the enactment of enabling legislation expressly authorizing the formation of community trusts in accordance with criteria set forth by statute and administered by the Secretary of State, under Chapter 55A of the General Statutes. These community trusts permit the pooling of resources contributed by families or persons with philanthropic intent, along with the reservation of portions of these funds for the use and benefit of designated beneficiaries.

(c) This Article shall be liberally construed and applied to promote its underlying purposes and policies, which are, among others, to:

(1) Encourage the orderly establishment of community trusts for the benefit of persons with severe chronic disabilities;

(2) Ensure that community trusts are administered properly and that the managing boards of the trusts are free from conflicts of interest;

(3) Facilitate sound administration of trust funds for persons with severe chronic disabilities by allowing family members and others to pool resources in order to make professional management investment more efficient;

(4) Provide parents of persons with severe chronic disabilities peace of mind in knowing that a means exists to ensure that the interests of their children who have severe chronic disabilities are properly looked after and managed after the parents die or become incapacitated;

(5) Help make guardians available for persons with severe chronic disabilities who are incompetent, when no other family member is available for this purpose;

(6) Encourage the availability of private resources to purchase for persons with severe chronic disabilities goods and services that are not available through any governmental or charitable program and to conserve these resources by limiting purchases to those that are not available from other sources;

(7) Encourage the inclusion, as beneficiaries of community trusts, of persons who lack resources and whose families are indigent, in a way that does not diminish the resources available to other beneficiaries whose families have contributed to the trust; and

(8) Remove the disincentives that discourage parents and others from setting aside funds for the future protection of persons with severe chronic disabilities by ensuring that the interest of beneficiaries in community trusts are not considered assets or income that would disqualify them from any governmental or charitable entitlement program with an economic means test. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3.)

Editor's Note. — Session Laws 2005-192, s. 7(b), made this Chapter effective January 1, 2006.

Where appropriate, the historical citations to sections in repealed Article 4B of Chapter 36A, covering the same subject matter as this Chapter, have been added to corresponding sections in this Chapter 36D.

§ 36D-2. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Beneficiary" means any person with a severe chronic disability who has qualified as a member of the community trust program and who has the right to receive those services and benefits vested with the management of the business and affairs of a corporation, formed for the purpose of managing a community trust, irrespective of the name by which the group is designated.

(2) "Community trust" means a nonprofit organization that offers the following services:

  a. Administration of special trust funds for persons with severe chronic disabilities;

  b. Follow along services;

  c. Guardianship for persons with severe chronic disabilities who are incompetent, when no other family member or immediate friend is available for this purpose; and

  d. Advice and counsel to persons who have been appointed as individual guardians of the persons or estates of persons with severe chronic disabilities.

(3) "Follow along services" means (i) those services offered by community trusts that are designed to ensure that the needs of each beneficiary are being met for as long as may be required and may include periodic visits to the beneficiary and to the places where the beneficiary receives services, (ii) participation in the development of individualized plans being made by service providers for the beneficiary, and (iii) other similar services consistent with the purposes of this Article.

(4) "Severe chronic disability" means a physical or mental impairment that is expected to give rise to a long-term need for specialized health, social, and other services, and that makes the person with the disability dependent upon others for assistance to secure these services.

(5) "Surplus trust funds" means funds accumulated in the trust from contributions made on behalf of an individual beneficiary that, after

the death of the beneficiary, are determined by the board to be in excess of the actual cost of providing services during the beneficiary's lifetime, including the beneficiary's share of administrative costs.

(6) "Trustee" means any member of the board of a corporation, formed for the purpose of managing a community trust, whether that member is designated as a trustee, director, manager, governor, or by any other title. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3.)

Editor's Note. — Subdivisions (5) and (6) were designated as such by the Revisor of Statutes to preserve alphabetical order.

§ 36D-3. Scope.

This Article applies to every community trust established in this State. In addition to meeting the other requirements of this Article, every board that administers a community trust shall incorporate as a nonprofit corporation under Chapter 55A of the General Statutes. Except as otherwise provided in this Chapter, Chapter 55A of the General Statutes applies to community trusts. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3.)

§ 36D-4. Administration; powers and duties.

(a) Every community trust shall be administered by a board. The board shall be comprised of no less than nine and no more than 21 members, at least one-third of whom are parents or relatives of persons with severe chronic disabilities. No board member shall be a provider of habilitative, health, social, or educational services to persons with severe chronic disabilities or an employee of such a service provider. The board may, however, allow service providers to serve on the board in an advisory capacity. Board members shall be selected, to the maximum extent possible, from geographic areas throughout the area served by the trust.

The certificate of incorporation filed with the Secretary of State under Chapter 55A of the General Statutes shall, in addition to the requirements set forth in that Chapter, demonstrate that the requirements of this section have been met.

(b) Notwithstanding any other law, no trustee may be compensated for services provided as a member of the board of a community trust. No fees or commissions shall be paid to these trustees; however, a trustee may be paid for necessary expenses incurred by the trustee and may receive indemnification as permitted under Chapter 55A of the General Statutes.

(c) For every community trust incorporated under this Article, the corporation itself is considered the trustee of any funds administered by it. No individual board member is considered to be trustee of any fund deposited on behalf of any individual beneficiary with severe chronic disabilities.

(d) The board shall adopt bylaws that include a declaration delineating the primary geographic area serviced by the trust and the principal services to be provided. The board shall file the bylaws with the Secretary of State.

(e) The board may retain paid staff as it considers necessary to provide follow along services to the extent required by each beneficiary. The community trust may authorize the expenditure of funds for any goods or services, including recreational services, which the board, in its sole discretion, determines will promote the well-being of any beneficiary. The community trust may pay for the burial of any beneficiary. The community trust, however, may not expend funds for any goods or services of comparable quality to those available to any particular beneficiary through any governmental or charitable program, insurance, or other sources. The community trust may expend funds to meet the reasonable costs of administering the community trust.

(f) The community trust is not required to provide services to a beneficiary who is a competent adult and who has refused to accept the services. Further, the community trust shall not provide services of a nature or in a manner that would be contrary to the public policy of this State at the time the services are to be provided. In either case, the community trust may offer alternate services that are consistent with the purposes of this Article and in keeping with the best interests of the beneficiary.

(g) The community trust may accept appointment as guardian of the person, guardian of the estate, or guardian of both on behalf of any beneficiary. If the community trust accepts appointment as guardian of the person of an individual, it shall assign a staff member to carry out its responsibilities as the guardian. The community trust may, upon request, offer consultative and professional assistance to an individual, private or public guardian of any of its beneficiaries.

(h) The community trust may accept contributions, bequests, and designations under life insurance policies to the community trust on behalf of individuals with severe chronic disabilities for the purpose of qualifying them as beneficiaries.

(i) At the time a contribution, bequest, or assignment of insurance proceeds is made, the trustor shall receive a written statement of the services to be provided to the beneficiary. The statement shall include a starting date for the delivery of services or the condition precedent, such as the death of the trustor, which shall determine the starting date. The statement shall describe the frequency with which services shall be provided and their duration, and the criteria or procedures for modifying the program of services from time to time in the best interests of the beneficiary. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3.)

Editor's Note. — Subsections (c) through (i) were designated as such by the Revisor of Statutes, the designations in Session Laws 2005-192 having been (b1) to (h).

§ 36D-5. Accountability.

Along with the annual report filed with the Secretary of State under Chapter 55A of the General Statutes, the community trust shall file an itemized statement that shows the funds collected for the year, income earned, salaries, other expenses incurred, and the opening and final trust balances. A copy of this statement shall be made available, upon request, to any beneficiary, trustor, or designee of the trustor. In addition, once annually, each trustor or the trustor's designee shall receive a detailed individual statement of the services provided to the trustor's beneficiary during the previous 12 months and the services to be provided during the following 12 months. The community trust shall make a copy of the individual statement available to any beneficiary, upon request. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3.)

§ 36D-6. Gifts, surplus trust funds.

The community trust may accept gifts and use surplus trust funds for the purpose of qualifying as beneficiary any indigent person whose family members lack the resources to make a full contribution on that person's behalf. The extent and character of the services and selection of beneficiaries are at the discretion of the community trust. The community trust may not use surplus trust funds to make any charitable contribution on behalf of any beneficiary or any group or class of beneficiaries. The community trust may accept gifts to meet start-up costs, reduce the charges to the trust for the cost of administration, and for any other purpose that is consistent with this Article. Gifts made to the trust for an unspecified purpose shall be used by the community trust either to qualify indigent persons whose families lack the means to qualify them as beneficiaries of the trust or to meet any start-up costs that the trust incurs. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3.)

§ 36D-7. Special requests on behalf of beneficiary.

The community trust may agree to fulfill any special requests made on behalf of a beneficiary as long as the requests are consistent with this Article and provided that an adequate contribution has been made for this purpose on behalf of a beneficiary. The community trust may agree to serve as trustee for any individual trust created on behalf of a beneficiary, regardless of whether the trust is revocable or irrevocable, has one or more remaindermen or contingent beneficiaries, or any other condition, so long as the individual trust is consistent with the purposes of this Article. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3.)

§ 36D-8. Irrevocability; impossibility of fulfillment.

A community trust for persons with severe chronic disabilities is irrevocable, but the trustees in their sole discretion may provide compensation for any contribution to the trust to any trustor who, upon good cause, withdraws a beneficiary designated by the trustor from the trust, or if it becomes impossible to fulfill the conditions of the trust with regard to an individual beneficiary for reasons other than the death of the beneficiary. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3.)

§ 36D-9. Beneficiary's interest in trust not asset for income eligibility determination.

Notwithstanding any provisions of Chapter 108A of the General Statutes, the beneficiary's interest in any community trust is not considered to be an asset for the purpose of determining income eligibility for any publicly operated program, nor shall that interest be reached in satisfaction of a claim for support and maintenance of the beneficiary. No agency shall reduce the benefits of services available to any individual because that person is the beneficiary of a community trust. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3.)

§ 36D-10. Trust not subject to law against perpetuities; restraints on alienation.

A community trust shall not be subject to or held to be in violation of any principle of law against perpetuities or restraints on alienation or perpetual accumulations of trusts. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3.)

§ 36D-11. Settlement; trustee limitations.

The community trust shall settle a community trust by filing a final accounting in the superior court. In addition, at any time before the settlement of the final account, the community trust, the Secretary of State, or the Attorney General may bring an action for the dissolution of a nonprofit corporation in the superior court for the purpose of terminating the trust or merging it with another charitable trust.

No trustee or any private individual is entitled to share in the distribution of any of the trust assets upon dissolution, merger, or settlement of the community trust. Upon dissolution, merger, or settlement, the superior court shall distribute all of the remaining net assets of the community trust in a manner that is consistent with the purposes of this Article. (1991 (Reg. Sess., 1992), c. 768, s. 1; 2005-192, s. 3.)

Chapter 37.

Allocation of Principal and Income.

Article 1.

Uniform Principal and Income Act.

Sec.
37-1 through 37-15. [Repealed.]

Article 2.

Principal and Income Act of 1973.

Sec.
37-16 through 37-40. [Repealed.]

Article 1.

Uniform Principal and Income Act.

§§ 37-1 through 37-15: Repealed by Session Laws 1973, c. 729, s. 3.

Article 2.

Principal and Income Act of 1973.

§§ 37-16 through 37-40: Repealed by Session Laws 2003-232, s. 1, effective January 1, 2004, and applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in provisions of Chapter 37A of the General Statutes.

Cross References. — For similar provisions, see the Uniform Principal and Income Act at G.S. 37A-1-101 et seq.

Chapter 37A.

Uniform Principal and Income Act.

Article 1.

Definitions and Fiduciary Duties; Conversion to Unitrust; Judicial Control of Discretionary Power.

Part 1. Definitions.

Sec.
37A-1-101. Short title.
37A-1-102. Definitions.
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Part 2. Conversion to Unitrust.

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37A-1-104.2. Conversion in trustee's discretion without court approval.
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37A-1-104.8. No liability on part of trustee or disinterested person acting in good faith.
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37A-1-104.21. Definitions.
37A-1-104.22. Determination of unitrust amount.
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37A-1-104.24. Change or conversion of unitrust amount.
37A-1-104.25. Determination of character of unitrust amount.
37A-1-104.26. Unitrust amount in excess of a five percent payout.

Part 3. Judicial Control of Discretionary Power.

37A-1-105. Judicial control of discretionary power.

Article 2.

Decedent's Estate or Terminating Income Interest.

37A-2-201. Determination and distribution of net income.
37A-2-202. Distribution to residuary and remainder beneficiaries.

Article 3.

Apportionment at Beginning and End of Income Interest.

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Sec.
37A-6-601. Uniformity of application and construction.
37A-6-602. Severability clause.

Editor's Note. — Session Laws 2003-232, s. 7, provides: "The Revisor of Statutes shall cause to be printed with this act all relevant portions of the official comments to the Uniform Principal and Income Act of 1997 and all explanatory comments of the drafters of this act, as the Revisor considers appropriate."

Official Comments, copyright 2003, are reprinted in Articles 1 to 6 with the permission of the National Conference of Commissioners on Uniform State Laws. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

Article 1.

Definitions and Fiduciary Duties; Conversion to Unitrust; Judicial Control of Discretionary Power.

Part 1. Definitions.

§ 37A-1-101. Short title.

This Chapter may be cited as the Uniform Principal and Income Act. (2003-232, s. 2.)

Editor's Note. — Session Laws 2003-232, s. 8, made this Chapter effective January 1, 2004, and applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes, as enacted in this act.

§ 37A-1-102. Definitions.

The following definitions apply in this Chapter:

(1) "Accounting period" means a calendar year unless another 12-month period is selected by a fiduciary. The term includes a portion of a calendar year or other 12-month period that begins when an income interest begins or ends when an income interest ends.

(2) "Beneficiary" includes, in the case of a decedent's estate, an heir, legatee, and devisee and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) "Fiduciary" means a personal representative or a trustee. The term includes an executor, administrator, successor personal representative, special administrator, and a person performing substantially the same function.

(4) "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in Article 4 of this Chapter.

(5) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust require it to

be distributed or authorize it to be distributed in the trustee's discretion.

(7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this Chapter to or from income during the period.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

(12) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court. (2003-232, s. 2.)

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"Income beneficiary." The definitions of income beneficiary (Section 102(5)) and income interest (Section 102(6)) cover both mandatory and discretionary beneficiaries and interests. There are no definitions for "discretionary income beneficiary" or "discretionary income interest" because those terms are not used in the Act.

Inventory value. There is no definition for inventory value in this Act because the provisions in which that term was used in the 1962 Act have either been eliminated (in the case of the underproductive property provision) or changed in a way that eliminates the need for the term (in the case of bonds and other money obligations, property subject to depletion, and the method for determining entitlement to income distributed from a probate estate).

"Net income." The reference to "transfers under this Act to or from income" means transfers made under Sections 104(a), 412(b), 502(b), 503(b), 504(a), and 506.

"Terms of a trust." This term was chosen in preference to "terms of the trust instrument" (the phrase used in the 1962 Act) to make it clear that the Act applies to oral trusts as well as those whose terms are expressed in written documents. The definition is based on the Restatement (Second) of Trusts § 4 (1959) and the Restatement (Third) of Trusts § 4 (Tent. Draft No. 1, 1996). Constructional preferences or rules would also apply, if necessary, to determine the terms of the trust.

§ 37A-1-103. Fiduciary duties; general principles.

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of Articles 2 and 3 of this Chapter, a fiduciary:

(1) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this Chapter;

(2) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this Chapter;

(3) Shall administer a trust or estate in accordance with this Chapter if the terms of the trust or the will do not contain a different provision

or do not give the fiduciary a discretionary power of administration; and

(4) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this Chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under G.S. 37A-1-104(a), any discretionary power in connection with the conversion or administration of a unitrust under Part 2 of this Article, or a discretionary power of administration regarding a matter within the scope of this Chapter, whether granted by the terms of a trust, a will, or this Chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this Chapter is presumed to be fair and reasonable to all of the beneficiaries.

(c) The exercise of powers of allocation of receipts and expenditures contained or incorporated by reference to G.S. 32-27(29) in wills dated prior to January 1, 2004, shall continue to be valid. (2003-232, s. 2.)

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Prior Act. The rule in Section 2(a) of the 1962 Act is restated in Section 103(a), without changing its substance, to emphasize that the Act contains only default rules and that provisions in the terms of the trust are paramount. However, Section 2(a) of the 1962 Act applies only to the allocation of receipts and disbursements to or between principal and income. In this Act, the first sentence of Section 103(a) states that it also applies to matters within the scope of Articles 2 and 3. Section 103(a)(2) incorporates the rule in Section 2(b) of the 1962 Act that a discretionary allocation made by the trustee that is contrary to a rule in the Act should not give rise to an inference of imprudence or partiality by the trustee.

The Act deletes the language that appears at the end of 1962 Act Section 2(a)(3) — "and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their affairs" — because persons of ordinary prudence, discretion and judgment, acting in the management of their own affairs do not normally think in terms of the interests of successive beneficiaries. If there is an analogy to an individual's decision-making process, it is probably the individual's decision to spend or to save, but this is not a useful guideline for trust administration. No case has been found in which a court has relied on the "prudent man" rule of the 1962 Act.

Fiduciary discretion. The general rule is that if a discretionary power is conferred upon a trustee, the exercise of that power is not subject to control by a court except to prevent an abuse of discretion. Restatement (Second) of Trusts § 187. The situations in which a court will control the exercise of a trustee's discretion are discussed in the comments to § 187. See also id. § 233 Comment *p* .

Questions for which there is no provision. Section 103(a)(4) allocates receipts and disbursements to principal when there is no provision for a different allocation in the terms of the trust, the will, or the Act. This may occur because money is received from a financial instrument not available at the present time (inflation-indexed bonds might have fallen into this category had they been announced after this Act was approved by the Commissioners on Uniform State Laws) or because a transaction is of a type or occurs in a manner not anticipated by the Drafting Committee for this Act or the drafter of the trust instrument.

Allocating to principal a disbursement for which there is no provision in the Act or the terms of the trust preserves the income beneficiary's level of income in the year it is allocated to principal, but thereafter will reduce the amount of income produced by the principal. Allocating to principal a receipt for which there is no provision will increase the income received by the income beneficiary in subsequent years, and will eventually, upon termination of the trust, also favor the remainder beneficiary. Allocating these items to principal implements the rule that requires a trustee to administer the trust impartially, based on what is fair and reasonable to both income and remainder beneficiaries. However, if the trustee decides that an adjustment between principal and income is needed to enable the trustee to comply with Section 103(b), after considering the return from the portfolio as a whole, the trustee may make an appropriate adjustment under Section 104(a).

Duty of impartiality. Whenever there are two or more beneficiaries, a trustee is under a duty to deal impartially with them. Restatement of Trusts 3d: Prudent Investor Rule § 183 (1992). This rule applies whether the beneficiaries' interests in the trust are concurrent or successive. If the terms of the trust give the trustee discretion to favor one beneficiary over another, a court will not control the exercise of such discretion except to prevent the trustee from abusing it. Id. § 183, Comment a. "The precise meaning of the trustee's duty of impartiality and the balancing of competing interests and objectives inevitably are matters of judgment and interpretation. Thus, the duty and balancing are affected by the purposes, terms, distribution requirements, and other circumstances of the trust, not only at the outset but as they may change from time to time." Id. § 232, Comment *c*.

The terms of a trust may provide that the trustee, or an accountant engaged by the trustee, or a committee of persons who may be family members or business associates, shall have the power to determine what is income and what is principal. If the terms of a trust provide that this Act specifically or principal and income legislation in general does not apply to the trust but fail to provide a rule to deal with a matter provided for in this Act, the trustee has an implied grant of discretion to decide the question. Section 103(b) provides that the rule of impartiality applies in the exercise of such a discretionary power to the extent that the terms of the trust do not provide that one or more of the beneficiaries are to be favored. The fact that a person is named an income beneficiary or a remainder beneficiary is not by itself an indication of partiality for that beneficiary.

§ 37A-1-104. Trustee's power to adjust.

(a) A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or shall be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in G.S. 37A-1-103(a), that the trustee is unable to comply with G.S. 37A-1-103(b). In lieu of exercising the power to adjust, the trustee may convert the trust to a unitrust as permitted under Part 2 of this Article, in which case the unitrust amount shall become the net income of the trust.

(b) In deciding whether and to what extent to exercise the power conferred by subsection (a) of this section, a trustee shall consider all factors relevant to the trust and its beneficiaries, including the following factors to the extent they are relevant:

(1) The nature, purpose, and expected duration of the trust;

(2) The intent of the grantor or settlor;

(3) The identity and circumstances of the beneficiaries;

(4) The needs for liquidity, regularity of income, and preservation and appreciation of capital;

(5) The assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(6) The net amount allocated to income under the other sections of this Chapter and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available;

(7) Whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to invade principal or accumulate income;

(8) The actual and anticipated effect of economic conditions on principal and income and effects of inflation and deflation; and

(9) The anticipated tax consequences of an adjustment.

(c) A trustee shall not make an adjustment:

(1) That diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction would be allowed, in whole or in part, if the trustee did not have the power to make the adjustment;

(2) That reduces the actuarial value of the income interest in a trust to which a person transfers property with the intent to qualify for a gift tax exclusion;

(3) That changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust assets;

(4) From any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless both income and principal are so set aside;

(5) If possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(6) If possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(7) If the trustee is a beneficiary of the trust;

(8) If the trustee is not a beneficiary but the adjustment would benefit the trustee directly or indirectly, except that a trustee may make an adjustment that also benefits a beneficiary even if the terms of the trust provide for trustee compensation as a percentage of the trust's income; or

(9) If the trust has been converted to, and is then operating as, a unitrust under Part 2 of this Article.

(d) If subdivision (5), (6), (7), or (8) of subsection (c) of this section applies to a trustee and there is more than one trustee, a cotrustee to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is not permitted by the terms of the trust.

(e) A trustee may renounce the entire power conferred by subsection (a) of this section or may renounce only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in subdivisions (1) through (6) or subdivision (8) of subsection (c) of this section or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in subsection (c) of this section. The renunciation may be permanent or for a specified period, including a period measured by the life of an individual.

(f) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income do not affect the application of this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by subsection (a) of this section. (2003-232, s. 2; 2007-106, s. 44.)

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Purpose and Scope of Provision. The purpose of Section 104 is to enable a trustee to select investments using the standards of a prudent investor without having to realize a particular portion of the portfolio's total return in the form of traditional trust accounting income such as interest, dividends, and rents. Section 104(a) authorizes a trustee to make adjustments between principal and income if three conditions are met: (1) the trustee must be managing the trust assets under the prudent investor rule; (2) the terms of the trust must express the income beneficiary's distribution rights in terms of the right to receive "income" in the sense of traditional trust accounting income; and (3) the trustee must determine, after applying the rules in Section 103(a), that he is unable to comply with Section 103(b). In deciding whether and to what extent to exercise the power to adjust, the trustee is required to consider the factors described in Section 104(b), but the trustee may not make an adjustment in circumstances described in Section 104(c).

Section 104 does not empower a trustee to increase or decrease the degree of beneficial enjoyment to which a beneficiary is entitled under the terms of the trust; rather, it authorizes the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio's total return is too small or too large because of investment decisions made by the trustee under the prudent investor rule. The paramount consideration in applying Section 104(a) is the requirement in Section 103(b) that "a fiduciary must administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries." The power to adjust is subject to control by the court to prevent an abuse of discretion. Restatement (Second) of Trusts § 187 (1959). See also id. §§ 183, 232, 233, Comment *p*(1959).

Section 104 will be important for trusts that are irrevocable when a State adopts the prudent investor rule by statute or judicial approval of the rule in Restatement of Trusts 3d: Prudent Investor Rule. Wills and trust instruments executed after the rule is adopted can be drafted to describe a beneficiary's distribution rights in terms that do not depend upon the amount of trust accounting income, but to the extent that drafters of trust documents continue to describe an income beneficiary's distribution rights by referring to trust accounting income, Section 104 will be an important tool in trust administration.

Three conditions to the exercise of the power to adjust. The first of the three conditions that must be met before a trustee can exercise the power to adjust — that the trustee invest and manage trust assets as a prudent investor — is expressed in this Act by language derived from the Uniform Prudent Investor Act, but the condition will be met whether the prudent investor rule applies because the Uniform Act or other prudent investor legislation has been enacted, the prudent investor rule has been approved by the courts, or the terms of the trust require it. Even if a State's legislature or courts have not formally adopted the rule, the Restatement establishes the prudent investor rule as an authoritative interpretation of the common law prudent man rule, referring to the prudent investor rule as a "modest reformulation of the Harvard College dictum and the basic rule of prior Restatements." Restatement of Trusts 3d: Prudent Investor Rule, Introduction, at 5. As a result, there is a basis for concluding that the first condition is satisfied in virtually all States except those in which a trustee is permitted to invest only in assets set forth in a statutory "legal list."

The second condition will be met when the terms of the trust require all of the "income" to be distributed at regular intervals; or when the terms of the trust require a trustee to distribute all of the income, but permit the trustee to decide how much to distribute to each member of a class of beneficiaries; or when the terms of a trust provide that the beneficiary shall receive the greater of the trust accounting income and a fixed dollar amount (an annuity), or of trust accounting income and a fractional share of the value of the trust assets (a unitrust amount). If the trust authorizes the trustee in its discretion to distribute the trust's income to the beneficiary or to accumulate some or all of the income, the condition will be met because the terms of the trust do not permit the trustee to distribute more than the trust accounting income.

To meet the third condition, the trustee must first meet the requirements of Section 103(a), i.e., she must apply the terms of the trust, decide whether to exercise the discretionary powers given to the trustee under the terms of the trust, and must apply the provisions of the Act if the terms of the trust do not contain a different provision or give the trustee discretion. Second, the trustee must determine the extent to which the terms of the trust clearly manifest an intention by the settlor that the trustee may or must favor one or more of the beneficiaries. To the extent that the terms of the trust do not require partiality, the trustee must conclude that she is unable to comply with the duty to administer the trust impartially. To the extent that the terms of the trust do require or permit the trustee to favor the income beneficiary or the remainder beneficiary, the trustee must conclude that she is unable to achieve the degree of partiality required or permitted. If the trustee comes to either conclusion — that she is unable to administer the trust impartially or that she is unable to achieve the degree of partiality required or permitted — she may exercise the power to adjust under Section 104(a).

Impartiality and productivity of income. The duty of impartiality between income and remainder beneficiaries is linked to the trustee's duty to make the portfolio productive of trust accounting income whenever the distribution requirements are expressed in terms of distributing the trust's "income." The 1962 Act implies that the duty to produce income applies on an asset by asset basis because the right of an income beneficiary to receive "delayed income" from the sale proceeds of underproductive property under Section 12 of that Act arises if "any part of principal ... has not produced an average net income of a least 1% per year of its inventory value for more than a year ...." Under the prudent investor rule, "[t]o whatever extent a requirement of income productivity exists, ... the requirement applies not investment by investment but to the portfolio as a whole." Restatement of Trusts 3d: Prudent Investor Rule § 227, Comment *i*, at 34. The power to adjust under Section 104(a) is also to be exercised by considering net income from the portfolio as a whole and not investment by investment. Section 413(b) of this Act eliminates the underproductive property rule in all cases other than trusts for which a marital deduction is allowed; the rule applies to a marital deduction trust if the trust's assets "consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets ..." — in other words, the section applies by reference to the portfolio as a whole.

While the purpose of the power to adjust in Section 104(a) is to eliminate the need for a trustee who operates under the prudent investor rule to be concerned about the income component of the portfolio's total return, the trustee must still determine the extent to which a distribution must be made to an income beneficiary and the adequacy of the portfolio's liquidity as a whole to make that distribution.

For a discussion of investment considerations involving specific investments and techniques under the prudent investor rule, see Restatement of Trusts 3d: Prudent Investor Rule § 227, Comments *k-p*.

Factors to consider in exercising the power to adjust. Section 104(b) requires a trustee to consider factors relevant to the trust and its beneficiaries in deciding whether and to what extent the power to adjust should be exercised. Section 2(c) of the Uniform Prudent Investor Act sets forth circumstances that a trustee is to consider in investing and managing trust assets. The circumstances in Section 2(c) of the Uniform Prudent Investor Act are the source of the factors in paragraphs (3) through (6) and (8) of Section 104(b) (modified where necessary to adapt them to the purposes of this Act) so that, to the extent possible, comparable factors will apply to investment decisions and decisions involving the power to adjust. If a trustee who is operating under the prudent investor rule decides that the portfolio should be composed of financial assets whose total return will result primarily from capital appreciation rather than dividends, interest, and rents, the trustee can decide at the same time the extent to which an adjustment from principal to income may be necessary under Section 104. On the other hand, if a trustee decides that the risk and return objectives for the trust are best achieved by a portfolio whose total return includes interest and dividend income that is sufficient to provide the income beneficiary with the beneficial interest to which the beneficiary is entitled under the terms of the trust, the trustee can decide that it is unnecessary to exercise the power to adjust.

Assets received from the settlor. Section 3 of the Uniform Prudent Investor Act provides that "[a] trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying." The special circumstances may include the wish to retain a family business, the benefit derived from deferring liquidation of the asset in order to defer payment of income taxes, or the anticipated capital appreciation from retaining an asset such as undeveloped real estate for a long period. To the extent the trustee retains assets received from the settlor because of special circumstances that overcome the duty to diversify, the trustee may take these circumstances into account in determining whether and to what extent the power to adjust should be exercised to change the results produced by other provisions of this Act that apply to the retained assets. See Section 104(b)(5); Uniform Prudent Investor Act § 3, Comment, 7B U.L.A. 18, at 25-26 (Supp. 1997); Restatement of Trusts 3d: Prudent Investor Rule § 229 and Comments *a-e* .

Limitations on the power to adjust. The purpose of subsections (c)(1) through (4) is to preserve tax benefits that may have been an important purpose for creating the trust. Subsections (c)(5), (6), and (8) deny the power to adjust in the circumstances described in those subsections in order to prevent adverse tax consequences, and subsection (c)(7) denies the power to adjust to any beneficiary, whether or not possession of the power may have adverse tax consequences.

Under subsection (c)(1), a trustee cannot make an adjustment that diminishes the income interest in a trust that requires all of the income to be paid at least annually to a spouse and for which an estate tax or gift tax marital deduction is allowed; but this subsection does not prevent the trustee from making an adjustment that increases the amount of income paid from a marital deduction trust to the spouse. Subsection (c)(1) applies to a trust that qualifies for the marital deduction because the spouse has a general power of appointment ver the trust, but it applies to a qualified erminable interest property (QTIP) trust only f and to the extent that the fiduciary makes the lection required to obtain the tax deduction. Subsection (c)(1) does not apply to a so-called estate" trust. This type of trust qualifies for the narital deduction because the terms of the rust require the principal and undistributed ncome to be paid to the surviving spouse's state when the spouse dies; it is not necessary or the terms of an estate trust to require the ncome to be distributed annually. Reg. § 20.2056(c)-2(b)(1)(iii).

Subsection (c)(3) applies to annuity trusts nd unitrusts with no charitable beneficiaries s well as to trusts with charitable income or emainder beneficiaries; its purpose is to make t clear that a beneficiary's right to receive a ixed annuity or a fixed fraction of the value of trust's assets is not subject to adjustment nder Section 104(a). Subsection (c)(3) does not pply to any additional amount to which the eneficiary may be entitled that is expressed in erms of a right to receive income from the rust. For example, if a beneficiary is to receive fixed annuity or the trust's income, whichever s greater, subsection (c)(3) does not prevent a rustee from making an adjustment under Section 104(a) in determining the amount of the rust's income.

If subsection (c)(5), (6), (7), or (8), prevents a rustee from exercising the power to adjust, ubsection (d) permits a cotrustee who is not ubject to the provision to exercise the power nless the terms of the trust do not permit the otrustee to do so.

Release of the power to adjust. Section 04(e) permits a trustee to release all or part of he power to adjust in circumstances in which he possession or exercise of the power might eprive the trust of a tax benefit or impose a tax urden. For example, if possessing the power ould diminish the actuarial value of the income interest in a trust for which the income eneficiary's estate may be eligible to claim a redit for property previously taxed if the beneficiary dies within ten years after the death of he person creating the trust, the trustee is ermitted under subsection (e) to release just he power to adjust from income to principal.

Trust terms that limit a power to adjust. ection 104(f) applies to trust provisions that imit a trustee's power to adjust. Since the ower is intended to enable trustees to employ he prudent investor rule without being constrained by traditional principal and income ules, an instrument executed before the adoption of this Act whose terms describe the mount that may or must be distributed to a eneficiary by referring to the trust's income or hat prohibit the invasion of principal or that rohibit equitable adjustments in general should not be construed as forbidding the use of the power to adjust under Section 104(a) if the need for adjustment arises because the trustee is operating under the prudent investor rule. Instruments containing such provisions that are executed after the adoption of this Act should specifically refer to the power to adjust if the settlor intends to forbid its use. See generally, Joel C. Dobris, Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning, 66 Iowa L. Rev. 273 (1981).

Examples. The following examples illustrate the application of Section 104:

Example (1) — T is the successor trustee of a trust that provides income to A for life, remainder to B. T has received from the prior trustee a portfolio of financial assets invested 20% in stocks and 80% in bonds. Following the prudent investor rule, T determines that a strategy of investing the portfolio 50% in stocks and 50% in bonds has risk and return objectives that are reasonably suited to the trust, but T also determines that adopting this approach will cause the trust to receive a smaller amount of dividend and interest income. After considering the factors in Section 104(b), T may transfer cash from principal to income to the extent T considers it necessary to increase the amount distributed to the income beneficiary.

Example (2) — T is the trustee of a trust that requires the income to be paid to the settlor's son C for life, remainder to C's daughter D. In a period of very high inflation, T purchases bonds that pay double-digit interest and determines that a portion of the interest, which is allocated to income under Section 406 of this Act, is a return of capital. In consideration of the loss of value of principal due to inflation and other factors that T considers relevant, T may transfer part of the interest to principal.

Example (3) — T is the trustee of a trust that requires the income to be paid to the settlor's sister E for life, remainder to charity F. E is a retired schoolteacher who is single and has no children. E's income from her social security, pension, and savings exceeds the amount required to provide for her accustomed standard of living. The terms of the trust permit T to invade principal to provide for E's health and to support her in her accustomed manner of living, but do not otherwise indicate that T should favor E or F. Applying the prudent investor rule, T determines that the trust assets should be invested entirely in growth stocks that produce very little dividend income. Even though it is not necessary to invade principal to maintain E's accustomed standard of living, she is entitled to receive from the trust the degree of beneficial enjoyment normally accorded a person who is the sole income beneficiary of a trust, and T may transfer cash from principal to income to provide her with that degree of enjoyment.

Example (4) — T is the trustee of a trust that is governed by the law of State X. The trust became irrevocable before State X adopted the prudent investor rule. The terms of the trust require all of the income to be paid to G for life, remainder to H, and also give T the power to invade principal for the benefit of G for "dire emergencies only." The terms of the trust limit the aggregate amount that T can distribute to G from principal during G's life to 6% of the trust's value at its inception. The trust's portfolio is invested initially 50% in stocks and 50% in bonds, but after State X adopts the prudent investor rule T determines that, to achieve suitable risk and return objectives for the trust, the assets should be invested 90% in stocks and 10% in bonds. This change increases the total return from the portfolio and decreases the dividend and interest income. Thereafter, even though G does not experience a dire emergency, T may exercise the power to adjust under Section 104(a) to the extent that T determines that the adjustment is from only the capital appreciation resulting from the change in the portfolio's asset allocation. If T is unable to determine the extent to which capital appreciation resulted from the change in asset allocation or is unable to maintain adequate records to determine the extent to which principal distributions to G for dire emergencies do not exceed the 6% limitation, T may not exercise the power to adjust. See Joel C. Dobris, Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning, 66 Iowa L. Rev. 273 (1981).

Example (5) — T is the trustee of a trust for the settlor's child. The trust owns a diversified portfolio of marketable financial assets with a value of $600,000, and is also the sole beneficiary of the settlor's IRA, which holds a diversified portfolio of marketable financial assets with a value of $900,000. The trust receives a distribution from the IRA that is the minimum amount required to be distributed under the Internal Revenue Code, and T allocates 10% of the distribution to income under Section 409(c) of this Act. The total return on the IRA's assets exceeds the amount distributed to the trust, and the value of the IRA at the end of the year is more than its value at the beginning of the year. Relevant factors that T may consider in determining whether to exercise the power to adjust and the extent to which an adjustment should be made to comply with Section 103(b) include the total return from all of the trust's assets, those owned directly as well as its interest in the IRA, the extent to which the trust will be subject to income tax on the portion of the IRA distribution that is allocated to principal, and the extent to which the income beneficiary will be subject to income tax on the amount that T distributes to the income beneficiary.

Example (6) — T is the trustee of a trust whose portfolio includes a large parcel of undeveloped real estate. T pays real property taxes on the undeveloped parcel from income each year pursuant to Section 501(3). After considering the return from the trust's portfolio as a whole and other relevant factors described in Section 104(b), T may exercise the power to adjust under Section 104(a) to transfer cash from principal to income in order to distribute to the income beneficiary an amount that T considers necessary to comply with Section 103(b).

Example (7) — T is the trustee of a trust whose portfolio includes an interest in a mutual fund that is sponsored by T. As the manager of the mutual fund, T charges the fund a management fee that reduces the amount available to distribute to the trust by $2,000. If the fee had been paid directly by the trust, one-half of the fee would have been paid from income under Section 501(1) and the other one-half would have been paid from principal under Section 502(a)(1). After considering the total return from the portfolio as a whole and other relevant factors described in Section 104(b), T may exercise its power to adjust under Section 104(a) by transferring $1,000, or half of the trust's proportionate share of the fee, from principal to income.

Editor's Note. — Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 44, effective October 1, 2007, substituted "indirectly, except that a trustee may make an adjustment that also benefits a beneficiary even if the terms of the trust provide for trustee compensation as a percentage of the trust's income; or" for "indirectly; or" in subdivision (c)(8). See Editor's note for applicability.

Part 2. Conversion to Unitrust.

§ 37A-1-104.1. Definitions.

The following definitions apply to this Part:

(1) Code. — The Internal Revenue Code of 1986, as amended from time to time, and any statutory enactment successor to the Code; reference to a specific section of the Code in this Part shall be considered a reference also to any successor provision dealing with the subject matter of that section of the Code.

(2) Repealed by Session Laws 2007-106, s. 45, effective October 1, 2007.

(3) Disinterested person. — A person who is not a related or subordinate party with respect to the person then acting as trustee of the trust and excludes the settlor of the trust and any interested trustee.

(4) Repealed by Session Laws 2007-106, s. 45, effective October 1, 2007.

(5) Income trust. — A trust, created by either an inter vivos or a testamentary instrument, which directs or permits the trustee to distribute the net income of the trust to one or more persons, either in fixed proportions or in amounts or proportions determined by the trustee, and regardless of whether the trust directs or permits the trustee to distribute principal of the trust to one or more of those persons.

(6) Interested distributee. — A living beneficiary who is a distributee or permissible distributee of trust income or principal who has the power to remove the existing trustee and designate as successor a person who may be a related or subordinate party with respect to that distributee.

(7) Interested trustee. — Any of the following:
  a. An individual trustee who is a qualified beneficiary.
  b. Any trustee who may be removed and replaced by an interested distributee.
  c. An individual trustee whose legal obligation to support a beneficiary may be satisfied by distributions of income and principal of the trust.

(7a) Legal disability. — A person under a legal disability is a person who is a minor, an incompetent, or an unborn individual, or whose identity or location is unknown.

(7b) Qualified beneficiary. — A qualified beneficiary as defined in G.S. 36C-1-103(15).

(8) Related or subordinate party. — A related or subordinate party as defined in section 672(c) of the Code.

(8a) Representative. — A person who may represent and bind another as provided in Article 3 of Chapter 36C of the General Statutes, the provisions of which shall apply for purposes of this Article.

(8b) Settlor. — An individual, including a testator, who creates a trust.

(9) Total return unitrust. — An income trust that has been converted under and meets the provisions of this Part.

(9a) Treasury regulations. — The regulations, rulings, procedures, notices, or other administrative pronouncements issued by the Internal Revenue Service, as amended from time to time.

(10) Trustee. — Any person acting as trustee of the trust, except as otherwise expressly provided in this Part, whether acting in that person's discretion or on the direction of one or more persons acting in a fiduciary capacity.

(11) Unitrust amount. — An amount computed as a percentage of the fair market value of the trust. (2003-232, s. 2; 2005-244, ss. 1, 2; 2007-106, s. 45.)

Editor's Note. — Some of the definitions above were renumbered in alphabetical order at the direction of the Revisor of Statutes.

Subdivision (5), as amended by Session Laws 2005-244, ss. 1 and 2, effective July 30, 2005, is applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes.

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 45, effective October 1, 2007, rewrote the section. See Editor's note for applicability.

§ 37A-1-104.2. Conversion in trustee's discretion without court approval.

(a) Any trustee, other than an interested trustee, or, where two or more persons are acting as trustees, a majority of the trustees who are not interested trustees (in either case hereafter "trustee"), may, in the trustee's sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if all of the following apply:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.

(2) The trustee gives written notice of its intention to take the action, including copies of the written policy and this Part, to (i) the settlor of the trust, if living, and (ii) all persons who are the qualified beneficiaries of the trust at the time the notice is given. If a qualified beneficiary is under a legal disability, notice shall be given to the representative of the qualified beneficiary if a representative is available without court order.

(3) There is at least (i) one qualified beneficiary described in G.S. 36C-1-103(15)a. or b. who is not under a legal disability or a representative of a qualified beneficiary so described and (ii) one qualified beneficiary described in G.S. 36C-1-103(15)c. who is not under a legal disability or a representative of a qualified beneficiary so described. and

(4) No person receiving notice of the trustee's intention to take the proposed action objects to the action within 60 days after notice has been given. The objection shall be by written instrument delivered to the trustee.

(b) If there is no trustee of the trust other than an interested trustee, the interested trustee or, where two or more persons are acting as trustee and are interested trustees, a majority of the interested trustees may, in its sole discretion and without court approval, (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust if all of the following apply:

(1) The trustee adopts a written policy for the trust providing (i) in the case of a trust being administered as an income trust, that future distributions from the trust will be unitrust amounts rather than net income as determined under this Chapter, (ii) in the case of a trust being administered as a total return unitrust, that future distributions from the trust will be net income as determined under this Chapter rather than unitrust amounts, or (iii) that the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust will be changed as stated in the policy.

(2) The trustee appoints a disinterested person who, in its sole discretion but acting in a fiduciary capacity, determines for the trustee (i) the percentage to be used to calculate the unitrust amount, (ii) the method to be used in determining the fair market value of the trust, and (iii) which assets, if any, are to be excluded in determining the unitrust amount.

(3) The trustee gives written notice of its intention to take the action, including copies of the written policy and this Part, and the determinations of the disinterested person to (i) the settlor of the trust, if living, and (ii) all persons who are the qualified beneficiaries of the trust at the time of the giving of the notice. If a qualified beneficiary is under a legal disability, notice shall be given to the representative of the qualified beneficiary if a representative is available without court order.

(4) There is at least one (i) qualified beneficiary described in G.S. 36C-1-103(15)a. or b. or a representative of a beneficiary so described and (ii) one qualified beneficiary described in G.S. 36C-1-103(15)c. or a representative of a qualified beneficiary so described.

(5) No person receiving notice of the trustee's intention to take the proposed action of the trustee objects to the action or to the determination of the disinterested person within 60 days after notice has been given. The objection must be by written instrument delivered to the trustee.

(c) A trustee may act under subsection (a) or (b) of this section with respect to a trust for which both income and principal have been set aside permanently for charitable purposes under the governing instrument and for which a federal estate or gift tax deduction has been taken, provided that all of the following apply:

(1) Instead of sending written notice to the persons described in subdivisions (2) and (3) of subsection (a) of this section or subdivisions (3) and (4) of subsection (b) of this section, as the case may be, the trustee shall send written notice to each charitable organization expressly designated to receive the income of the trust under the governing instrument and, if no charitable organization is expressly designated to receive all of the income of the trust under the governing instrument, to the Attorney General of this State.

(2) Subdivision (4) of subsection (a) of this section or subdivision (5) of subsection (b) of this section, as the case may be, shall not apply to this action.

(3) In each taxable year, the trustee shall distribute the greater of the unitrust amount or the amount required by section 4942 of the Code.

(d) The provisions of G.S. 36C-1-109 regarding notices and the sending of documents to persons under Chapter 36C of the General Statutes shall apply for purposes of notices and the sending of documents under this section. (2003-232, s. 2; 2005-244, s. 3; 2007-106, s. 46.)

Editor's Note. — This section was amended by Session Laws 2007-106, s. 46, in the coded bill drafting format provided by G.S. 120-20.1. The word "and" at the end of subdivision (a)(3) was not stricken through. Subsection (a) has been set out in the form above at the direction of the Revisor of Statutes.

This section, as rewritten by Session Laws 2005-244, s. 3, effective July 30, 2005, is applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes.

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 46, effective October 1, 2007, rewrote the section. See Editor's note for applicability.

§ 37A-1-104.3. Conversion with court approval.

(a) If any trustee desires to (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust but does not have the ability to or elects not to do it under G.S. 37A-1-104.2, the trustee may petition the court for an order as the trustee considers appropriate. In the event, however, there is only one trustee of the trust and the trustee is an interested trustee or in the event there are two or more trustees of the trust and a majority of them are interested trustees, the court, in its own discretion or on the petition of the trustee or trustees or any person interested in the trust, may appoint a disinterested person who, acting in a fiduciary capacity, shall present information to the court as shall be necessary to enable the court to make its determinations under this Part.

(b) A qualified beneficiary or a representative of a qualified beneficiary may request the trustee to (i) convert an income trust to a total return unitrust, (ii) reconvert a total return unitrust to an income trust, or (iii) change the percentage used to calculate the unitrust amount or the method used to determine the fair market value of the trust. If the trustee does not take the action requested, the qualified beneficiary or a representative of the qualified beneficiary may petition the court to order the trustee to take the action.

(c) All proceedings under this section shall be conducted as provided in Article 2 of Chapter 36C of the General Statutes. (2003-232, s. 2; 2007-106, s. 47.)

Editor's Note. — Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 47, effective October 1, 2007, substituted "G.S. 37A-1-104.2," for "G.S. 36A-1-104.2," in subsection (a); in subsection (b), substituted "qualified" for "competent" twice and inserted "or a representative of a qualified beneficiary" twice; and substituted "Article 2 of Chapter 36C of the General Statutes" for "Article 3 of Chapter 36A of the General Statutes" at the end of subsection (c). See Editor's note for applicability.

§ 37A-1-104.4. Determination of unitrust amount.

(a) The fair market value of the trust shall be determined at least annually, using a valuation date selected by the trustee in its discretion. The trustee, in its discretion, may use an average of the fair market value on the same valuation date for the current fiscal year and not more than three preceding fiscal years, if the use of this average appears desirable to reduce the impact of fluctuations in market value on the unitrust amount. Assets for which a fair market value cannot be readily ascertained shall be valued using valuation methods as are considered reasonable and appropriate by the trustee. Assets, such as a residence or tangible personal property, used by the trust beneficiary may be excluded from the fair market value for computing the unitrust amount.

(b) The percentage to be used in determining the unitrust amount shall be a reasonable current return from the trust, in any event not less than three percent (3%) nor more than five percent (5%), taking into account the intentions of the settlor of the trust as expressed in the governing instrument, the needs of the beneficiaries, general economic conditions, projected current earnings and appreciation for the trust, and projected inflation and its impact on the trust.

(c) Repealed by Session Laws 2005-244, s. 4, effective July 30, 2005. See notes for applicability language.

(d) Following the conversion of an income trust to a total return unitrust, the trustee:

(1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) May, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as the discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)-3(b) of the Treasury Regulations, as amended from time to time; and

(4) Shall then consider the unitrust amount as coming from the principal of the trust. (2003-232, s. 2; 2005-244, s. 4; 2007-106, ss. 48, 49.)

Editor's Note. — This section, as rewritten by Session Laws 2005-244, s. 4, effective July 30, 2005, is applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes.

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, ss. 48 and 49, effective October 1, 2007, inserted "also" following "trust beneficiary" in the last sentence of subsection (a), and substituted "settlor" for "grantor" near the middle of subsection (b). See Editor's note for applicability.

§ 37A-1-104.5. Matters in trustee's discretion.

In administering a total return unitrust, the trustee may, in its sole discretion but subject to the provisions of the governing instrument, determine:

(1) The effective date of the conversion;
(2) The timing of distributions, including provisions for prorating a distribution for a short year in which a beneficiary's right to payments commences or ceases;
(3) Whether distributions are to be made in cash or in kind or partly in cash and partly in kind;
(4) If the trust is reconverted to an income trust, the effective date of the reconversion; and
(5) Any other administrative issues as may be necessary or appropriate to carry out the purposes of this Part. (2003-232, s. 2.)

§ 37A-1-104.6. No effect on principal distributions.

Conversion to a total return unitrust under this Part shall not affect any other provision of the governing instrument, if any, regarding distributions of principal. For purposes of this Part, the distribution of a unitrust amount is considered a distribution of income and not of principal. (2003-232, s. 2.)

§ 37A-1-104.7: Repealed by Session Laws 2007-106, s. 49.1, effective October 1, 2007.

Editor's Note. — Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

§ 37A-1-104.8. No liability on part of trustee or disinterested person acting in good faith.

No trustee or disinterested person who in good faith takes or fails to take any action under this Part shall be liable to any person affected by the action or inaction, regardless of whether the person received written notice as provided in this Part and regardless of whether the person was under a legal disability at the time of the delivery of the notice. The exclusive remedy for any person affected by an action or inaction shall be to obtain an order of the court directing the trustee (i) to convert an income trust to a total return unitrust, (ii) to reconvert from a total return unitrust to an income trust, or (iii) to change the percentage used to calculate the unitrust amount. (2003-232, s. 2.)

§ 37A-1-104.9. Applicability.

This Part shall apply to all trusts in existence on, or created after January 1, 2004, unless (i) the governing instrument contains a provision clearly expressing the settlor's intention that the current beneficiary or beneficiaries are to receive an amount other than a reasonable current return from the trust, (ii) the trust is a trust described in section 170(f)(2)(B), section 664(d), section 2702(a)(3), or section 2702(b) of the Code, (iii) the trust is a trust under which any amount is, or has been in the past, set aside permanently for charitable purposes unless the income from the trust also is devoted permanently to charitable purposes, or (iv) the governing instrument expressly prohibits use of this Part by specific reference to this Part, or expressly states the settlor's intent that net income not be calculated as a unitrust amount. A provision in the governing instrument that "the provisions of Part 2 of Article 1 of Chapter 37A of the General Statutes or any corresponding provision of future law, shall not be used in the administration of this trust." or "the trustee shall not determine the distributions to the income beneficiary as a unitrust amount." or similar words reflecting that intent is sufficient to preclude the use of this Part. (2003-232, s. 2; 2005-244, s. 5; 2007-106, s. 50.)

Editor's Note. — Session Laws 2005-244, s. 7, provides in part: "G.S. 37A-1-104.9(iii), as rewritten in Section 5 of this act, applies retroactively to October 1, 2004, and applies to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes."

This section, as amended by Session Laws 2005-244, s. 5, effective July 30, 2005, is applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes.

Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

Effect of Amendments. — Session Laws 2007-106, s. 50, effective October 1, 2007, substituted "settlor's" for "grantor's" twice. See Editor's note for applicability.

Part 2A. Express Total Return Unitrusts.

§ 37A-1-104.21. Definitions.

(a) An "express total return unitrust" means a trust that has a governing instrument requiring the distribution at least annually of a unitrust amount equal to a fixed percentage of not less than three percent (3%) nor more than five percent (5%) per year of the net fair market value of the trust's assets, valued at least annually.

(b) "Code" means the Internal Revenue Code as described in G.S. 37A-1-104.1(1).

(c) "Treasury regulations" means the treasury regulations described in G.S. 37A-1-104.1(9a). (2005-244, s. 6.)

Editor's Note. — Session Laws 2005-244, s. 7, made this part effective July 30, 2005, and applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes.

The numbers of G.S. 37A-1-104.21 through 37A-1-104.25 were assigned by the Revisor of Statutes, the numbers in Session Laws 2005-244, s. 6, having been G.S. 37A-1-104A.1 through 37A-1-104A.5.

§ 37A-1-104.22. Determination of unitrust amount.

(a) The unitrust amount to be distributed by the express total return unitrust may be determined in the governing instrument by reference to the net fair market value of the trust's assets determined annually or averaged on a multiple year basis.

(b) The terms of the governing instrument of an express total return unitrust may provide that:

(1) Assets for which a fair market value cannot be readily ascertained shall be valued using valuation methods that the trustee considers reasonable and appropriate.

(2) Assets, such as a residence property or tangible personal property, used by the trust beneficiary entitled to the unitrust amount may be excluded from the net fair market value for computing the unitrust amount. (2005-244, s. 6.)

§ 37A-1-104.23. Effect of distribution of unitrust amount.

The distribution from an express total return unitrust of the fixed percentage of not less than three percent (3%) nor more than five percent (5%) reasonably apportions between the income beneficiaries and remaindermen the total return of an express total return unitrust. (2005-244, s. 6.)

§ 37A-1-104.24. Change or conversion of unitrust amount.

(a) The terms of the governing instrument of an express total return unitrust may provide the method similar to the method provided under G.S. 37A-1-104.2(a) for changing the unitrust percentage or for converting from a unitrust to an income trust or for a reconversion of an income trust to a unitrust, or for all of these actions.

(b) If the terms of the governing instrument of an express total return unitrust do not specifically or by reference to G.S. 37A-1-104.2 grant a power to the trustee to change the unitrust percentage or change to an income trust, the trustee shall not have that power. (2005-244, s. 6.)

§ 37A-1-104.25. Determination of character of unitrust amount.

Unless the terms of the governing instrument of the express total return unitrust specifically provide otherwise, the trustee:

(1) Shall consider the unitrust amount as paid from net accounting income determined as if the trust were not a unitrust;

(2) Shall then consider the unitrust amount as paid from ordinary income not allocable to net accounting income;

(3) May, in the trustee's discretion, consider the unitrust amount as paid from net short-term gain described in section 1222(5) of the Code and then from net long-term capital gain described in section 1222(7) of the Code so long as this discretionary power is exercised consistently and in a reasonable and impartial manner, but the amount so paid from net capital gains may not be greater than the excess of the unitrust amount over the amount of distributable net income as defined in section 643(a) of the Code without regard to section 1.643(a)-3(b) of the treasury regulations; and

(4) Shall then consider the unitrust amount as coming from the principal of the trust. (2005-244, s. 6.)

§ 37A-1-104.26. Unitrust amount in excess of a five percent payout.

A trust that provides for a fixed percentage payout in excess of five percent (5%) per year is considered an express total return unitrust that pays out a fixed percentage of five percent (5%) per year and pays out principal to the extent that the fixed percentage payout exceeds five percent (5%) per year. (2005-244, s. 6.)

Editor's Note. — The number of this section, G.S. 37A-1-104.26, was assigned by the Revisor of Statutes, the number in Session Laws 2005-244, s. 6, having been G.S. 37A-104A.6.

Part 3. Judicial Control of Discretionary Power.

§ 37A-1-105. Judicial control of discretionary power.

(a) The court shall not order a fiduciary to change a decision to exercise or not to exercise a discretionary power conferred by this Chapter unless it determines that the decision was an abuse of the fiduciary's discretion. A fiduciary's decision is not an abuse of discretion merely because the court would have exercised the power in a different manner or would not have exercised the power.

(b) The decisions to which subsection (a) of this section applies include:

(1) A decision under G.S. 37A-1-104(a) as to whether and to what extent an amount should be transferred from principal to income or from income to principal.

(2) A decision regarding the factors that are relevant to the trust and its beneficiaries, the extent to which the factors are relevant, and the weight, if any, to be given to those factors in deciding whether and to what extent to exercise the discretionary power conferred by G.S. 37A-1-104(a).

(c) If the court determines that a fiduciary has abused the fiduciary's discretion, the court may place the income and remainder beneficiaries in the positions they would have occupied if the discretion had not been abused, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or in a distribution that is too small, the court shall order the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to the beneficiary's appropriate position.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall place the beneficiaries, the trust, or both, in whole or in part, in their appropriate positions by ordering the fiduciary to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or ordering that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying subdivisions (1) and (2) of this subsection, to place the beneficiaries, the trust, or both in the positions they would have occupied if the discretion had not been abused, the court may order the fiduciary to pay an appropriate amount from its own funds to one or more of the beneficiaries or the trust or both.

(d) Upon petition by the fiduciary, the court having jurisdiction over a trust or estate shall determine whether a proposed exercise or nonexercise by the fiduciary of a discretionary power conferred by this Chapter will result in an abuse of the fiduciary's discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion. (2003-232, s. 2.)

OFFICIAL COMMENT

General. All of the discretionary powers in the 1997 Act are subject to the normal rules that govern a fiduciary's exercise of discretion. Section 105 codifies those rules for purposes of the Act so that they will be readily apparent and accessible to fiduciaries, beneficiaries, their counsel and the courts if and when questions concerning such powers arise.

Section 105 also makes clear that the normal rules governing the exercise of a fiduciary's powers apply to the discretionary power to adjust conferred upon a trustee by Section 104(a). Discretionary provisions authorizing trustees to determine what is income and what is principal have been used in governing instruments for years; Section 2 of the 1931 Uniform Principal and Income Act recognized that practice by providing that "the person establishing the principal may himself direct the manner of ascertainment of income and principal...or grant discretion to the trustee or other person to do so...." Section 103(a)(2) also recognizes the power of a settlor to grant such discretion to the trustee. Section 105 applies to a discretionary power granted by the terms of a trust or a will as well as the power to adjust in Section 104(a).

Power to Adjust. The exercise of the power to adjust is governed by a trustee's duty of impartiality, which requires the trustee to strike an appropriate balance between the interests of the income and remainder beneficiaries. Section 103(b) expresses this duty by requiring the trustee to "administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries." Because this involves the exercise of judgment in circumstances rarely capable of perfect resolution, trustees are not expected to achieve perfection; they are, however, required to make conscious decisions in good faith and with proper motives.

In seeking the proper balance between the interests of the beneficiaries in matters involving principal and income, a trustee's traditional approach has been to determine the settlor's objectives from the terms of the trust, gather the information needed to ascertain the financial circumstances of the beneficiaries, determine the extent to which the settlor's objectives can be achieved with the resources available in the trust, and then allocate the trust's assets between stocks and fixed-income securities in a way that will produce a particular level or range of income for the income beneficiary. The key element in this process has been to determine the appropriate level or range of income for the income beneficiary, and that will continue to be the key element in deciding whether and to what extent to exercise the discretionary power conferred by Section 104(a). If it becomes necessary for a court to determine whether an abuse of the discretionary power to adjust between principal and income has occurred, the criteria should be the same as those that courts have used in the past to determine whether a trustee has abused its discretion in allocating the trust's assets between stocks and fixed-income securities.

A fiduciary has broad latitude in choosing the methods and criteria to use in deciding whether and to what extent to exercise the power to adjust in order to achieve impartiality between income beneficiaries and remainder beneficiaries or the degree of partiality for one or the other that is provided for by the terms of the trust or the will. For example, in deciding what the appropriate level or range of income should be for the income beneficiary and whether to exercise the power, a trustee may use the methods employed prior to the adoption of the 1997 Act in deciding how to allocate trust assets between stocks and fixed-income securities; or may consider the amount that would be distributed each year based on a percentage of the portfolio's value at the beginning or end of an accounting period, or the average portfolio value for several accounting periods, in a manner similar to a unitrust, and may select a percentage that the trustee believes is appropriate for this purpose and use the same percentage or different percentages in subsequent years. The trustee may also use hypothetical portfolios of marketable securities to determine an appropriate level or range of income within which a distribution might fall.

An adjustment may be made prospectively at the beginning of an accounting period, based on a projected return or range of returns for a trust's portfolio, or retrospectively after the fiduciary knows the total realized or unrealized return for the period; and instead of an annual adjustment, the trustee may distribute a fixed dollar amount for several years, in a manner similar to an annuity, and may change the fixed dollar amount periodically. No inference of abuse is to be drawn if a fiduciary uses different methods or criteria for the same trust from time to time, or uses different methods or criteria for different trusts for the same accounting period.

While a trustee must consider the portfolio as a whole in deciding whether and to what extent to exercise the power to adjust, a trustee may apply different criteria in considering the portion of the portfolio that is composed of marketable securities and the portion whose market value cannot be determined readily, and may take into account a beneficiary's use or possession of a trust asset.

Under the prudent investor rule, a trustee is to incur costs that are appropriate and reasonable in relation to the assets and the purposes of the trust, and the same consideration applies in determining whether and to what extent to exercise the power to adjust. In making investment decisions under the prudent investor rule, the trustee will have considered the purposes, terms, distribution requirements, and other circumstances of the trust for the purpose of adopting an overall investment strategy having risk and return objectives reasonably suited to the trust. A trustee is not required to duplicate that work for principal and income purposes, and in many cases the decision about whether and to what extent to exercise the power to adjust may be made at the same time as the investment decisions. To help achieve the objective of reasonable investment costs, a trustee may also adopt policies that apply to all trusts or to individual trusts or classes of trusts, based on their size or other criteria, stating whether and under what circumstances the power to adjust will be exercised and the method of making adjustments; no inference of abuse is to be drawn if a trustee adopts such policies.

General rule. The first sentence of Section 105(a) is from Restatement (Second) of Trusts § 187 and Restatement (Third) of Trusts (Tentative Draft No. 2, 1999) § 50(1). The second sentence of Section 105(a) derives from Comment e to § 187 of the Second Restatement and Comment *b* to § 50 of the Third Restatement.

The reference in Section 105(a) to a fiduciary's decision to exercise or not to exercise a discretionary power underscores a fundamental precept, which is that a fiduciary has a duty to make a conscious decision about exercising or not exercising a discretionary power. Comment *b* to § 50 of the Third Restatement states:

> [A] court will intervene where the exercise of a power is left to the judgment of a trustee who improperly fails to exercise that judgment. Thus, even where a trustee has discretion whether or not to make any payments to a particular beneficiary, the court will interpose if the trustee, arbitrarily or without knowledge of or inquiry into relevant circumstances, fails to exercise the discretion.

Section 105(b) makes clear that the rule of subsection (a) applies not only to the power conferred by Section 104(a) but also to the evaluation process required by Section 104(b) in deciding whether and to what extent to exercise the power to adjust. Under Section 104(b), a trustee is to consider all of the factors that are relevant to the trust and its beneficiaries, including, to the extent the trustee determines they are relevant, the nine factors enumerated in Section 104(b). Section 104(b) derives from Section 2(c) of the Uniform Prudent Investor Act, which lists eight circumstances that a trustee shall consider, to the extent they are relevant, in investing and managing assets. The trustee's decisions about what factors are relevant for purposes of Section 104(b) and the weight to be accorded each of the relevant factors are part of the discretionary decision-making process. As such, these decisions are not subject to change for the purpose of changing the trustee's ultimate decision unless the court determines that there has been an abuse of discretion in determining the relevancy and weight of these factors.

Remedy. The exercise or nonexercise of a discretionary power under the Act normally affects the amount or timing of a distribution to the income or remainder beneficiaries. The primary remedy under Section 105(c) for abuse of discretion is the restoration of the beneficiaries and the trust to the positions they would have occupied if the abuse had not occurred. It draws on a basic principle of restitution that if a person pays money to someone who is not intended to receive it (and in a case to which this Act applies, not intended by the settlor to receive it in the absence of an abuse of discretion by the trustee), that person is entitled to restitution on the ground that the payee would be unjustly enriched if he were permitted to retain the payment. See Restatement of Restitution § 22 (1937). The objective is to accomplish the restoration initially by making adjustments between the beneficiaries and the trust to the extent possible; to the extent that restoration is not possible by such adjustments, a court may order the trustee to pay an amount to one or more of the beneficiaries, the trust, or both the beneficiaries and the trust. If the court determines that it is not possible in the circumstances to restore them to the their appropriate positions, the court may provide other remedies appropriate to the circumstances. The approach of Section 105(c) is supported by Comment *b* to § 50 of the Third Restatement of Trusts:

> When judicial intervention is required, a court may direct the trustee to make or refrain from making certain payments; issue instructions to clarify the standards or guidelines

applicable to the exercise of the power; or rescind the trustee's payment decisions, usually directing the trustee to recover amounts improperly distributed and holding the trustee liable for failure or inability to do so....

Advance determinations. Section 105(d) employs the familiar remedy of the trustee's petition to the court for instructions. It requires the court to determine, upon a petition by the fiduciary, whether a proposed exercise or nonexercise of a discretionary power by the fiduciary of a power conferred by the Act would be an abuse of discretion under the general rule of Section 105(a). If the petition contains the information prescribed in the second sentence of subsection (d), the proposed action or inaction is presumed not to result in an abuse, and a beneficiary who challenges the proposal must establish that it will.

Subsection (d) is intended to provide a fiduciary the opportunity to obtain an assurance of finality in a judicial proceeding before proceeding with a proposed exercise or nonexercise of a discretionary power. Its purpose is not, however, to have the court instruct the fiduciary how to exercise the discretion.

A fiduciary may also obtain the consent of the beneficiaries to a proposed act or an omission to act, and a beneficiary cannot hold the fiduciary liable for that act or omission unless:

(a) the beneficiary was under an incapacity at the time of such consent or of such act or omission; or

(b) the beneficiary, when he gave his consent, did not know of his rights and of the material facts which the trustee knew or should have known and which the trustee did not reasonably believe that the beneficiary knew; or

(c) the consent of the beneficiary was induced by improper conduct of the trustee.

Restatement (Second) of Trusts § 216.

If there are many beneficiaries, including some who are incapacitated or unascertained, the fiduciary may prefer the greater assurance of finality provided by a judicial proceeding that will bind all persons who have an interest in the trust.

Editor's Note. — Session Laws 2003-232, s. 8, makes this Chapter effective January 1, 2004, and applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes, as enacted in this act.

Article 2.

Decedent's Estate or Terminating Income Interest.

§ 37A-2-201. Determination and distribution of net income.

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in Articles 3 through 5 of this Chapter that apply to trustees and the rules in subdivision (5) of this section. The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in Articles 3 through 5 of this Chapter that apply to trustees and by:

  a. Including in net income all income from property used to discharge liabilities;

  b. Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

c. Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) Unless the will or trust instrument otherwise provides, or the court otherwise directs, a fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright interest, computed as provided in G.S. 24-1 from the date that is one year following the date of death of the person whose death gives rise to the payment of the pecuniary bequest or the happening of the contingency that causes the income interest to end, from net income determined under subdivision (2) of this section or from principal to the extent that net income is insufficient. However, this subdivision shall not apply to a pecuniary bequest:

a. To or for the benefit of a decedent's surviving spouse that is or can be qualified for the federal estate tax marital deduction; or

b. To or for the benefit of charitable organizations that are qualified for the federal estate tax charitable deduction, including a charitable remainder trust.

(4) A fiduciary shall distribute the net income remaining after distributions required by subdivision (3) of this section in the manner described in G.S. 37A-2-202 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary shall not reduce principal or income receipts from property described in subdivision (1) of this section because of a payment described in G.S. 37A-5-501 or G.S. 37A-5-502 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed. (2003-232, s. 2.)

OFFICIAL COMMENT

Terminating income interests and successive income interests. A trust that provides for a single income beneficiary and an outright distribution of the remainder ends when the income interest ends. A more complex trust may have a number of income interests, either concurrent or successive, and the trust will not necessarily end when one of the income interests ends. For that reason, the Act speaks in terms of income interests ending and beginning rather than trusts ending and beginning. When an income interest in a trust ends, the trustee's powers continue during the winding up period required to complete its administration. A terminating income interest is one that has ended but whose administration is not complete.

If two or more people are given the right to receive specified percentages or fractions of the income from a trust concurrently and one of the concurrent interests ends, e.g., when a beneficiary dies, the beneficiary's income interest ends but the trust does not. Similarly, when a trust with only one income beneficiary ends upon the beneficiary's death, the trust instrument may provide that part or all of the trust assets shall continue in trust for another income beneficiary. While it is common to think and speak of this (and even to characterize it in a trust instrument) as a "new" trust, it is a continuation of the original trust for a remainder beneficiary who has an income interest in the trust assets instead of the right to receive them outright. For purposes of this Act, this is a successive income interest in the same trust. The fact that a trust may or may not end when an income interest ends is not significant for purposes of this Act.

If the assets that are subject to a terminating income interest pass to another trust because the income beneficiary exercises a general power of appointment over the trust assets, the recipient trust would be a new trust; and if they pass to another trust because the beneficiary exercises a nongeneral power of appointment over the trust assets, the recipient trust might be a new trust in some States (see 5A Austin W. Scott & William F. Fratcher, The Law of Trusts § 640, at 483 (4th ed. 1989)); but for purposes of this Act a new trust created in these circumstances is also a successive income interest.

Gift of a pecuniary amount. Section 201(3) and (4) provide different rules for an outright gift of a pecuniary amount and a gift in trust of a pecuniary amount; this is the same approach used in Section 5(b)(2) of the 1962 Act.

Interest on pecuniary amounts. Section 201(3) provides that the beneficiary of an outright pecuniary amount is to receive the interest or other amount provided by applicable law if there is no provision in the will or the terms of the trust. Many States have no applicable law that provides for interest or some other amount to be paid on an outright pecuniary gift under an inter vivos trust; this section provides that in such a case the interest or other amount to be paid shall be the same as the interest or other amount required to be paid on testamentary pecuniary gifts. This provision is intended to accord gifts under inter vivos instruments the same treatment as testamentary gifts. The various state authorities that provide for the amount that a beneficiary of an outright pecuniary amount is entitled to receive are collected in Richard B. Covey, Marital Deduction and Credit Shelter Dispositions and the Use of Formula Provisions, App. B (4th ed. 1997).

Administration expenses and interest on death taxes. Under Section 201(2)(B) a fiduciary may pay administration expenses and interest on death taxes from either income or principal. An advantage of permitting the fiduciary to choose the source of the payment is that, if the fiduciary's decision is consistent with the decision to deduct these expenses for income tax purposes or estate tax purposes, it eliminates the need to adjust between principal and income that may arise when, for example, an expense that is paid from principal is deducted for income tax purposes or an expense that is paid from income is deducted for estate tax purposes.

The United States Supreme Court has considered the question of whether an estate tax marital deduction or charitable deduction should be reduced when administration expenses are paid from income produced by property passing in trust for a surviving spouse or for charity and deducted for income tax purposes. The Court rejected the IRS position that administration expenses properly paid from income under the terms of the trust or state law must reduce the amount of a marital or charitable transfer, and held that the value of the transferred property is not reduced for estate tax purposes unless the administration expenses are material in light of the income the trust corpus could have been expected to generate. Commissioner v. Estate of Otis C. Hubert, 117 S.Ct. 1124 (1997). The provision in Section 201(2)(B) permits a fiduciary to pay and deduct administration expenses from income only to the extent that it will not cause the reduction or loss of an estate tax marital or charitable contributions deduction, which means that the limit on the amount payable from income will be established eventually by Treasury Regulations.

Interest on estate taxes. The IRS agrees that interest on estate and inheritance taxes may be deducted for income tax purposes without having to reduce the estate tax deduction for amounts passing to a charity or surviving spouse, whether the interest is paid from principal or income. Rev. Rul. 93-48, 93-2 C.B. 270. For estates of persons who died before 1998, a fiduciary may not want to deduct for income tax purposes interest on estate tax that is deferred under Section 6166 or 6163 because deducting that interest for estate tax purposes may produce more beneficial results, especially if the estate has little or no income or the income tax bracket is significantly lower than the estate tax bracket. For estates of persons who die after 1997, no estate tax or income tax deduction will be allowed for interest paid on estate tax that is deferred under Section 6166. However, interest on estate tax deferred under Section 6163 will continue to be deductible for both purposes, and interest on estate tax deficiencies will continue to be deductible for estate tax purposes if an election under Section 6166 is not in effect.

Under the 1962 Act, Section 13(c)(5) charges interest on estate and inheritance taxes to principal. The 1931 Act has no provision. Section 501(3) of this Act provides that, except to the extent provided in Section 201(2)(B) or (C), all interest must be paid from income.

Editor's Note. — Session Laws 2003-232, s. 8, makes this Chapter effective January 1, 2004, and applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes, as enacted in this act.

§ 37A-2-202. Distribution to residuary and remainder beneficiaries.

(a) Each beneficiary described in G.S. 37A-2-201(4) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

(1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets shall be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust to which G.S. 37A-2-201(3) applies.

(3) The beneficiary's fractional interest in the undistributed principal assets shall be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset. (2003-232, s. 2; 2006-259, s. 13(p).)

OFFICIAL COMMENT

Relationship to prior Acts. Section 202 retains the concept in Section 5(b)(2) of the 1962 Act that the residuary legatees of estates are to receive net income earned during the period of administration on the basis of their proportionate interests in the undistributed assets when distributions are made. It changes the basis for determining their proportionate interests by using asset values as of a date reasonably near the time of distribution instead of inventory values; it extends the application of these rules to distributions from terminating trusts; and it extends these rules to gain or loss realized from the disposition of assets during administration, an omission in the 1962 Act that has been noted by several commentators. See, e.g., Richard B. Covey, Marital Deduction and Credit Shelter Dispositions and the Use of Formula Provisions 91 (4th ed. 1998); Thomas H. Cantrill, Fractional or Percentage Residuary Bequests: Allocation of Postmortem Income, Gain and Unrealized Appreciation, 10 Prob. Notes 322, 327 (1985).

Editor's Note. — Session Laws 2006-259, s. 13(s), provides: "This section becomes effective October 1, 2006, and applies to (i) all trusts created before, on, or after that date; (ii) all judicial proceedings concerning trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2006, shall apply."

Effect of Amendments. — Session Laws 2006-259, s. 13(p), effective October 1, 2006, added "to which G.S. 37A-2-201(3) applies" at the end of subdivision (b)(2). See Editor's note for applicability.

ARTICLE 3.

Apportionment at Beginning and End of Income Interest.

§ 37A-3-301. When right to income begins and ends.

(a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(2) On the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(3) On the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under subsection (d) of this section, even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income. (2003-232, s. 2.)

OFFICIAL COMMENT

Period during which there is no beneficiary. The purpose of the second part of subsection (d) is to provide that, at the end of a period during which there is no beneficiary to whom a trustee may distribute income, the trustee must apply the same apportionment rules that apply when a mandatory income interest ends. This provision would apply, for example, if a settlor creates a trust for grandchildren before any grandchildren are born. When the first grandchild is born, the period preceding the date of birth is treated as having ended, followed by a successive income interest, and the apportionment rules in Sections 302 and 303 apply accordingly if the terms of the trust do not contain different provisions.

Editor's Note. — Session Laws 2003-232, s. 8, makes this Chapter effective January 1, 2004, and applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes, as enacted in this act.

§ 37A-3-302. Apportionment of receipts and disbursements when decedent dies or income interest begins.

(a) A trustee shall allocate an income receipt or disbursement, other than one to which G.S. 37A-2-201(1) applies to principal, if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement shall be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins shall be allocated to principal, and the balance shall be allocated to income.

(c) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this Chapter. Distributions to shareholders or other owners from an entity to which G.S. 37A-4-401 applies are considered to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that shall be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals. (2003-232, s. 2.)

OFFICIAL COMMENT

Prior Acts. Professor Bogert stated that "Section 4 of the [1962] Act makes a change with respect to the apportionment of the income of trust property not due until after the trust began but which accrued in part before the commencement of the trust. It treats such income as to be credited entirely to the income account in the case of a living trust, but to be apportioned between capital and income in the case of a testamentary trust. The [1931] Act apportions such income in the case of both types of trusts, except in the case of corporate dividends." George G. Bogert, The Revised Uniform Principal and Income Act, 38 Notre Dame Law. 50, 52 (1962). The 1962 Act also provides that an asset passing to an inter vivos trust by a bequest in the settlor's will is governed by the rule that applies to a testamentary trust, so that different rules apply to assets passing to an inter vivos trust depending upon whether they were transferred to the trust during the settlor's life or by his will.

Having several different rules that apply to similar transactions is confusing. In order to simplify administration, Section 302 applies the same rule to inter vivos trusts (revocable and irrevocable), testamentary trusts, and assets that become subject to an inter vivos trust by a testamentary bequest.

Periodic payments. Under Section 302, a periodic payment is principal if it is due but unpaid before a decedent dies or before an asset becomes subject to a trust, but the next payment is allocated entirely to income and is not apportioned. Thus, periodic receipts such as rents, dividends, interest, and annuities, and disbursements such as the interest portion of a mortgage payment, are not apportioned. This is the original common law rule. Edwin A. Howes, Jr., The American Law Relating to Income and Principal 70 (1905). In trusts in which a surviving spouse is dependent upon a regular flow of cash from the decedent's securities portfolio, this rule will help to maintain payments to the spouse at the same level as before the settlor's death. Under the 1962 Act, the pre-death portion of the first periodic payment due after death is apportioned to principal in the case of a testamentary trust or securities bequeathed by will to an inter vivos trust.

Nonperiodic payments. Under the second sentence of Section 302(b), interest on an obligation that does not provide a due date for the interest payment, such as interest on an income tax refund, would be apportioned to principal to the extent it accrues before a person dies or an income interest begins unless the obligation is specifically given to a devisee or remainder beneficiary, in which case all of the accrued interest passes under Section 201(1) to the person who receives the obligation. The same rule applies to interest on an obligation that has a due date but does not provide for periodic payments. If there is no stated interest on the obligation, such as a zero coupon bond, and the proceeds from the obligation are received more than one year after it is purchased or acquired by the trustee, the entire amount received is principal under Section 406.

§ 37A-3-303. Apportionment when income interest ends.

(a) In this section, "undistributed income" means net income received before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or to the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent (5%) of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked shall be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements. (2003-232, s. 2.)

OFFICIAL COMMENT

Prior Acts. Both the 1931 Act (Section 4) and the 1962 Act (Section 4(d)) provide that a deceased income beneficiary's estate is entitled to the undistributed income. The Drafting Committee concluded that this is probably not what most settlors would want, and that, with respect to undistributed income, most settlors would favor the income beneficiary first, the remainder beneficiaries second, and the income beneficiary's heirs last, if at all. However, it decided not to eliminate this provision to avoid causing disputes about whether the trustee should have distributed collected cash before the income beneficiary died.

Accrued periodic payments. Under the prior Acts, an income beneficiary or his estate is entitled to receive a portion of any payments, other than dividends, that are due or that have accrued when the income interest terminates. The last sentence of subsection (a) changes that rule by providing that such items are not included in undistributed income. The items affected include periodic payments of interest, rent, and dividends, as well as items of income that accrue over a longer period of time; the rule also applies to expenses that are due or accrued.

Example — accrued periodic payments. The rules in Section 302 and Section 303 work in the following manner: Assume that a periodic payment of rent that is due on July 20 has not been paid when an income interest ends on July 30; the successive income interest begins on July 31, and the rent payment that was due on July 20 is paid on August 3. Under Section 302(a), the July 20 payment is added to the principal of the successive income interest when received. Under Section 302(b), the entire periodic payment of rent that is due on August 20 is income when received by the successive income interest. Under Section 303, neither the income beneficiary of the terminated income interest nor the beneficiary's estate is entitled to any part of either the July 20 or the August 20 payments because neither one was received before the income interest ended on July 30. The same principles apply to expenses of the trust.

Beneficiary with an unqualified power to revoke. The requirement in subsection (b) to pay undistributed income to a mandatory income beneficiary or her estate does not apply to the extent the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. Without this exception, subsection (b) would apply to a revocable living trust whose settlor is the mandatory income beneficiary during her lifetime, even if her will provides that all of the assets in the probate estate are to be distributed to the trust.

If a trust permits the beneficiary to withdraw all or a part of the trust principal after attaining a specified age and the beneficiary attains that age but fails to withdraw all of the principal that she is permitted to withdraw, a trustee is not required to pay her or her estate the undistributed income attributable to the portion of the principal that she left in the trust. The assumption underlying this rule is that the beneficiary has either provided for the disposition of the trust assets (including the undistributed income) by exercising a power of appointment that she has been given or has not withdrawn the assets because she is willing to have the principal and undistributed income be distributed under the terms of the trust. If the beneficiary has the power to withdraw 25% of the trust principal, the trustee must pay to her or her estate the undistributed income from the 75% that she cannot withdraw.

Article 4.

Allocation of Receipts During Administration of Trust.

Part 1. Receipts From Entities.

§ 37A-4-401. Character of receipts.

(a) In this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which G.S. 37A-4-402 applies, a business or activity to which G.S. 37A-4-403 applies, or an asset-backed security to which G.S. 37A-4-415 applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:
- (1) Property other than money;
- (2) Money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;
- (3) Money received in total or partial liquidation of the entity; and
- (4) Money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:
- (1) To the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or
- (2) If the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent (20%) of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under subdivision (2) of subsection (d) of this section, to the extent that it does not exceed the amount of income tax that a trustee or beneficiary shall pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors. (2003-232, s. 2.)

OFFICIAL COMMENT

Entities to which Section 401 applies. The reference to partnerships in Section 401(a) is intended to include all forms of partnerships, including limited partnerships, limited liability partnerships, and variants that have slightly different names and characteristics from State to State. The section does not apply, however, to receipts from an interest in property that a trust owns as a tenant in common with one or more co-owners, nor would it apply to an interest in a joint venture if, under applicable law, the trust's interest is regarded as that of a tenant in common.

Capital gain dividends. Under the Internal Revenue Code and the Income Tax Regulations, a "capital gain dividend" from a mutual fund or real estate investment trust is the excess of the fund's or trust's net long-term capital gain over its net short-term capital loss. As a result, a capital gain dividend does not include any net short-term capital gain, and cash received by a trust because of a net short-term capital gain is income under this Act.

Reinvested dividends. If a trustee elects (or continues an election made by its predecessor) to reinvest dividends in shares of stock of a distributing corporation or fund, whether evidenced by new certificates or entries on the books of the distributing entity, the new shares would be principal. Making or continuing such an election would be equivalent to deciding under Section 104 to transfer income to principal in order to comply with Section 103(b). However, if the trustee makes or continues the election for a reason other than to comply with Section 103(b), e.g., to make an investment without incurring brokerage commissions, the trustee should transfer cash from principal to income in an amount equal to the reinvested dividends.

Distribution of property. The 1962 Act describes a number of types of property that would be principal if distributed by a corporation. This becomes unwieldy in a section that applies to both corporations and all other entities. By stating that principal includes the distribution of any property other than money, Section 401 embraces all of the items enumerated in Section 6 of the 1962 Act as well as any other form of nonmonetary distribution not specifically mentioned in that Act.

Partial liquidations. Under subsection (d)(1), any distribution designated by the entity as a partial liquidating distribution is principal regardless of the percentage of total assets that it represents. If a distribution exceeds 20% of the entity's gross assets, the entire distribution is a partial liquidation under subsection (d)(2) whether or not the entity describes it as a partial liquidation. In determining whether a distribution is greater than 20% of the gross assets, the portion of the distribution that does not exceed the amount of income tax that the trustee or a beneficiary must pay on the entity's taxable income is ignored.

Other large distributions. A cash distribution may be quite large (for example, more than 10% but not more than 20% of the entity's gross assets) and have characteristics that suggest it should be treated as principal rather than income. For example, an entity may have received cash from a source other than the conduct of its normal business operations because it sold an investment asset; or because it sold a business asset other than one held for sale to customers in the normal course of its business and did not replace it; or it borrowed a large sum of money and secured the repayment of the loan with a substantial asset; or a principal source of its cash was from assets such as mineral interests, 90% of which would have been allocated to principal if the trust had owned the assets directly. In such a case the trustee, after considering the total return from the portfolio as a whole and the income component of that return, may decide to exercise the power under Section 104(a) to make an adjustment between income and principal, subject to the limitations in Section 104(c).

Editor's Note. — Session Laws 2003-232, s. 8, makes this Chapter effective January 1, 2004, and applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes, as enacted in this act.

§ 37A-4-402. Distribution from trust or estate.

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest and shall allocate to principal an amount received as a distribution of principal from the trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in a trust to a trustee, G.S. 37A-4-401 or G.S. 37A-4-415 applies to a receipt from the trust. (2003-232, s. 2.)

OFFICIAL COMMENT

Terms of the distributing trust or estate. Under Section 103(a), a trustee is to allocate receipts in accordance with the terms of the recipient trust or, if there is no provision, in accordance with this Act. However, in determining whether a distribution from another trust or an estate is income or principal, the trustee should also determine what the terms of the distributing trust or estate say about the distribution - for example, whether they direct that the distribution, even though made from the income of the distributing trust or estate, is to be added to principal of the recipient trust. Such a provision should override the terms of this Act, but if the terms of the recipient trust contain a provision requiring such a distribution to be allocated to income, the trustee may have to obtain a judicial resolution of the conflict between the terms of the two documents.

Investment trusts. An investment entity to which the second sentence of this section applies includes a mutual fund, a common trust fund, a business trust or other entity organized as a trust for the purpose of receiving capital contributed by investors, investing that capital, and managing investment assets, including asset-backed security arrangements to which Section 415 applies. See John H. Langbein, The Secret Life of the Trust: The Trust as an Instrument of Commerce, 107 Yale L.J. 165 (1997).

§ 37A-4-403. Business and other activities conducted by trustee.

(a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts shall be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

(1) Retail, manufacturing, service, and other traditional business activities;
(2) Farming;
(3) Raising and selling livestock and other animals;
(4) Management of rental properties;
(5) Extraction of minerals and other natural resources;
(6) Timber operations; and
(7) Activities to which G.S. 37A-4-414 applies. (2003-232, s. 2.)

OFFICIAL COMMENT

Purpose and scope. The provisions in Section 403 are intended to give greater flexibility to a trustee who operates a business or other activity in proprietorship form rather than in a wholly-owned corporation (or, where permitted by state law, a single-member limited liability company), and to facilitate the trustee's ability to decide the extent to which the net receipts from the activity should be allocated to income, just as the board of directors of a corporation owned entirely by the trust would decide the amount of the annual dividend to be paid to the trust. It permits a trustee to account for farming or livestock operations, rental properties, oil and gas properties, timber operations, and activities in derivatives and options as though they were held by a separate entity. It is not intended, however, to permit a trustee to account separately for a traditional securities portfolio to avoid the provisions of this Act that apply to such securities.

Section 403 permits the trustee to account separately for each business or activity for which the trustee determines separate accounting is appropriate. A trustee with a computerized accounting system may account for these activities in a "subtrust"; an individual trustee may continue to use the business and record-keeping methods employed by the decedent or transferor who may have conducted the business under an assumed name. The intent of this section is to give the trustee broad authority to select business record-keeping methods that best suit the activity in which the trustee is engaged.

If a fiduciary liquidates a sole proprietorship or other activity to which Section 403 applies, the proceeds would be added to principal, even though derived from the liquidation of accounts receivable, because the proceeds would no longer be needed in the conduct of the business. If the liquidation occurs during probate or during an income interest's winding up period, none of the proceeds would be income for purposes of Section 201.

Separate accounts. A trustee may or may not maintain separate bank accounts for business activities that are accounted for under Section 403. A professional trustee may decide not to maintain separate bank accounts, but an individual trustee, especially one who has continued a decedent's business practices, may continue the same banking arrangements that were used during the decedent's lifetime. In either case, the trustee is authorized to decide to what extent cash is to be retained as part of the business assets and to what extent it is to be transferred to the trust's general accounts, either as income or principal.

Part 2. Receipts Not Normally Apportioned.

§ 37A-4-404. Principal receipts.

A trustee shall allocate to principal:

(1) To the extent not allocated to income under this Chapter, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;

(2) Money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this Article;

(3) Amounts recovered from third parties to reimburse the trust because of disbursements described in G.S. 37A-5-502(a)(7) or for other reasons to the extent not based on the loss of income;

(4) Proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(5) Net income received in an accounting period during which there is no beneficiary to whom a trustee may or shall distribute income; and

(6) Other receipts as provided in Part 3 of this Article. (2003-232, s. 2.)

OFFICIAL COMMENT

Eminent domain awards. Even though the award in an eminent domain proceeding may include an amount for the loss of future rent on a lease, if that amount is not separately stated the entire award is principal. The rule is the same in the 1931 and 1962 Acts.

Editor's Note. — Session Laws 2003-232, s. 8, makes this Chapter effective January 1, 2004, and applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes, as enacted in this act.

§ 37A-4-405. Rental property.

To the extent that a trustee accounts for receipts from rental property under this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, shall be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount. (2003-232, s. 2.)

OFFICIAL COMMENT

Application of Section 403. This section applies to the extent that the trustee does not account separately under Section 403 for the management of rental properties owned by the trust.

Receipts that are capital in nature. A portion of the payment under a lease may be a reimbursement of principal expenditures for improvements to the leased property that is characterized as rent for purposes of invoking contractual or statutory remedies for nonpayment. If the trustee is accounting for rental income under Section 405, a transfer from income to reimburse principal may be appropriate under Section 504 to the extent that some of the "rent" is really a reimbursement for improvements. This set of facts could also be a relevant factor for a trustee to consider under Section 104(b) in deciding whether and to what extent to make an adjustment between principal and income under Section 104(a) after considering the return from the portfolio as a whole.

§ 37A-4-406. Obligation to pay money.

(a) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, shall be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee more than one year after it is purchased or acquired by the trustee, including an obligation whose purchase price or value when it is acquired is less than its value at maturity. If the obligation matures within one year after it is purchased or acquired by the trustee, an amount received in excess of its purchase price or its value when acquired by the trust shall be allocated to income.

(c) This section does not apply to an obligation to which G.S. 37A-4-409, 37A-4-410, 37A-4-411, 37A-4-412, 37A-4-414, or 37A-4-415 applies. (2003-232, s. 2.)

OFFICIAL COMMENT

Variable or floating interest rates. The reference in subsection (a) to variable or floating interest rate obligations is intended to clarify that, even though an obligation's interest rate may change from time to time based upon changes in an index or other market indicator, an obligation to pay money containing a variable or floating rate provision is subject to this section and is not to be treated as a derivative financial instrument under Section 414.

Discount obligations. Subsection (b) applies to all obligations acquired at a discount, including short-term obligations such as U.S. Treasury Bills, long-term obligations such as U.S. Savings Bonds, zero-coupon bonds, and discount bonds that pay interest during part, but not all, of the period before maturity. Under subsection (b), the entire increase in value of these obligations is principal when the trustee receives the proceeds from the disposition unless the obligation, when acquired, has a maturity of less than one year. In order to have one rule that applies to all discount obligations, the Act eliminates the provision in the 1962 Act for the payment from principal of an amount equal to the increase in the value of U.S. Series E bonds. The provision for bonds that mature within one year after acquisition by the trustee is derived from the Illinois act. 760 ILCS 15/8 (1996).

Subsection (b) also applies to inflation-indexed bonds — any increase in principal due to inflation after issuance is principal upon redemption if the bond matures more than one year after the trustee acquires it; if it matures within one year, all of the increase, including any attributable to an inflation adjustment, is income.

Effect of Section 104. In deciding whether and to what extent to exercise the power to adjust between principal and income granted by Section 104(a), a relevant factor for the trustee to consider is the effect on the portfolio as a whole of having a portion of the assets invested in bonds that do not pay interest currently.

§ 37A-4-407. Insurance policies and similar contracts.

(a) Except as otherwise provided in subsection (b) of this section, a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to G.S. 37A-4-403, loss of profits from a business.

(c) This section does not apply to a contract to which G.S. 37A-4-409 applies. (2003-232, s. 2.)

Part 3. Receipts Normally Apportioned.

§ 37A-4-408. Insubstantial allocations not required.

If a trustee determines that an allocation between principal and income required by G.S. 37A-4-409, 37A-4-410, 37A-4-411, 37A-4-412, or 37A-4-415 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in G.S. 37A-1-104(c) applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in G.S. 37A-1-104(d) and may be released for the reasons and in the manner described in G.S. 37A-1-104(e). An allocation is presumed to be insubstantial if:

(1) The amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten percent (10%); or

(2) The value of the asset producing the receipt for which the allocation would be made is less than ten percent (10%) of the total value of the trust's assets at the beginning of the accounting period. (2003-232, s. 2.)

OFFICIAL COMMENT

This section is intended to relieve a trustee from making relatively small allocations while preserving the trustee's right to do so if an allocation is large in terms of absolute dollars.

For example, assume that a trust's assets, which include a working interest in an oil well, have a value of $1,000,000; the net income from the assets other than the working interest is $40,000; and the net receipts from the working interest are $400. The trustee may allocate all of the net receipts from the working interest to principal instead of allocating 10%, or $40, to income under Section 411. If the net receipts from the working interest are $35,000, so that the amount allocated to income under Section 411 would be $3,500, the trustee may decide that this amount is sufficiently significant to the income beneficiary that the allocation provided for by Section 411 should be made, even though the trustee is still permitted under Section 408 to allocate all of the net receipts to principal because the $3,500 would increase the net income of $40,000, as determined before making an allocation under Section 411, by less than 10%. Section 408 will also relieve a trustee from having to allocate net receipts from the sale of trees in a small woodlot between principal and income.

While the allocation to principal of small amounts under this section should not be a cause for concern for tax purposes, allocations are not permitted under this section in circumstances described in Section 104(c) to eliminate claims that the power in this section has adverse tax consequences.

Editor's Note. — Session Laws 2003-232, s. 8, makes this Chapter effective January 1, 2004, and applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes, as enacted in this act.

§ 37A-4-409. Deferred compensation, annuities, and similar payments.

(a) In this section, "payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent (10%) of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this subsection, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

(d) If, to obtain an estate tax marital deduction for a trust, a trustee shall allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.

(e) This section does not apply to payments to which G.S. 37A-4-410 applies. (2003-232, s. 2.)

OFFICIAL COMMENT

Scope. Section 409 applies to amounts received under contractual arrangements that provide for payments to a third party beneficiary as a result of services rendered or property transferred to the payer. While the right to receive such payments is a liquidating asset of the kind described in Section 410 (i.e., "an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration"), these payment rights are covered separately in Section 409 because of their special characteristics.

Section 409 applies to receipts from all forms of annuities and deferred compensation arrangements, whether the payment will be received by the trust in a lump sum or in installments over a period of years. It applies to bonuses that may be received over two or three years and payments that may last for much longer periods, including payments from an individual retirement account (IRA), deferred compensation plan (whether qualified or not qualified for special federal income tax treatment), and insurance renewal commissions. It applies to a retirement plan to which the settlor has made contributions, just as it applies to an annuity policy that the settlor may have purchased individually, and it applies to variable annuities, deferred annuities, annuities issued by commercial insurance companies, and "private annuities" arising from the sale of property to another individual or entity in exchange for payments that are to be made for the life of one or more individuals. The section applies whether the payments begin when the payment right becomes subject to the trust or are deferred until a future date, and it applies whether payments are made in cash or in kind, such as employer stock (in-kind payments usually will be made in a single distribution that will be allocated to principal under the second sentence of subsection (c)).

The 1962 Act. Under Section 12 of the 1962 Act, receipts from "rights to receive payments on a contract for deferred compensation" are allocated to income each year in an amount "not in excess of 5% per year" of the property's inventory value. While "not in excess of 5%" suggests that the annual allocation may range from zero to 5% of the inventory value, in practice the rule is usually treated as prescribing a 5% allocation. The inventory value is usually the present value of all the future payments, and since the inventory value is determined as of the date on which the payment right becomes subject to the trust, the inventory value, and thus the amount of the annual income allocation, depends significantly on the applicable interest rate on the decedent's date of death. That rate may be much higher or lower than the average long-term interest rate. The amount determined under the 5% formula tends to become fixed and remain unchanged even though the amount received by the trust increases or decreases.

Allocations Under Section 409(b). Section 409(b) applies to plans whose terms characterize payments made under the plan as dividends, interest, or payments in lieu of dividends or interest. For example, some deferred compensation plans that hold debt obligations or stock of the plan's sponsor in an account for future delivery to the person rendering the services provide for the annual payment to that person of dividends received on the stock or interest received on the debt obligations. Other plans provide that the account of the person rendering the services shall be credited with "phantom" shares of stock and require an annual payment that is equivalent to the dividends that would be received on that number of shares if they were actually issued; or a plan may entitle the person rendering the services to receive a fixed dollar amount in the future and provide for the annual payment of interest on the deferred amount during the period prior to its payment. Under Section 409(b), payments of dividends, interest or payments in lieu of dividends or interest under plans of this type are allocated to income; all other payments received under these plans are allocated to principal.

Section 409(b) does not apply to an IRA or an arrangement with payment provisions similar to an IRA. IRAs and similar arrangements are subject to the provisions in Section 409(c).

Allocations Under Section 409(c). The focus of Section 409, for purposes of allocating payments received by a trust to or between principal and income, is on the payment right rather than on assets that may be held in a fund from which the payments are made. Thus, if an IRA holds a portfolio of marketable stocks and bonds, the amount received by the IRA as dividends and interest is not taken into account in determining the principal and income allocation except to the extent that the Internal Revenue Service may require them to be taken into account when the payment is received by a trust that qualifies for the estate tax marital deduction (a situation that is provided for in Section 409(d)). An IRA is subject to federal income tax rules that require payments to begin by a particular date and be made over a specific number of years or a period measured by the lives of one or more persons. The payment right of a trust that is named as a beneficiary of an IRA is not a right to receive particular items that are paid to the IRA, but is instead the right to receive an amount determined by dividing the value of the IRA by the remaining number of years in the payment period. This payment right is similar to the right to receive a unitrust amount, which is normally expressed as an amount equal to a percentage of the value of the unitrust assets without regard to dividends or interest that may be received by the unitrust.

An amount received from an IRA or a plan with a payment provision similar to that of an IRA is allocated under Section 409(c), which differentiates between payments that are required to be made and all other payments. To the extent that a payment is required to be made (either under federal income tax rules or, in the case of a plan that is not subject to those rules, under the terms of the plan), 10% of the amount received is allocated to income and the balance is allocated to principal. All other payments are allocated to principal because they represent a change in the form of a principal asset; Section 409 follows the rule in Section 404(2), which provides that money or property received from a change in the form of a principal asset be allocated to principal.

Section 409(c) produces an allocation to income that is similar to the allocation under the 1962 Act formula if the annual payments are the same throughout the payment period, and it is simpler to administer. The amount allocated to income under Section 409 is not dependent upon the interest rate that is used for valuation purposes when the decedent dies, and if the payments received by the trust increase or decrease from year to year because the fund from which the payment is made increases or decreases in value, the amount allocated to income will also increase or decrease.

Marital deduction requirements. When an IRA is payable to a QTIP marital deduction trust, the IRS treats the IRA as separate terminable interest property and requires that a QTIP election be made for it. In order to qualify for QTIP treatment, an IRS ruling states that all of the IRA's income must be distributed annually to the QTIP marital deduction trust and then must be allocated to trust income for distribution to the spouse. Rev. Rul. 89-89, 1989-2 C.B. 231. If an allocation to income under this Act of 10% of the required distribution from the IRA does not meet the requirement that all of the IRA's income be distributed from the trust to the spouse, the provision in subsection (d) requires the trustee to make a larger allocation to income to the extent necessary to qualify for the marital deduction. The requirement of Rev. Rul. 89-89 should also be satisfied if the IRA beneficiary designation permits the spouse to require the trustee to withdraw the necessary amount from the IRA and distribute it to her, even though the spouse never actually requires the trustee to do so. If such a provision is in the beneficiary designation, a distribution under subsection (d) should not be necessary.

Application of Section 104. Section 104(a) of this Act gives a trustee who is acting under the prudent investor rule the power to adjust from principal to income if, considering the portfolio as a whole and not just receipts from deferred compensation, the trustee determines that an adjustment is necessary. See Example (5) in the Comment following Section 104.

§ 37A-4-410. Liquidating asset.

(a) In this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to G.S. 37A-4-409, resources subject to G.S. 37A-4-411, timber subject to G.S. 37A-4-412, an activity subject to G.S. 37A-4-414, an asset subject to G.S. 37A-4-415, or any asset for which the trustee establishes a reserve for depreciation under G.S. 37A-5-503.

(b) A trustee shall allocate to income ten percent (10%) of the receipts from a liquidating asset and the balance to principal. (2003-232, s. 2.)

OFFICIAL COMMENT

Prior Acts. Section 11 of the 1962 Act allocates receipts from "property subject to depletion" to income in an amount "not in excess of 5%" of the asset's inventory value. The 1931 Act has a similar 5% rule that applies when the trustee is under a duty to change the form of the investment. The 5% rule imposes on a trust the obligation to pay a fixed annuity to the income beneficiary until the asset is exhausted. Under both the 1931 and 1962 Acts the balance of each year's receipts is added to principal. A fixed payment can produce unfair results. The remainder beneficiary receives all of the receipts from unexpected growth in the asset, e.g., if royalties on a patent or copyright increase significantly. Conversely, if the receipts diminish more rapidly than expected, most of the amount received by the trust will be allocated to income and little to principal. Moreover, if the annual payments remain the same for the life of the asset, the amount allocated to principal will usually be less than the original inventory value. For these reasons, Section 410 abandons the annuity approach under the 5% rule.

Lottery payments. The reference in subsection (a) to rights to receive payments under an arrangement that does not provide for the payment of interest includes state lottery prizes and similar fixed amounts payable over time that are not deferred compensation arrangements covered by Section 409.

§ 37A-4-411. Minerals, water, and other natural resources.

(a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources under this section, the trustee shall allocate them as follows:

(1) If received as nominal delay rental or nominal annual rent on a lease, a receipt shall be allocated to income.

(2) If received from a production payment, a receipt shall be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance shall be allocated to principal.

(3) If an amount received as a royalty, shut-in-well payment, take-or-pay payment, bonus, or delay rental is more than nominal, ninety percent (90%) shall be allocated to principal and the balance to income.

(4) If an amount is received from a working interest or any other interest not provided for in subdivision (1), (2), or (3) of this subsection, ninety percent (90%) of the net amount received shall be allocated to principal and the balance to income.

(b) An amount received on account of an interest in water that is renewable shall be allocated to income. If the water is not renewable, ninety percent (90%) of the amount shall be allocated to principal and the balance to income.

(c) This Chapter applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) If a trust owns an interest in minerals, water, or other natural resources on January 1, 2004, the trustee may allocate receipts from the interest as provided in this Chapter or in the manner used by the trustee before January 1, 2004. If the trust acquires an interest in minerals, water, or other natural resources after January 1, 2004, the trustee shall allocate receipts from the interest as provided in this Chapter. (2003-232, s. 2.)

OFFICAL COMMENT

Prior Acts. The 1962 Act allocates to principal as a depletion allowance, 27-1/2% of the gross receipts, but not more than 50% of the net receipts after paying expenses. The Internal Revenue Code no longer provides for a 27-1/2% depletion allowance, although the major oil-producing States have retained the 27-1/2% provision in their principal and income acts (Texas amended its Act in 1993, but did not change the depletion provision). Section 9 of the 1931 Act allocates all of the net proceeds received as consideration for the "permanent severance of natural resources from the lands" to principal.

Section 411 allocates 90% of the net receipts to principal and 10% to income. A depletion provision that is tied to past or present Code provisions is undesirable because it causes a large portion of the oil and gas receipts to be paid out as income. As wells are depleted, the amount received by the income beneficiary falls drastically. Allocating a larger portion of the receipts to principal enables the trustee to acquire other income producing assets that will continue to produce income when the mineral reserves are exhausted.

Application of Sections 403 and 408. This section applies to the extent that the trustee does not account separately for receipts from minerals and other natural resources under Section 403 or allocate all of the receipts to principal under Section 408.

Open mine doctrine. The purpose of Section 411(c) is to abolish the "open mine doctrine" as it may apply to the rights of an income beneficiary and a remainder beneficiary in receipts from the production of minerals from land owned or leased by a trust. Instead, such receipts are to be allocated to or between principal and income in accordance with the provisions of this Act. For a discussion of the open mine doctrine, see generally 3A Austin W. Scott & William F. Fratcher, The Law of Trusts § 239.3 (4th ed. 1988), and Nutter v. Stockton, 626 P.2d 861 (Okla. 1981).

Effective date provision. Section 9(b) of the 1962 Act provides that the natural resources provision does not apply to property interests held by the trust on the effective date of the Act, which reflects concerns about the constitutionality of applying a retroactive administrative provision to interests in real estate, based on the opinion in the Oklahoma case of *Franklin v. Margay Oil Corporation,* 153 P.2d 486, 501 (Okla. 1944). Section 411(d) permits a trustee to use either the method provided for in this Act or the method used before the Act takes effect. Lawyers in jurisdictions other than Oklahoma may conclude that retroactivity is not a problem as to property situated in their States, and this provision permits trustees to decide, based on advice from counsel in States whose law may be different from that of Oklahoma, whether they may apply this provision retroactively if they conclude that to do so is in the best interests of the beneficiaries.

If the property is in a State other than the State where the trust is administered, the trustee must be aware that the law of the property's situs may control this question. The outcome turns on a variety of questions: whether the terms of the trust specify that the law of a State other than the situs of the property shall govern the administration of the trust, and whether the courts will follow the terms of the trust; whether the trust's asset is the land itself or a leasehold interest in the land (as it frequently is with oil and gas property); whether a leasehold interest or its proceeds should be classified as real property or personal property, and if as personal property, whether applicable state law treats it as a movable or an immovable for conflict of laws purposes. See 5A Austin W. Scott & William F. Fratcher, The Law of Trusts §§ 648, at 531, 533-534; § 657, at 600 (4th ed. 1989).

§ 37A-4-412. Timber.

(a) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

(1) To income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) To principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) To or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in subdivisions (1) and (2) of this subsection; or

(4) To principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to subdivision (1), (2), or (3) of this subsection.

(b) In determining net receipts to be allocated pursuant to subsection (a) of this section, a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) This Chapter applies whether or not a decedent or transferor was harvesting timber from the property before it becomes subject to the trust.

(d) If a trust owns an interest in timberland on January 1, 2004, the trustee may allocate net receipts from the sale of timber and related products as provided in this Chapter or in the manner used by the trustee before January 1, 2004. If the trust acquires an interest in timberland after January 1, 2004, the trustee shall allocate net receipts from the sale of timber and related products as provided in this Chapter. (2003-232, s. 2.)

OFFICIAL COMMENT

Scope of section. The rules in Section 412 are intended to apply to net receipts from the sale of trees and by-products from harvesting and processing trees without regard to the kind of trees that are cut or whether the trees are cut before or after a particular number of years of growth. The rules apply to the sale of trees that are expected to produce lumber for building purposes, trees sold as pulpwood, and Christmas and other ornamental trees. Subsection (a) applies to net receipts from property owned by the trustee and property leased by the trustee. The Act is not intended to prevent a tenant in possession of the property from using wood that he cuts on the property for personal, noncommercial purposes, such as a Christmas tree, firewood, mending old fences or building new fences, or making repairs to structures on the property.

Under subsection (a), the amount of net receipts allocated to income depends upon whether the amount of timber removed is more or less than the rate of growth. The method of determining the amount of timber removed and the rate of growth is up to the trustee, based on methods customarily used for the kind of timber involved.

Application of Sections 403 and 408. This section applies to the extent that the trustee does not account separately for net receipts from the sale of timber and related products under Section 403 or allocate all of the receipts to principal under Section 408. The option to account for net receipts separately under Section 403 takes into consideration the possibility that timber harvesting operations may have been conducted before the timber property became subject to the trust, and that it may make sense to continue using accounting methods previously established for the property. It also permits a trustee to use customary accounting practices for timber operations even if no harvesting occurred on the property before it became subject to the trust.

§ 37A-4-413. Property not productive of income.

(a) If a marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under G.S. 37A-1-104 and distributes to the spouse from principal under the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by G.S. 37A-1-104(a). The trustee may decide which action or combination of actions to take.

(b) In cases not governed by subsection (a) of this section, proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period. (2003-232, s. 2.)

OFFICIAL COMMENT

Prior Acts' Conflict with Uniform Prudent Investor Act. Section 2(b) of the Uniform Prudent Investor Act provides that "[a] trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole ...." The underproductive property provisions in Section 12 of the 1962 Act and Section 11 of the 1931 Act give the income beneficiary a right to receive a portion of the proceeds from the sale of underproductive property as "delayed income." In each Act the provision applies on an asset by asset basis and not by taking into consideration the trust portfolio as a whole, which conflicts with the basic precept in Section 2(b) of the Prudent Investor Act. Moreover, in determining the amount of delayed income, the prior Acts do not permit a trustee to take into account the extent to which the trustee may have distributed principal to the income beneficiary, under principal invasion provisions in the terms of the trust, to compensate for insufficient income from the unproductive asset. Under Section 104(b)(7) of this Act, a trustee must consider prior distributions of principal to the income beneficiary in deciding whether and to what extent to exercise the power to adjust conferred by Section 104(a).

Duty to make property productive of income. In order to implement the Uniform Prudent Investor Act, this Act abolishes the right to receive delayed income from the sale proceeds of an asset that produces little or no income, but it does not alter existing state law regarding the income beneficiary's right to compel the trustee to make property productive of income. As the law continues to develop in this area, the duty to make property productive of current income in a particular situation should be determined by taking into consideration the performance of the portfolio as a whole and the extent to which a trustee makes principal distributions to the income beneficiary under the terms of the trust and adjustments between principal and income under Section 104 of this Act.

Trusts for which the value of the right to receive income is important for tax reasons may be affected by Reg. § 1.7520-3(b)(2)(v) *Example (1)*, § 20.7520-3(b)(2)(v) *Examples (1)* and *(2)*, and § 25.7520-3(b)(2)(v) *Examples (1)* and *(2)*, which provide that if the income beneficiary does not have the right to compel the trustee to make the property productive, the income interest is considered unproductive and may not be valued actuarially under those sections.

Marital deduction trusts. Subsection (a) draws on language in Reg. § 20.2056(b)-5(f)(4) and (5) to enable a trust for a spouse to qualify for a marital deduction if applicable state law is unclear about the spouse's right to compel the trustee to make property productive of income. The trustee should also consider the application of Section 104 of this Act and the provisions of Restatement of Trusts 3d: Prudent Investor Rule § 240, at 186, app. § 240, at 252 (1992). Example (6) in the Comment to Section 104 describes a situation involving the payment from income of carrying charges on unproductive real estate in which Section 104 may apply.

Once the two conditions have occurred — insufficient beneficial enjoyment from the property and the spouse's demand that the trustee take action under this section — the trustee must act; but instead of the formulaic approach of the 1962 Act, which is triggered only if the trustee sells the property, this Act permits the trustee to decide whether to make the property productive of income, convert it, transfer funds from principal to income, or to take some combination of those actions. The trustee may rely on the power conferred by Section 104(a) to adjust from principal to income if the trustee decides that it is not feasible or appropriate to make the property productive of income or to convert the property. Given the purpose of Section 413, the power under Section 104(a) would be exercised to transfer principal to income and not to transfer income to principal.

Section 413 does not apply to a so-called "estate" trust, which will qualify for the marital deduction, even though the income may be accumulated for a term of years or for the life of the surviving spouse, if the terms of the trust require the principal and undistributed income to be paid to the surviving spouse's estate when the spouse dies. Reg. § 20.2056(c)-2(b)(1)(iii).

§ 37A-4-414. Derivatives and options.

(a) In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments that gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under G.S. 37A-4-403 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option shall be allocated to principal. An amount paid to acquire the option shall be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, shall be allocated to principal. (2003-232, s. 2.)

OFFICIAL COMMENT

Scope and application. It is difficult to predict how frequently and to what extent trustees will invest directly in derivative financial instruments rather than participating indirectly through investment entities that may utilize these instruments in varying degrees. If the trust participates in derivatives indirectly through an entity, an amount received from the entity will be allocated under Section 401 and not Section 414. If a trustee invests directly in derivatives to a significant extent, the expectation is that receipts and disbursements related to derivatives will be accounted for under Section 403; if a trustee chooses not to account under Section 403, Section 414(b) provides the default rule. Certain types of option transactions in which trustees may engage are dealt with in subsection (c) to distinguish those transactions from ones involving options that are embedded in derivative financial instruments.

Definition of "derivative." "Derivative" is a difficult term to define because new derivatives are invented daily as dealers tailor their terms to achieve specific financial objectives for particular clients. Since derivatives are typically contract-based, a derivative can probably be devised for almost any set of objectives if another party can be found who is willing to assume the obligations required to meet those objectives.

The most comprehensive definition of derivative is in the Exposure Draft of a Proposed Statement of Financial Accounting Standards titled "Accounting for Derivative and Similar Financial Instruments and for Hedging Activities," which was released by the Financial Accounting Standards Board (FASB) on June 20, 1996 (No. 162-B). The definition in Section 414(a) is derived in part from the FASB definition. The purpose of the definition in subsection (a) is to implement the substantive rule in subsection (b) that provides for all receipts and disbursements to be allocated to principal to the extent the trustee elects not to account for transactions in derivatives under Section 403. As a result, it is much shorter than the FASB definition, which serves much more ambitious objectives.

A derivative is frequently described as including futures, forwards, swaps and options, terms that also require definition, and the definition in this Act avoids these terms. FASB used the same approach, explaining in paragraph 65 of the Exposure Draft:

> The definition of *derivative financial instrument* in this Statement includes those financial instruments generally considered to be derivatives, such as forwards, futures, swaps, options, and similar instruments. The Board considered defining a derivative financial instrument by merely referencing those commonly understood instruments, similar to paragraph 5 of Statement 119, which says that "...a derivative financial instrument is a futures, forward, swap, or option contract, or other financial instrument with similar characteristics." However, the continued development of financial markets and innovative financial instruments could ultimately render a definition based on examples inadequate and obsolete. The Board, therefore, decided to base the definition of a derivative financial instrument on a description of the common characteristics of those instruments in order to accommodate the accounting for newly developed derivatives. (Footnote omitted.)

Marking to market. A gain or loss that occurs because the trustee marks securities to market or to another value during an accounting period is not a transaction in a derivative financial instrument that is income or principal under the Act — only cash receipts and disbursements, and the receipt of property in exchange for a principal asset, affect a trust's principal and income accounts.

Receipt of property other than cash. If a trustee receives property other than cash upon the settlement of a derivatives transaction, that property would be principal under Section 404(2).

Options. Options to which subsection (c) applies include an option to purchase real estate owned by the trustee and a put option purchased by a trustee to guard against a drop in value of a large block of marketable stock that must be liquidated to pay estate taxes. Subsection (c) would also apply to a continuing and regular practice of selling call options on securities owned by the trust if the terms of the option require delivery of the securities. It does not apply if the consideration received or given for the option is something other than cash or property, such as cross-options granted in a buy-sell agreement between owners of an entity.

§ 37A-4-415. Asset-backed securities.

(a) In this section, "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which G.S. 37A-4-401 or G.S. 37A-4-409 applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee shall allocate ten percent (10%) of the payment to income and the balance to principal. (2003-232, s. 2.)

OFFICIAL COMMENT

Scope of section. Typical asset-backed securities include arrangements in which debt obligations such as real estate mortgages, credit card receivables and auto loans are acquired by an investment trust and interests in the trust are sold to investors. The source for payments to an investor is the money received from principal and interest payments on the underlying debt. An asset-backed security includes an "interest only" or a "principal only" security that permits the investor to receive only the interest payments received from the bonds, mortgages or other assets that are the collateral for the asset-backed security, or only the principal payments made on those collateral assets. An asset-backed security also includes a security that permits the investor to participate in either the capital appreciation of an underlying security or in the interest or dividend return from such a security, such as the "Primes" and "Scores" issued by Americus Trust. An asset-backed security does not include an interest in a corporation, partnership, or an investment trust described in the Comment to Section 402, whose assets consist significantly or entirely of investment assets. Receipts from an instrument that do not come within the scope of this section or any other section of the Act would be allocated entirely to principal under the rule in Section 103(a)(4), and the trustee may then consider whether and to what extent to exercise the power to adjust in Section 104, taking into account the return from the portfolio as whole and other relevant factors.

ARTICLE 5.

Allocation of Disbursements During Administration of Trust.

§ 37A-5-501. Disbursements from income.

A trustee shall make the following disbursements from income to the extent that they are not disbursements to which G.S. 37A-2-201(2)b. or G.S. 37A-2-201(2)c. applies:

(1) One-half of the regular compensation of the trustee and of any person providing investment advisory or custodial services to the trustee;

(2) One-half of all expenses for accountings, judicial proceedings, or other matters that involve both the income and remainder interests;

(3) All of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal, and expenses of a proceeding or other matter that concerns primarily the income interest; and

(4) Recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset. (2003-232, s. 2.)

OFFICIAL COMMENT

Trustee fees. The regular compensation of a trustee or the trustee's agent includes compensation based on a percentage of either principal or income or both.

Insurance premiums. The reference in paragraph (4) to "recurring" premiums is intended to distinguish premiums paid annually for fire insurance from premiums on title insurance, each of which covers the loss of a principal asset. Title insurance premiums would be a principal disbursement under Section 502(a)(5).

Regularly recurring taxes. The reference to "regularly recurring taxes assessed against principal" includes all taxes regularly imposed on real property and tangible and intangible personal property.

Editor's Note. — Session Laws 2003-232, s. 8, makes this Chapter effective January 1, 2004, and applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes, as enacted in this act.

§ 37A-5-502. Disbursements from principal.

(a) A trustee shall make the following disbursements from principal:

(1) The remaining one-half of the disbursements described in G.S. 37A-5-501(1) and G.S. 37A-5-501(2);

(2) All of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination and disbursements made to prepare property for sale;

(3) Payments on the principal of a trust debt;

(4) Expenses of a proceeding that concerns primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) Premiums paid on a policy of insurance not described in G.S. 37A-5-501(4) of which the trust is the owner and beneficiary;

(6) Estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) Disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances, collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common-law claims by third parties, and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation. (2003-232, s. 2.)

OFFICIAL COMMENT

Environmental expenses. All environmental expenses are payable from principal, subject to the power of the trustee to transfer funds to principal from income under Section 504. However, the Drafting Committee decided that it was not necessary to broaden this provision to cover other expenditures made under compulsion of governmental authority. See generally the annotation at 43 A.L.R.4th 1012 (Duty as Between Life Tenant and Remainderman with Respect to Cost of Improvements or Repairs Made Under Compulsion of Governmental Authority).

Environmental expenses paid by a trust are to be paid from principal under Section 502(a)(7) on the assumption that they will usually be extraordinary in nature. Environmental expenses might be paid from income if the trustee is carrying on a business that uses or sells toxic substances, in which case environmental cleanup costs would be a normal cost of doing business and would be accounted for under Section 403. In accounting under that Section, environmental costs will be a factor in determining how much of the net receipts from the business is trust income. Paying all other environmental expenses from principal is consistent with this Act's approach regarding receipts — when a receipt is not clearly a current return on a principal asset, it should be added to principal because over time both the income and remainder beneficiaries benefit from this treatment. Here, allocating payments required by environmental laws to principal imposes the detriment of those payments over time on both the income and remainder beneficiaries.

Under Sections 504(a) and 504(b)(5), a trustee who makes or expects to make a principal disbursement for an environmental expense described in Section 502(a)(7) is authorized to transfer an appropriate amount from income to principal to reimburse principal for disbursements made or to provide a reserve for future principal disbursements.

The first part of Section 502(a)(7) is based upon the definition of an "environmental remediation trust" in Treas. Reg. § 301.7701-4(e)(as amended in 1996). This is not because the Act applies to an environmental remediation trust, but because the definition is a useful and thoroughly vetted description of the kinds of expenses that a trustee owning contaminated property might incur. Expenses incurred to comply with environmental laws include the cost of environmental consultants, administrative proceedings and burdens of every kind imposed as the result of an administrative or judicial proceeding, even though the burden is not formally characterized as a penalty.

Title proceedings. Disbursements that are made to protect a trust's property, referred to in Section 502(a)(4), include an "action to assure title" that is mentioned in Section 13(c)(2) of the 1962 Act.

Insurance premiums. Insurance premiums referred to in Section 502(a)(5) include title insurance premiums. They also include premiums on life insurance policies owned by the trust, which represent the trust's periodic investment in the insurance policy. There is no provision in the 1962 Act for life insurance premiums.

Taxes. Generation-skipping transfer taxes are payable from principal under subsection (a)(6).

§ 37A-5-503. Transfers from income to principal for depreciation.

(a) In this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) Of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) During the administration of a decedent's estate; or

(3) Under this section if the trustee is accounting under G.S. 37A-4-403 for the business or activity in which the asset is used.

(c) An amount transferred to principal under this section need not be held as a separate fund. (2003-232, s. 2.)

OFFICIAL COMMENT

Prior Acts. The 1931 Act has no provision for depreciation. Section 13(a)(2) of the 1962 Act provides that a charge shall be made against income for "... a reasonable allowance for depreciation on property subject to depreciation under generally accepted accounting principles ...." That provision has been resisted by many trustees, who do not provide for any depreciation for a variety of reasons. One reason relied upon is that a charge for depreciation is not needed to protect the remainder beneficiaries if the value of the land is increasing; another is that generally accepted accounting principles may not require depreciation to be taken if the property is not part of a business. The Drafting Committee concluded that the decision to provide for depreciation should be discretionary with the trustee. The power to transfer funds from income to principal that is granted by this section is a discretionary power of administration referred to in Section 103(b), and in exercising the power a trustee must comply with Section 103(b).

One purpose served by transferring cash from income to principal for depreciation is to provide funds to pay the principal of an indebtedness secured by the depreciable property. Section 504(b)(4) permits the trustee to transfer additional cash from income to principal for this purpose to the extent that the amount transferred from income to principal for depreciation is less than the amount of the principal payments.

§ 37A-5-504. Transfers from income to reimburse principal.

(a) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(b) Principal disbursements to which subsection (a) of this section applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

(1) An amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;
(2) A capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;
(3) Disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;
(4) Periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and
(5) Disbursements described in G.S. 37A-5-502(a)(7).

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in subsection (a) of this section. (2003-232, s. 2.)

OFFICIAL COMMENT

Prior Acts. The sources of Section 504 are Section 13(b) of the 1962 Act, which permits a trustee to "regularize distributions," if charges against income are unusually large, by using "reserves or other reasonable means" to withhold sums from income distributions; Section 13(c)(3) of the 1962 Act, which authorizes a trustee to establish an allowance for depreciation out of income if principal is used for extraordinary repairs, capital improvements and special assessments; and Section 12(3) of the 1931 Act, which permits the trustee to spread income expenses of unusual amount "throughout a series of years." Section 504 contains a more detailed enumeration of the circumstances in which this authority may be used, and includes in subsection (b)(4) the express authority to use income to make principal payments on a mortgage if the depreciation charge against income is less than the principal payments on the mortgage.

§ 37A-5-505. Income taxes.

(a) A tax required to be paid by a trustee based on receipts allocated to income shall be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal shall be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income shall be paid proportionately:

(1) From income to the extent that receipts from the entity are allocated to income; and
(2) From principal to the extent that:
    a. Receipts from the entity are allocated to principal; and

b. The trust's share of the entity's taxable income exceeds the total receipts described in subdivision (1) and sub-subdivision (2)a. of this subsection.

(d) For purposes of this section, receipts allocated to principal or income shall be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax. (2003-232, s. 2.)

OFFICIAL COMMENT

Electing Small Business Trusts. An Electing Small Business Trust (ESBT) is a creature created by Congress in the Small Business Job Protection Act of 1996 (P.L. 104-188). For years beginning after 1996, an ESBT may qualify as an S corporation stockholder even if the trustee does not distribute all of the trust's income annually to its beneficiaries. The portion of an ESBT that consists of the S corporation stock is treated as a separate trust for tax purposes (but not for trust accounting purposes), and the S corporation income is taxed directly to that portion of the trust even if some or all of that income is distributed to the beneficiaries.

A trust normally receives a deduction for distributions it makes to its beneficiaries. Subsection (d) takes into account the possibility that an ESBT may not receive a deduction for trust accounting income that is distributed to the beneficiaries. Only limited guidance has been issued by the Internal Revenue Service, and it is too early to anticipate all of the technical questions that may arise, but the powers granted to a trustee in Sections 506 and 104 to make adjustments are probably sufficient to enable a trustee to correct inequities that may arise because of technical problems.

§ 37A-5-506. Adjustments between principal and income because of taxes.

(a) A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries that arise from:

(1) Elections and decisions, other than those described in subsection (b) of this section, that the fiduciary makes from time to time regarding tax matters;

(2) An income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) The ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate or trust or a beneficiary.

(b) If the amount of an estate tax marital deduction or charitable contribution deduction is reduced because a fiduciary deducts an amount paid from principal for income tax purposes instead of deducting it for estate tax purposes, and as a result estate taxes paid from principal are increased and income taxes paid by an estate, trust, or beneficiary are decreased, each estate, trust, or beneficiary that benefits from the decrease in income tax shall reimburse the principal from which the increase in estate tax is paid. The total reimbursement shall equal the increase in the estate tax to the extent that the principal used to pay the increase would have qualified for a marital deduction or charitable contribution deduction but for the payment. The proportionate share of the reimbursement for each estate, trust, or beneficiary whose income taxes are reduced shall be the same as its proportionate share of the total decrease in income tax. An estate or trust shall reimburse principal from income. (2003-232, s. 2.)

OFFICIAL COMMENT

Discretionary adjustments. Section 506(a) permits the fiduciary to make adjustments between income and principal because of tax law provisions. It would permit discretionary adjustments in situations like these: (1) A fiduciary elects to deduct administration expenses that are paid from principal on an income tax return instead of on the estate tax return; (2) a distribution of a principal asset to a trust or other beneficiary causes the taxable income of an estate or trust to be carried out to the distributee and relieves the persons who receive the income of any obligation to pay income tax on the income; or (3) a trustee realizes a capital gain on the sale of a principal asset and pays a large state income tax on the gain, but under applicable federal income tax rules the trustee may not deduct the state income tax payment from the capital gain in calculating the trust's federal capital gain tax, and the income beneficiary receives the benefit of the deduction for state income tax paid on the capital gain. See generally Joel C. Dobris, Limits on the Doctrine of Equitable Adjustment in Sophisticated Postmortem Tax Planning, 66 Iowa L. Rev. 273 (1981).

Section 506(a)(3) applies to a qualified Subchapter S trust (QSST) whose income beneficiary is required to include a pro rata share of the S corporation's taxable income in his return. If the QSST does not receive a cash distribution from the corporation that is large enough to cover the income beneficiary's tax liability, the trustee may distribute additional cash from principal to the income beneficiary. In this case the retention of cash by the corporation benefits the trust principal. This situation could occur if the corporation's taxable income includes capital gain from the sale of a business asset and the sale proceeds are reinvested in the business instead of being distributed to shareholders.

Mandatory adjustment. Subsection (b) provides for a mandatory adjustment from income to principal to the extent needed to preserve an estate tax marital deduction or charitable contributions deduction. It is derived from New York's EPTL § 11-1.2(A), which requires principal to be reimbursed by those who benefit when a fiduciary elects to deduct administration expenses on an income tax return instead of the estate tax return. Unlike the New York provision, subsection (b) limits a mandatory reimbursement to cases in which a marital deduction or a charitable contributions deduction is reduced by the payment of additional estate taxes because of the fiduciary's income tax election. It is intended to preserve the result reached in *Estate of Britenstool v. Commissioner*, 46 T.C. 711 (1966), in which the Tax Court held that a reimbursement required by the predecessor of EPTL § 11-1.2(A) resulted in the estate receiving the same charitable contributions deduction it would have received if the administration expenses had been deducted for estate tax purposes instead of for income tax purposes. Because a fiduciary will elect to deduct administration expenses for income tax purposes only when the income tax reduction exceeds the estate tax reduction, the effect of this adjustment is that the principal is placed in the same position it would have occupied if the fiduciary had deducted the expenses for estate tax purposes, but the income beneficiaries receive an additional benefit. For example, if the income tax benefit from the deduction is $30,000 and the estate tax benefit would have been $20,000, principal will be reimbursed $20,000 and the net benefit to the income beneficiaries will be $10,000.

Irrevocable grantor trusts. Under Sections 671-679 of the Internal Revenue Code (the "grantor trust" provisions), a person who creates an irrevocable trust for the benefit of another person may be subject to tax on the trust's income or capital gains, or both, even though the settlor is not entitled to receive any income or principal from the trust. Because this is now a well-known tax result, many trusts have been created to produce this result, but there are also trusts that are unintentionally subject to this rule. The Act does not require or authorize a trustee to distribute funds from the trust to the settlor in these cases because it is difficult to establish a rule that applies only to trusts where this tax result is unintended and does not apply to trusts where the tax result is intended. Settlors who intend this tax result rarely state it as an objective in the terms of the trust, but instead rely on the operation of the tax law to produce the desired result. As a result it may not be possible to determine from the terms of the trust if the result was intentional or unintentional. If the drafter of such a trust wants the trustee to have the authority to distribute principal or income to the settlor to reimburse the settlor for taxes paid on the trust's income or capital gains, such a provision should be placed in the terms of the trust. In some situations the Internal Revenue Service may require that such a provision be placed in the terms of the trust as a condition to issuing a private letter ruling.

ARTICLE 6.

Miscellaneous Provisions.

§ 37A-6-601. Uniformity of application and construction.

In applying and construing this Chapter, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it. (2003-232, s. 2.)

Editor's Note. — Session Laws 2003-232, s. 8, makes this Chapter effective January 1, 2004, and applicable to every trust or decedent's estate existing on that date or coming into existence after that date, except as otherwise expressly provided in the will or terms of the trust or in the provisions of Chapter 37A of the General Statutes, as enacted in this act.

§ 37A-6-602. Severability clause.

If any provision of this Chapter or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Chapter that can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are severable. (2003-232, s. 2.)

Chapter 38.

Boundaries.

Sec.
38-1. Special proceeding to establish.
38-2. Occupation sufficient ownership.

Sec.
38-3. Procedure.
38-4. Surveys in disputed boundaries.

§ 38-1. Special proceeding to establish.

The owner of land, any of whose boundary lines are in dispute, may establish any of such lines by special proceedings in the superior court of the county in which the land or any part thereof is situated. (1893, c. 22; Rev., s. 325; C.S., s. 361.)

Cross References. — As to special proceedings generally, see G.S. 1-393 et seq.

CASE NOTES

Statute Is Not Jurisdictional. — Boundary disputes are usually tried by special proceedings brought before the clerk of superior court under this Chapter. This statute is not jurisdictional, however, and by consent a boundary dispute may be originally tried before a superior court judge. Wadsworth v. Georgia-Pacific Corp., 38 N.C. App. 1, 247 S.E.2d 25 (1978), vacated on other grounds, 297 N.C. 172, 253 S.E.2d 925 (1979).

Strict Observance of Statutes Required. — As under prior statutes relating to processioning proceedings, a strict observance of statutory provisions in all material respects is required. Pruden v. Keemer, 262 N.C. 212, 136 S.E.2d 604 (1964).

Purpose of Processioning. — The primary object of this section and the following sections of this Chapter is to facilitate the speedy determination of disputed boundaries between adjoining landowners who do not contest each other's title to their respective tracts. Parker v. Taylor, 133 N.C. 103, 45 S.E. 473 (1903).

The sole purpose of a processioning proceeding is to establish the true location of disputed boundary lines. Pruden v. Keemer, 262 N.C. 212, 136 S.E.2d 604 (1964); Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

The primary purpose of a processioning proceeding is to establish the correct location of the disputed dividing line. Such a proceeding may not be dismissed by a directed verdict. A plaintiff instituting a true processioning proceeding has the legal right to have the line ascertained and fixed by judicial decree regardless of the sufficiency of his evidence to establish the line as contended for by him. Sipe v. Blankenship, 37 N.C. App. 499, 246 S.E.2d 527 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 450 (1979), overruled on other grounds, Walls v. Grohman, 315 N.C. 239, 337 S.E.2d 556 (1985).

Only Question Is Location of True Dividing Line. — Ordinarily, in a special proceeding under this Chapter, where it is admitted that the lands of petitioner and respondent adjoin, the only question presented is the location of the true dividing line. Lane v. Lane, 255 N.C. 444, 121 S.E.2d 893 (1961).

Where the only issue to be determined is the location of a dividing line between two parcels of land, the appropriate action is a processioning proceeding as provided by this section; however, in the event title to the land is put in issue, the Clerk may not hear the case, but must transfer it to the Superior Court where it becomes, in effect, an action to quiet title pursuant to G.S. 41-10. Chappell v. Donnelly, 113 N.C. App. 626, 439 S.E.2d 802 (1994).

Title or ownership is not directly put in issue in a processioning proceeding. Pruden v. Keemer, 262 N.C. 212, 136 S.E.2d 604 (1964).

Title to the land is not in issue unless so made by the pleadings. Cole v. Seawell, 152 N.C. 349, 67 S.E. 753 (1910).

But Denial of Plaintiff's Ownership Converts Proceeding into Quiet Title Action. — When title is placed in issue by the defendant's denial of the plaintiff's ownership, then, by G.S. 1-399 [see now G.S. 1-301.2], the pending special proceedings are converted into a civil action to quiet title, and the court will try all the issues in controversy connected therewith. Woody v. Fountain, 143 N.C. 66, 55 S.E. 425 (1906). See Roberts v. Sawyer, 229 N.C. 279, 49 S.E.2d 468 (1948); Nesbitt v. Fairview Farms, Inc., 239 N.C. 481, 80 S.E.2d 472 (1954).

Putting Title in Issue Converts Proceeding into Quiet Title Action. — Where the only issue to be tried is the location of a dividing line, it is a processioning proceeding under this Chapter. However, where title to the land is put in issue the clerk has no authority to pass on any question involved. He must transfer the proceeding to the regular session of superior court where it becomes in effect an action to quiet title pursuant to G.S. 41-10. Cobb v. Spurlin, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

When Title Is Not in Dispute. — Where petitioners allege ownership of contiguous tracts by the respective parties, and a dispute between them as to the true dividing line, and respondents do not deny petitioners' allegation of ownership except with respect to lappages and infringements on lands owned by respondent, and join in the prayer that the dividing line be properly located, title is not in dispute. Nesbitt v. Fairview Farms, Inc., 239 N.C. 481, 80 S.E.2d 472 (1954).

Proceeding Instituted by Owner Whose Boundaries Are in Dispute. — A special proceeding under this Chapter may be instituted by an owner of land whose boundary lines are in dispute. Pruden v. Keemer, 262 N.C. 212, 136 S.E.2d 604 (1964).

Consent of Both Owners Not Required. — Until the passage of this section the consent of both adjoining landowners was necessary in order to have the dispute as to the bounds of their respective estates judicially determined. Under the present law either of the adjoining proprietors as a matter of right is entitled to have the land processioned, without the other's consent, and, where there has been an appeal, to have all the controverted matters settled by the jury under the guidance of the court. Green v. Williams, 144 N.C. 60, 56 S.E. 549 (1907).

But Dispute as to Boundary Necessary. — To sustain an action to establish the true dividing line between adjoining owners of land, a dispute as to the location of the line must be shown or the case on appeal will be dismissed in the Supreme Court. Wood v. Hughes, 195 N.C. 185, 141 S.E. 569 (1928).

Only disputed boundary lines are the subject of processioning proceedings. Pruden v. Keemer, 262 N.C. 212, 136 S.E.2d 604 (1964).

Where the petition in processioning proceedings does not allege what boundary is in dispute between petitioners and respondents, and, while containing a legal description of the lands claimed by petitioners, fails to locate any lines as claimed by petitioners on the earth's surface, the petition is fatally defective and insufficient to confer jurisdiction on the court. Pruden v. Keemer, 262 N.C. 212, 136 S.E.2d 604 (1964).

Call in Deed Is Binding. — Plaintiffs in a processioning proceeding, under this Chapter, are bound by the call in their deed for a named corner whether it be marked or unmarked. Cornelison v. Hammond, 224 N.C. 757, 32 S.E.2d 326 (1944).

Where petitioners in a processioning proceeding introduce evidence fixing the corner of a contiguous tract, and the next call in their description is by course and distance to a stone (a corner in dispute), and the evidence is to the effect that the stone was small and had been moved, the disputed corner must, as a matter of law, be fixed at the distance called for from the established corner, with the result that petitioners' evidence is sufficient to support a finding of the corner as contended by them. Allen v. Cates, 262 N.C. 268, 136 S.E.2d 579 (1964).

Effect of Agreement between Parties. — Where, in proceedings to establish the disputed boundaries between adjoining lands, a binding executed agreement between the parties has been established by uncontradicted evidence, the plaintiff is estopped from proceeding under this section, and there is no error in the court's holding that the completed agreement of arbitration operated as an estoppel as a matter of law. Lowder v. Smith, 201 N.C. 642, 161 S.E. 223 (1931).

A boundary line agreement executed by a plaintiff and a defendant is an effective plea in bar to the plaintiff's proceeding to establish the true boundary line between her property and the property of defendant, notwithstanding (1) the plaintiff failed to acknowledge her signature to the agreement before a notary public and (2) the plaintiff did not know where the line would be located on the ground at the time she signed the agreement. Smith v. Digh, 9 N.C. App. 678, 177 S.E.2d 321 (1970).

Questions of Law and Fact as to Lines. — Ordinarily, in a special proceeding brought under this Chapter, "the only question presented is the location of the true dividing line," title or ownership to land not being directly at issue. Particularly, what are petitioners' lines is determinable as a matter of law from the calls in the description of their lands. Where these lines are located on the earth's surface is determinable as a matter of fact. Taylor v. Brittain, 76 N.C. App. 574, 334 S.E.2d 242 (1985), modified and aff'd, 317 N.C. 146, 343 S.E.2d 536 (1986).

Right to Have Issue Answered by Jury. — In a processioning proceeding under this chapter, where the only issue is the true boundary line, plaintiffs, as a matter of right, are entitled to have that issue answered by jury so that controversy may be ended by judicial decree, as the statute is expressly designed to provide a means of settlement by an orderly proceeding in court. Cornelison v. Hammond, 225 N.C. 535, 35 S.E.2d 633 (1945).

A directed verdict is never proper when the question is for the jury, and in processioning proceedings the determination of the boundary is for the jury. Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978).

Jury May Fix Boundary According to

Evidence Where Petitioner Does Not Meet Burden of Proof. — In processioning proceedings it is the duty of the jury to locate the boundary. If petitioners fail to carry their burden of proof, the jury need not fix the line according to the respondents' contentions, but may locate the boundary wherever they feel the evidence justifies. Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978).

Injunctive Relief. — To warrant the granting of an injunction in cases of special proceedings, the relief sought must be subsidiary to the relief asked in the special proceedings. Hunt v. Sneed, 64 N.C. 176 (1870).

Since this section gives no substantive relief — settles no rights, or titles to property — but only locates the dividing lines between the parties, the plaintiff was denied an injunction to restrain the defendant from commissions of trespasses when such order was asked for in the special proceedings instituted to determine the boundary line between the adjoining estates. Wilson v. Alleghany Co., 124 N.C. 7, 32 S.E. 326 (1899). See Jackson v. Jernigan, 216 N.C. 401, 5 S.E.2d 143 (1939).

Equitable Relief of Mutual Mistake. — As the procedure for the application of this section is that prescribed in G.S. 38-3, subsection (d), it was competent for the defendant under former G.S. 1-70 and G.S. 1-399 [see now G.S. 1-301.2] to plead the equitable relief of mutual mistake, having the cause transferred to the civil issue docket, and having the common grantor of the plaintiff and defendant made a party defendant. Smith v. Johnson, 209 N.C. 729, 184 S.E. 486 (1936).

Action of Trespass Converted into Processioning Proceeding. — Where, in an action in trespass, the parties stipulated that each had title to his respective tract, and that the only controversy was as to the true location of the dividing line between the tracts, the action was thereupon converted into a processioning proceeding. It is not thereafter subject to dismissal as in case of nonsuit. Welborn v. Bate Lumber Co., 238 N.C. 238, 77 S.E.2d 612 (1953).

When Nonsuit Not Proper. — Where, in a processioning proceeding it appears that the parties are owners of adjoining tracts and that a bona fide dispute exists between them as to the location of the dividing line, nonsuit is not proper. Plemmons v. Cutshall, 230 N.C. 595, 55 S.E.2d 74 (1949).

Where, in a processioning proceeding, the title of the respective parties is not in dispute, and the only real controversy is as to the location of the dividing line between the lands of the parties, nonsuit is erroneously entered. Brown v. Hodges, 230 N.C. 746, 55 S.E.2d 498 (1949).

Applied in Tice v. Winchester, 225 N.C. 673, 36 S.E.2d 257 (1945); Strickland v. Kornegay, 240 N.C. 758, 83 S.E.2d 903 (1954); Perkins v. Clarke, 241 N.C. 24, 84 S.E.2d 251 (1954); Twiford v. Harrison, 260 N.C. 217, 132 S.E.2d 321 (1963); Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51 (1985).

Cited in Nichols v. Wilson, 16 N.C. App. 286, 448 S.E.2d 119, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994); Kelly v. King, 225 N.C. 709, 36 S.E.2d 220 (1945); Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953); Kanupp v. Land, 248 N.C. 203, 102 S.E.2d 779 (1958); Johnson v. Daughety, 270 N.C. 762, 155 S.E.2d 205 (1967); Gahagan v. Gosnell, 270 N.C. 117, 153 S.E.2d 879 (1967); Vail v. Smith, 1 N.C. App. 498, 162 S.E.2d 78 (1968); Glen Forest Corp. v. Bensch, 9 N.C. App. 587, 176 S.E.2d 851 (1970); Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

§ 38-2. Occupation sufficient ownership.

The occupation of land constitutes sufficient ownership for the purposes of this Chapter. (1893, c. 22; 1903, c. 21; Rev., s. 326; C.S., s. 362.)

CASE NOTES

Sufficiency of Ownership — When Title Not in Dispute. — The courts have construed the term "occupation," as used in this section, to mean possession, and uniformly hold that one (a) in possession of the land, and/or (b) whose title thereto is not disputed, so that no issue is raised save only that of the location of the boundary, has sufficient ownership to avail himself of the special proceedings herein provided for. Williams v. Hughes, 124 N.C. 3, 32 S.E. 325 (1899); Parker v. Taylor, 133 N.C. 103, 45 S.E. 473 (1903).

Where it was admitted that plaintiff's title was not in dispute, and that defendant's title was not in dispute except as to the true boundary line, the refusal of the court to submit an issue as to plaintiff's title, in addition to the issue as to the true boundary line, was not error. Clark v. Dill, 208 N.C. 421, 181 S.E. 281 (1935).

Same — When Title Is in Dispute. — Where, however, the defendant puts the title to the land in issue, and the case has taken the form of a civil action, then the plaintiff can no longer rest his case by merely proving his occupation of the land as evidencing the boundary, but must go further and prove his title to the land. Woody v. Fountain, 143 N.C. 66, 55 S.E. 425 (1906). See Williams v. Hughes, 124 N.C. 3, 32 S.E. 325 (1899).

Cited in Johnson v. Daughety, 270 N.C. 762, 155 S.E.2d 205 (1967).

§ 38-3. Procedure.

(a) Petition; Summons; Hearing. — The owner shall file his petition under oath stating therein facts sufficient to constitute the location of such line as claimed by him and making defendants all adjoining owners whose interest may be affected by the location of said line. The clerk shall thereupon issue summons to the defendants as in other cases of special proceedings. If the defendants fail to answer, judgment shall be given establishing the line according to petition. If the answer deny the location set out in the petition, the clerk shall issue an order to the county surveyor or, if cause shown, to any competent surveyor to survey said line or lines according to the contention of both parties, and make report of the same with a map at a time to be fixed by the clerk, not more than 30 days from date of order; to which time the cause shall be continued. The cause shall then be heard by the clerk upon the location of said line or lines and judgment given determining the location thereof.

(b) Appeal to Session. — Either party may within 10 days after such determination by the clerk serve notice of appeal from the ruling of the clerk determining the said location. When notice of appeal is served it shall be the duty of the clerk to transmit the issues raised before him to the next session of the superior court of the county for trial by a jury, when the question shall be heard de novo.

(c) Survey after Judgment. — When final judgment is given in the proceeding the court shall issue an order to the surveyor to run and mark the line or lines as determined in the judgment. The surveyor shall make report including a map of the line as determined, which shall be filed with the judgment roll in the cause and entered with the judgment on the special proceedings docket.

(d) Procedure as in Special Proceedings. — The procedure under this Chapter, the jurisdiction of the court, and the right of appeal shall, in all respects, be the same as in special proceedings except as herein modified. (1893, c. 22; 1903, c. 21; Rev., s. 326; C.S., s. 363; 1971, c. 528, s. 35.)

Cross References. — As to special proceedings generally, see G.S. 1-393 et seq.

CASE NOTES

Issue Is Location of Dividing Line. — In a processioning proceeding under this Chapter when the cause is heard on appeal, unless pleadings are complicated by other allegations the only issue is as to the true location of the dividing line. Cornelison v. Hammond, 225 N.C. 535, 35 S.E.2d 633 (1945).

Applicability of Section. — The procedure prescribed by this section is applicable only in case of a dispute as to the true location of the boundary line between adjoining landowners. Johnson v. Daughety, 270 N.C. 762, 155 S.E.2d 205 (1967).

Compliance with the Procedural Steps Mandatory. — This section must be strictly followed in all material respects and any flagrant or negligent departure therefrom will be fatal to the proceedings. Forney v. Williamson, 98 N.C. 329, 4 S.E. 483 (1887).

But the court will look to substance and not to form of pleadings, and where an affidavit contains a full and explicit denial of the line set out in the plaintiff's petition it will be treated as an answer, since it contains all that is required by the section. Scott v. Kellum, 117 N.C. 664, 23 S.E. 180 (1895).

Parties to Proceeding. — All landowners whose land adjoins the disputed boundary and whose interest may be affected are necessary and proper parties. Landowners whose land adjoins boundary lines which are not in dispute, but which may connect with or intersect the disputed line, are not necessary parties, although they may be joined in the discretion of the trial judge. Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Effect of Misjoinder of Parties. — A proceeding under the provisions of this section to establish the true dividing line between adjoining owners of land will be dismissed upon demurrer for misjoinder of parties and causes of action that involve the title or interests of others not related to the matter in dispute, and which are entirely independent thereof. Rogers v. Rogers, 192 N.C. 50, 133 S.E. 184 (1926).

Failure to Comply with Subsection (c) Not Fatal. — Trial court correctly found that the prior judgment was res judicata as to the location of boundary line despite the fact the court did not issue an order to the surveyor to run and mark the boundary lines; although the trial court may not have totally complied with this section, the court strictly observed the statutory provisions in all material respects. Tindall v. Willis, 95 N.C. App. 374, 382 S.E.2d 778 (1989).

A defense bond is not required in a special proceeding to establish boundaries. Roberts v. Sawyer, 229 N.C. 279, 49 S.E.2d 468 (1948).

When Transfer to Regular Term Required. — The jurisdiction of the clerk in these special proceedings is limited in its scope. It extends only to those cases in which the only fact in issue is the location of the boundary line between the lands. Where the title to the land is put in issue the clerk has no authority to pass on any question involved, but must transfer the whole proceedings to the regular term of the court. Parker v. Taylor, 133 N.C. 103, 45 S.E. 473 (1903); Smith v. Johnson, 137 N.C. 43, 49 S.E. 62 (1904); Brown v. Hutchinson, 155 N.C. 205, 71 S.E. 302 (1911).

True Location of Disputed Line Must Be Alleged. — Under general rules applicable to pleadings, and specifically under this section, a petitioner must allege the true location of a disputed boundary line. Pruden v. Keemer, 262 N.C. 212, 136 S.E.2d 604 (1964).

The portion of this section providing that petitioner allege "facts sufficient to constitute the location of such line as claimed by him," requires that petitioner allege facts as to the location of the (disputed) line as claimed by him with sufficient definiteness that its location on the earth's surface may be determined from petitioner's description thereof. Pruden v. Keemer, 262 N.C. 212, 136 S.E.2d 604 (1964); Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978).

Parties May Agree to Have Case Heard in First Instance by Presiding Judge. — This section directs that a processioning proceeding be heard first by the clerk. But the direction is not jurisdictional. A stipulation by which the parties agree to bypass the clerk and have the case heard and determined in the first instance by the presiding judge will be upheld. Strickland v. Kornegay, 240 N.C. 758, 83 S.E.2d 903 (1954); Andrews v. Andrews, 252 N.C. 97, 113 S.E.2d 47 (1960).

Proceeding Assimilated to Action to Quiet Title. — If title becomes involved in a processioning proceeding, the proceeding becomes in effect an action to quiet title under G.S. 41-10. Roberts v. Sawyer, 229 N.C. 279, 49 S.E.2d 468 (1948). See Woody v. Fountain, 143 N.C. 66, 55 S.E. 425 (1906).

Where, in a special proceeding under this Chapter to establish a boundary line, the defendant denies by answer the petitioner's title and pleads 20 years' adverse possession under G.S. 1-40 as a defense, the proceeding is assimilated to an action to quiet title under G.S. 41-10 and the clerk, as directed by G.S. 1-399 [see now G.S. 1-301.2], should "transfer the cause to the civil issue docket for trial during term upon all issues raised by pleadings," in accordance with rules of practice applicable to such actions as originally instituted. Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949).

Where, in a special proceeding under this Chapter to establish a boundary line, the defendant by his answer denies the petitioner's title and as a defense pleads seven years' adverse possession under color of title under G.S. 1-38, or 20 years' adverse possession under G.S. 1-40, the proceeding is assimilated to an action to quiet title. In such case, as provided by G.S. 1-399 [see now G.S. 1-301.2], the clerk "shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings." Lane v. Lane, 255 N.C. 444, 121 S.E.2d 893 (1961).

Transfer of Cause and Injunctive Relief. — When defendant in a processioning proceeding puts title in issue, the cause should be transferred to the civil issue docket for trial, but when he does not do so the proceeding does not involve title or right to possession, but solely the location of the true dividing line, and therefore injunctive relief will not lie at the instance of one party to enjoin the other form retaining possession of the disputed strip, pending the final determination of the proceeding, even in the superior court on appeal, since the restraint sought is not germane to the subject of the action. Jackson v. Jackson, 216 N.C. 401, 5 S.E.2d 143 (1939). See Wilson v. Alleghany Co., 124 N.C. 7, 32 S.E. 326 (1899).

Effect of Erroneous Transfer of Cause. — The fact that the clerk in a processioning proceeding erroneously concludes that the answer converted the proceeding into an action to try title to realty, and thereupon transfers the cause to the civil issue docket for trial, does not deprive the superior court of jurisdiction to determine the processioning proceeding. Lance v. Cogdill, 236 N.C. 134, 71 S.E.2d 918 (1952).

Issues Raised and Waiver of Jury Trial. — Where a special proceeding to establish a boundary line is assimilated to an action to quiet title by the defendant's answer, the issues raised by the pleadings are (1) whether petitioner owns the land described in his petition, and (2) the location of the land so described. In such case if defendant does not tender issues pertinent to the issues above stated he waives his right to a trial by jury. Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949).

Exceptions Not Giving Right to Jury Trial. — Where compulsory reference is ordered in a special proceeding to establish a boundary line, upon defendant's denial of petitioners' title and plea of title by 20 years' advance possession, defendant's exception to the order of reference and exceptions to findings of fact made by the referee do not entitle him to a jury trial when he tenders issues which relate only to questions of fact based upon his exceptions, and fails to tender issues of fact which arise upon the pleadings and to relate such issues to his exceptions and to the findings by their respective numbers. Simmons v. Lee, 230 N.C. 216, 53 S.E.2d 79 (1949).

Effect of Defendant's Denial of Petitioners' Claims. — The third sentence of this section refers to defendant's failure to file an answer and did not apply where the respondents denied the petitioners' claims and alleged what they considered to be the correct boundary line. Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978).

Right to Have Issue Answered by Jury. — In processioning proceedings it is the duty of the jury to locate the boundary. If petitioners fail to carry their burden of proof, the jury need not fix the line according to the respondents' contentions, but may locate the boundary wherever they feel the evidence justifies. Beal v. Dellinger, 38 N.C. App. 732, 248 S.E.2d 775 (1978).

Burden of Proof — Plaintiff. — Upon the institution of the proceedings to ascertain the true dividing line between the lands the burden is on the plaintiff to establish such line. Hill v. Dalton, 140 N.C. 9, 52 S.E. 273 (1905); Woody v. Fountain, 143 N.C. 66, 55 S.E. 425 (1906).

Plaintiff's burden of proof does not shift to the defendant merely because, in addition to denying the line to be as claimed by the plaintiff, he alleges another to be the dividing line. Garris v. Harrington, 167 N.C. 86, 83 S.E. 253 (1914).

The plaintiff is the actor and has the burden of establishing the true location of the dividing line. McCanless v. Ballard, 222 N.C. 701, 24 S.E.2d 525 (1943); Jenkins v. Trantham, 244 N.C. 422, 94 S.E.2d 311 (1956).

The burden of proof rests upon a petitioner to establish the true location of a disputed boundary line. Pruden v. Keemer, 262 N.C. 212, 136 S.E.2d 604 (1964); Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

Same — Defendant. — Where a case was tried by stipulation on the defendant's counterclaim as to the location of the boundary line, the burden of proof was on the defendant to establish the boundary line. Wadsworth v. Georgia-Pacific Corp., 38 N.C. App. 1, 247 S.E.2d 25 (1978), vacated on other grounds, 297 N.C. 172, 253 S.E.2d 925 (1979).

If the plaintiffs are unable to show by the greater weight of evidence the location of the true dividing line at a point more favorable to them than the line as contended by the defendants, the jury should answer the issue in accord with the contentions of the defendants. Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

Plaintiffs May Assert Alternative Boundaries. — In a proceeding to establish disputed boundary lines petitioners may contend that the true boundary is shown by the line on surveyor's map marked by letters as alleged in their petition and also may contend that the true boundary is shown by the fence on the surveyor's map by reason of title having vested in them to the land in dispute up to the fence by adverse possession under G.S. 1-40. They may assert both contentions leaving it to the court and jury to say which line, if either, they have carried the burden of establishing. Jenkins v. Trantham, 244 N.C. 422, 94 S.E.2d 311 (1956).

Duty of Jury to Locate Boundary. — In a processioning proceeding, it is the duty of the jury to locate the boundary; petitioner has the burden of proof, and if he fails to carry that burden, the jury, in the absence of agreement that one or the other is the true line, need not fix the boundary according to respondent's contentions, but may locate the line wherever the jury feels the evidence requires. Combs v. Woodie, 53 N.C. App. 789, 281 S.E.2d 705 (1981).

Questions of Law and Fact. — What is the true dividing line between two contiguous tracts of land is a question of law for the court; where such line is actually located on the premises is an issue of fact for the jury. Lance v. Cogdill, 236 N.C. 134, 71 S.E.2d 918 (1952); Welborn v. Bate Lumber Co., 238 N.C. 238, 77 S.E.2d 612 (1953); Andrews v. Andrews, 252 N.C. 97, 113 S.E.2d 47 (1960). See Jenkins v. Trantham, 244 N.C. 422, 94 S.E.2d 311 (1956); Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

Where the true boundary is, is a question of fact for the jury; what the boundary is, is a question of law for the court. Combs v. Woodie, 53 N.C. App. 789, 281 S.E.2d 705 (1981).

A description contained in a junior conveyance cannot be used to locate the lines called for in a prior conveyance. The location of the lines called for in the prior conveyance is a question of fact to be ascertained from the description there given. Coley v. Morris Tel. Co., 267 N.C. 701, 149 S.E.2d 14 (1966).

The provision of a judgment for marking the line as judicially determined, as provided by subsection (c) of this section, was a mere direction for the performance of a ministerial duty which in no way affected the finality of the determination of how the line should be run. Harrill v. Taylor, 247 N.C. 748, 102 S.E.2d 223 (1958).

Evidence Generally. — The general rules for ascertaining boundaries apply equally well when recourse is had through special proceedings. Tallassee Power Co. v. Savage, 170 N.C. 625, 87 S.E. 629 (1916). See Woodard v. Harrell, 191 N.C. 194, 132 S.E. 12 (1926), containing dicta to the effect that parol evidence of location of boundary line may be properly admitted, if the parties were merely locating the true boundary line, but not to show a verbal agreement to change the true dividing line.

Surveyor's Report as Evidence. — The surveyor, when acting under this section, is not in any sense a referee, and his report to the court should not contain conclusions of law, but should only set forth a detailed account of the facts of the case, and when it does this it is entitled to great evidential weight, although it is not conclusive as to the results contained therein. Norwood v. Crawford, 114 N.C. 513, 19 S.E. 349 (1894). See Green v. Williams, 144 N.C. 60, 56 S.E. 549 (1907).

Surveyor may not give his opinion as to where the boundary is. Combs v. Woodie, 53 N.C. App. 789, 281 S.E.2d 705 (1981).

What Report of Processioners Must Contain. — A report of a processioner is radically defective when it does not state, with precision, the claims of the respective parties, so as to show what lines were disputed or how far they were disputed, and no undue laxity in the proceedings in this respect will be tolerated by the court. Hoyle v. Wilson, 29 N.C. 466 (1847).

Where one of the parties objects to the processioner's proceeding, the processioner must, in his return to the court, state "all the circumstances of the case," as for instance, the nature of the objection, the line or lines claimed by each party, etc. Carpenter v. Whitworth, 25 N.C. 204 (1842).

Acts and Admissions of Adjoining Proprietors as Evidence. — When a dividing line between two tracts can be located by the calls in a deed, the statements and acts of adjoining landowners are not competent evidence as to the location of the boundary line, but where the line is in dispute and is unfixed and uncertain, the acts and admissions of the adjoining proprietors recognizing a certain line as the proper boundary line are evidence competent to be submitted to the trier of the facts. Wadsworth v. Georgia-Pacific Corp., 38 N.C. App. 1, 247 S.E.2d 25 (1978), vacated on other grounds, 297 N.C. 172, 253 S.E.2d 925 (1979).

The clerk's jurisdiction to enter a judgment by default in a processioning proceeding is based solely on the sentence in the portion of this section reading "If the defendants fail to answer, judgment shall be given establishing the line according to petition." Pruden v. Keemer, 262 N.C. 212, 136 S.E.2d 604 (1964).

Failure to Except to Judgment of Clerk and Take Appeal within Time Allowed. — Where there is a failure to except to judgment of the clerk in a processioning proceeding fixing the boundary line between the contiguous tracts, and a failure to take an appeal from such judgment within the time allowed by this section, without any showing of excusable neglect, a petition for certiorari to review the judgment of the clerk is properly denied. Johnson v. Taylor, 257 N.C. 740, 127 S.E.2d 533 (1962).

Where Judgment Affirmed on Appeal. — Where judgment in a processioning proceeding establishing the dividing line between the tracts of the respective parties is affirmed on appeal, the lower court may retain the cause thereafter only for the purpose of putting into effect the provisions of this section. Nesbitt v. Fairview Farms, Inc., 239 N.C. 481, 80 S.E.2d 472 (1954).

Judgment of Clerk as Res Judicata — Where Title to Land Not in Issue. — Where the only fact in issue is the establishment and location of the boundary line, then the judgment of the clerk is, to this extent, binding on the parties and they may not again litigate on this precise point. Whitaker v. Garren, 167 N.C. 658, 83 S.E. 759 (1914).

The clerk's judgment may not estop the parties from asserting in a separate action title in the land. Nash v. Shute, 182 N.C. 528, 109 S.E. 353 (1921).

Same — Where Title in Issue. — Where, however, the parties join issue upon the title and the case is transferred to the regular term of the court, a judgment therein estops the parties both as to the title and the location of the line. Whitaker v. Garren, 167 N.C. 658, 83 S.E. 759 (1914). See Nash v. Shute, 182 N.C. 528, 109 S.E. 353 (1921).

Parties on Appeal. — Under the provision contained in this section for appeal by either party to the regular term (now session) of the court, other parties having an interest in the locus in quo may, upon motion, be permitted to come in. Batts v. Pridgen, 147 N.C. 133, 60 S.E. 897 (1908).

Applied in Simpson v. Lee, 26 N.C. App. 712, 217 S.E.2d 80 (1975).

Cited in Green Hi-Win Farm, Inc. v. Neal, 83 N.C. App. 201, 349 S.E.2d 614 (1986).

§ 38-4. Surveys in disputed boundaries.

(a) When in any action or special proceeding pending in the superior court the boundaries of lands are drawn in question, the court may, if deemed necessary, order a survey of the lands in dispute, in accordance with the boundaries and lines expressed in each party's titles, and such other surveys as shall be deemed useful.

(b) Surveys pursuant to this section shall be made by one surveyor appointed by the court, unless the court, in its discretion, determines that additional surveyors are necessary. The surveyor or surveyors shall proceed according to the order of the court, and make the surveys and as many plats thereof as shall be ordered.

(c) Upon the request of any party to the action or special proceeding, the court shall call such surveyor or surveyors as the court's witness, and any party to such action or proceeding shall have the privilege of direct examination, cross-examination, and impeachment of such witness. The fact that such witness is called by the court shall not change the weight, effect or admissibility of the testimony of such witness, and upon the request of any party to the suit, the court shall so instruct the jury.

(d) The court shall make an allowance for the fees of the surveyor or surveyors and they shall be taxed as a part of the costs. The court may, in its discretion, require the parties to make a deposit to secure the payment of such fees, and may, in its discretion, provide for the payment of such fees prior to the termination of the suit. (1779, c. 157; 1786, c. 252; R.C., c. 31, s. 119; Code, s. 939; Rev., s. 1504; C.S., s. 364; 1967, c. 33.)

CASE NOTES

This section vests in the court a sound discretion within the limits defined. Vance v. Pritchard, 218 N.C. 273, 10 S.E.2d 725 (1940).

Survey Not Required. — While the better practice is to order a survey in a proceeding to establish a boundary line, this section, the pertinent statute, does not require the court to do so. Young v. Young, 76 N.C. App. 93, 331 S.E.2d 769 (1985).

Better Practice Is to Order Survey. — While this section does not require the court to order a survey of the lands in dispute when the boundaries of lands are in question, it is the better practice to do so. Smothers v. Schlosser, 2 N.C. App. 272, 163 S.E.2d 127 (1968).

When Expenses of Surveys Are Taxable as Costs. — The expense of procuring surveys, maps, plans, photographs and documents are not taxable as costs unless there is clear statutory authority therefor or they have been ordered by the court. City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

Amount of the allowance for fees of the surveyor is within the court's discretion, after considering the evidence as to the work done. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814 (1984).

Unpaid Expenses. — A court which appoints a surveyor does not lack the authority to take heed of his request for unpaid expenses in the same case in which it appointed him, even though the surveyor is not a party to the underlying action. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814 (1984).

Clerk Has No Power to Make Allowance for Costs. — The word "court," as used in the last provision of this section, refers to the judge, and not to the clerk, and where the trial judge has failed to make an order allowing compensation to the surveyor, the clerk has no power to make the allowance; but on appeal from the clerk's refusal, such order will be made by the judge of the superior court. LaRoque v. Kennedy, 156 N.C. 360, 72 S.E. 454 (1911); Cannon v. Briggs, 174 N.C. 740, 94 S.E. 519 (1917); Ipock v. Miller, 245 N.C. 585, 96 S.E.2d 729 (1957).

Where in an action involving a boundary dispute a survey has been ordered and made, and the trial judge has failed to order compensation, the clerk has no authority to do so. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814 (1984).

Correction of Order. — The trial court's failure to allow and tax costs could be considered an oversight or omission in the order, and since the substantive rights of the parties were not affected thereby, the court had authority under G.S. 1A-1, Rule 60(a) to correct the inadvertent omission of costs from its order. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814 (1984).

Applied in Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

Cited in Roberts v. Sawyer, 229 N.C. 279, 49 S.E.2d 468 (1948); York Indus. Center v. Michigan Mut. Liab. Co., 271 N.C. 158, 155 S.E.2d 501 (1967); Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

Chapter 38A.

Landowner Liability.

Sec.
38A-1. Purpose.
38A-2. Definitions.

Sec.
38A-3. Exclusions.
38A-4. Limitation of liability.

§ 38A-1. Purpose.

The purpose of this Chapter is to encourage owners of land to make land and water areas available to the public at no cost for educational and recreational purposes by limiting the liability of the owner to persons entering the land for those purposes. (1995, c. 308, s. 1.)

§ 38A-2. Definitions.

The following definitions shall apply throughout this Chapter, unless otherwise specified:

(1) "Charge" means a price or fee asked for services, entertainment, recreation performed, or products offered for sale on land or in return for an invitation or permission to enter upon land, except as otherwise excluded in this Chapter.

(2) "Educational purpose" means any activity undertaken as part of a formal or informal educational program, and viewing historical, natural, archaeological, or scientific sites.

(3) "Land" means real property, land, and water, but does not mean a dwelling and the property immediately adjacent to and surrounding such dwelling that is generally used for activities associated with occupancy of the dwelling as a living space.

(4) "Owner" means any individual or nongovernmental legal entity that has any fee, leasehold interest, or legal possession, and any employee or agent of such individual or nongovernmental legal entity.

(5) "Recreational purpose" means any activity undertaken for recreation, exercise, education, relaxation, refreshment, diversion, or pleasure. (1995, c. 308, s. 1.)

CASE NOTES

Recreational User. — Pursuant to 28 U.S.C.S. § 1346(b)(1), the United States' motion to dismiss an estate's claims for, inter alia, negligent maintenance and upkeep of a road in a national forest was granted where the occupants of the vehicle that slid down an embankment after the shoulder of road collapsed were recreational users under G.S. 38A-4, road was not excluded from the definition of real property or land under G.S. 38A-2(3), and the United States had not wantonly caused decedent's death as it had no duty to warn of a soft shoulder following voluminous rainfall or to clear the road of a tree. Estate of Ledford v. United States, 299 F. Supp. 2d 544, 2004 U.S. Dist. LEXIS 1884 (W.D.N.C. 2004).

Road Not Excluded From Definition of Land. — National forest road was not excluded from the definition of real property or land found in G.S. 38A-2(3). Estate of Purkey v. United States, 299 F. Supp. 2d 539, 2004 U.S. Dist. LEXIS 1885 (W.D.N.C. 2004).

§ 38A-3. Exclusions.

For purposes of this Chapter, the term "charge" does not include:

(1) Any contribution in kind, services or cash contributed by a person, legal entity, nonprofit organization, or governmental entity other than the owner, whether or not sanctioned or solicited by the owner, the

purpose of which is to (i) remedy damage to land caused by educational or recreational use; or (ii) provide warning of hazards on, or remove hazards from, land used for educational or recreational purposes.

(2) Unless otherwise agreed in writing or otherwise provided by the State or federal tax codes, any property tax abatement or relief received by the owner from the State or local taxing authority in exchange for the owner's agreement to open the land for educational or recreational purposes. (1995, c. 308, s. 1.)

§ 38A-4. Limitation of liability.

Except as specifically recognized by or provided for in this chapter, an owner of land who either directly or indirectly invites or permits without charge any person to use such land for educational or recreational purposes owes the person the same duty of care that he owes a trespasser, except nothing in this chapter shall be construed to limit or nullify the doctrine of attractive nuisance and the owner shall inform direct invitees of artificial or unusual hazards of which the owner has actual knowledge. This section does not apply to an owner who invites or permits any person to use land for a purpose for which the land is regularly used and for which a price or fee is usually charged even if it is not charged in that instance, or to an owner whose purpose in extending an invitation or granting permission is to promote a commercial enterprise. (1995, c. 308, s. 1.)

CASE NOTES

Hidden Danger. — United States was entitled to summary judgment in visitor's personal injury suit; visitor did not allege, as required by G.S. 38A-4, made applicable by 28 U.S.C.S. § 1346(b), reckless indifference, willful or wanton infliction of injury, or even that the United States knew of the hidden danger that caused the visitor's fall in a national forest in Illinois. Johnston v. United States, — F. Supp. 2d —, 2002 U.S. Dist. LEXIS 12804 (W.D.N.C. July 11, 2002).

Illustrative Cases. — Trial court's judgment dismissing a lawsuit filed by a plaintiff who was injured at a church festival against a landowner who allowed the church to hold the festival on the landowner's farm was affirmed because evidence showed that the festival was not a commercial activity and there was no evidence which showed that the landowner willfully of wantonly inflicted injury on the plaintiff. Clontz v. St. Mark's Evangelical Lutheran Church, 157 N.C. App. 325, 578 S.E.2d 654, 2003 N.C. App. LEXIS 537 (2003), cert. denied, 357 N.C. 249, 582 S.E.2d 29 (2003).

Pursuant to 28 U.S.C.S. § 1346(b)(1), the United States' motion to dismiss an estate's claims for, inter alia, negligent maintenance and upkeep of a road in a national forest was granted where the occupants of the vehicle that slid down an embankment after the shoulder of road collapsed were recreational users under G.S. 38A-4, road was not excluded from the definition of real property or land under G.S. 38A-2(3), and the United States had not wantonly caused decedent's death as it had no duty to warn of a soft shoulder following voluminous rainfall or to clear the road of a tree. Estate of Ledford v. United States, 299 F. Supp. 2d 544, 2004 U.S. Dist. LEXIS 1884 (W.D.N.C. 2004).

For purposes of G.S. 38A-4, the occupants of the vehicle, including a decedent, were recreational users where they were driving on a national forest road in order to locate a campsite. Estate of Purkey v. United States, 299 F. Supp. 2d 539, 2004 U.S. Dist. LEXIS 1885 (W.D.N.C. 2004).

Pursuant to 28 U.S.C.S. § 1346(b)(1), the United States' motion to dismiss an estate's claims for failure to provide access across a forest road, negligent inspection, maintenance and upkeep of that road and the shoulder adjacent thereto, and negligent design, construction, and drainage thereof was granted where the decedent was considered a recreational user under G.S. 38A-4 because (1) she was attempting to access a part of the national forest in order to locate a campsite, (2) a road was not excluded from G.S. 38A-2(3)'s definition of real property or land, (3) the United States had not wantonly caused the decedent's death because it had no duty to warn of a soft shoulder after voluminous rainfall or to clear the road of a tree given that such events were not unusual on a national forest road, and (4) the estate made no allegations that the United States coupled any knowledge of the tree and shoulder with a design, purpose, or intent to do wrong and inflict injury. Estate of Purkey v. United States, 299 F. Supp. 2d 539, 2004 U.S. Dist. LEXIS 1885 (W.D.N.C. 2004).

Chapter 39.

Conveyances.

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39-23.5. Transfers fraudulent as to present creditors.
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Control Corners in Real Estate Developments.

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Article 1.

Construction and Sufficiency.

§ 39-1. Fee presumed, though word "heirs" omitted.

When real estate is conveyed to any person, the same shall be held and construed to be a conveyance in fee, whether the word "heir" is used or not, unless such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity. (1879, c. 148; Code, s. 1280; Rev., s. 946; C.S., s. 991.)

Cross References. — As to presumption of conveyance in fee simple when deed and registry of conveyance destroyed, see G.S. 8-21.

Legal Periodicals. — As to use of fee simple form deed to convey other than a fee, see 39 N.C.L. Rev. 283 (1961).

For case law survey as to real property, see 45 N.C.L. Rev. 964 (1967).

For article, "Doubt Reduction Through Conveyancing Reform — More Suggestions in the Quest for Clear Land Titles," see 46 N.C.L. Rev. 284 (1968).

For article, "The Rule in Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

For note on the continued use of the Artis-Oxendine rule in the construction of deeds, see 13 Wake Forest L. Rev. 478 (1977).

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

I. General Consideration.
II. Conflicting Clauses.
III. Illustrative Cases.

I. GENERAL CONSIDERATION.

This section changes the common-law rule that in order to convey a fee simple the word "heirs" should appear either in the premises or the habendum of the deed. Carolina Real Estate Co. v. Bland, 152 N.C. 225, 67 S.E. 483 (1910).

The rule of construction in this section prevails over common-law rules to the extent that they conflict. Robinson v. King, 68 N.C. App. 86, 314 S.E.2d 768 (1984).

Even prior to the enactment of the section the courts of this State commenced to draw away from the strictness of the common-law rule in this respect, and a perusal of a large number of cases bearing upon and controlling the subject show a marked tendency to mitigate the harshness of the law. So an exception as to devises and equitable estates had already been made. See Hollowell v. Manly, 179 N.C. 262, 102 S.E. 386 (1920); Whichard v. Whitehurst, 181 N.C. 79, 106 S.E. 463 (1921); Smith v. Proctor, 139 N.C. 314, 51 S.E. 889 (1905).

Deeds Executed Prior to Effective Force of Section. — Although a deed to lands executed and delivered prior to the effective force of this section would not pass an estate in fee simple if the deed entirely omitted the word "heirs" or other appropriate words of inheritance, a deed executed before such date to a school committee "and their successors in office in fee simple" was sufficient to pass a fee simple title of the lands conveyed therein. Tucker v. Smith, 199 N.C. 502, 154 S.E. 826 (1930).

Section Provides Same Rule for Deeds as for Devises. — This section provides the same rule of construction of deeds as is contained in G.S. 31-38 for construction of devises. Vickers v. Leigh, 104 N.C. 248, 10 S.E. 308 (1889).

Decisions Construing § 31-38 Are Pertinent. — Decisions construing G.S. 31-38, pertaining to the construction of wills, are pertinent in construing this section, since the statutes are similar in wording and effect. Artis v. Artis, 228 N.C. 754, 47 S.E.2d 228 (1948).

Fee Simple Presumed Unless Contrary Intention Appears. — All conveyances of land executed since the passage of this section are to be taken to be in fee simple, unless the intent of the grantor is plainly manifest in some part of the instrument to convey an estate of less dignity. It is the legislative will that the intention of the grantor and not the technical words of the common law shall govern. Triplett v. Williams, 149 N.C. 394, 63 S.E. 79 (1908).

By this section a deed, though not using the word "heirs," is a conveyance in fee, unless the contrary intention appears. Holloway v. Green, 167 N.C. 91, 83 S.E. 243 (1914).

The law favors creation of a fee simple estate unless it is clearly shown a lesser estate was intended. Vestal v. Vestal, 49 N.C. App. 263, 271 S.E.2d 306 (1980).

If it appeared that the word "heirs" was omitted because of ignorance, inadvertence or mistake, the word would be supplied so as to pass title in fee in accordance with the intention of the grantor. Vickers v. Leigh, 104 N.C. 248, 10 S.E. 308 (1889).

Presumption Held Rebutted. — The presumption of fee raised by this section was rebutted by the fact that the deed intended to convey only a life estate, which was manifest from the many restraining expressions contained therein. Boomer v. Grantham, 203 N.C. 230, 165 S.E. 698 (1932).

Section Inapplicable When Lesser Estate Intended. — This section does not apply when the deed discloses an intent to convey an estate less than a fee simple. Etheridge v. United States, 218 F. Supp. 809 (E.D.N.C. 1963).

This section does not apply where the granting clause of the deed in plain and explicit words shows that the intention of the grantor was to grant merely a life estate, and the habendum clause creates no estate contradictory or repugnant to that given in the granting clause. Griffin v. Springer, 244 N.C. 95, 92 S.E.2d 682 (1956).

Language in Deed Must Clearly Convey Less than Fee Simple. — The language of the deed must clearly manifest the intention of the parties to convey less than a fee simple absolute. Etheridge v. United States, 218 F. Supp. 809 (E.D.N.C. 1963).

This section does not change a common-law conveyance of inheritance to a conveyance of less effectiveness, i.e., to one conveying only a life estate. Whitley v. Arenson, 219 N.C. 121, 12 S.E.2d 906 (1941).

Absence of Words of Inheritance and Presence of Language Limiting Estate to Life of Grantee. — Under this section, the absence of words of inheritance, such as the use of the word "heir," combined with the presence of language limiting the estate to the term of the grantee's life, should be interpreted to convey a life estate. Robinson v. King, 68 N.C. App. 86, 314 S.E.2d 768 (1984).

Construction of Deed as Imposing Condition Subsequent Is Not Favored. — The law does not favor a construction of the language contained in a deed which would constitute a condition subsequent unless the intention of the parties to create such a restriction upon the title is clearly manifested. Mattox v. State, 280 N.C. 471, 186 S.E.2d 378 (1972).

A fee upon a condition subsequent is not created unless the grantor expressly reserves the right to reenter or provides for a forfeiture or for a reversion or that the instrument shall be null and void. Mattox v. State, 280 N.C. 471, 186 S.E.2d 378 (1972).

If a deed contains both the apt words to create a condition and an express clause of reentry, reverter, or forfeiture, an estate on condition subsequent is created. Mattox v. State, 280 N.C. 471, 186 S.E.2d 378 (1972).

Effect of Restraint upon Alienation. — Where a conveyance is construed under this section to be in fee, any attempt of restraint upon alienation is void, but where relevant, the words therein used may be construed to ascertain whether the intent of the grantor was to convey a fee or an estate of less dignity. Holloway v. Green, 167 N.C. 91, 83 S.E. 243 (1914).

Determining Whether Grant Is of Easement Appurtenant or in Gross. — The fact that the words "heirs and assigns" are not entered after the name of the grantee of an easement is not controlling in determining whether the easement granted is an easement appurtenant or in gross. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963); Gibbs v. Wright, 17 N.C. App. 495, 195 S.E.2d 40 (1973).

Applied in New York Life Ins. Co. v. Lassiter, 209 N.C. 156, 183 S.E. 616 (1936); Jackson v. Powell, 225 N.C. 599, 35 S.E.2d 892 (1945); Swaim v. Swaim, 235 N.C. 277, 69 S.E.2d 534 (1952); Crawford v. Wilson, 43 N.C. App. 69, 257 S.E.2d 696 (1979).

Cited in Krites v. Plott, 222 N.C. 679, 24 S.E.2d 531 (1943); Atlas Fire Apparatus, Inc. v. Beaver, 56 Bankr. 927 (Bankr. E.D.N.C. 1986); International Paper Co. v. Hufhum, 81 N.C. App. 606, 345 S.E.2d 231 (1986); Station Assocs. v. Dare County, 130 N.C. App. 56, 501 S.E.2d 705 (1998).

II. CONFLICTING CLAUSES.

The intention of the parties must be gathered from the whole instrument in conformity with established principles, and the division of the deed into formal parts is not permitted to prevail against such intention; for substance, not form, is the object sought. Etheridge v. United States, 218 F. Supp. 809 (E.D.N.C. 1963).

Conflict Between Granting Clause and Habendum. — Where a quitclaim deed was ambiguous in that the granting clause gave all right, title, and interest to the grantee, while the habendum clause gave her the land "for and during the term of her natural life," the trial court properly held that the grantee acquired only a life estate under the deed. Robinson v. King, 68 N.C. App. 86, 314 S.E.2d 768 (1984).

The granting clause of a deed was to one of the grantor's sons, his heirs and assigns, and following the description, "this deed is conveyed to the said grantee to him his lifetime and then to his boy children," with habendum to the said son "and his heirs and not to assign only to his brothers their only use and behoof forever" with warranty to the said son "and his heirs and assigns." It was held that the portion of the habendum restraining assignment except to the brothers of the grantee was equally consistent with an assignment of a life estate and with an assignment of the fee, and to hold that the grant to the "son and his heirs" conveyed the fee simple would require that other portions of the instrument expressive of the intent of the grantor be disregarded; thus in accordance with the intention of the grantor as gathered from the entire instrument the deed conveyed a life estate to the son with remainder to the son's male children, the intent of the grantor to convey an estate of less dignity than a fee being apparent. Jefferson v. Jefferson, 219 N.C. 333, 13 S.E.2d 745 (1941).

In event of any repugnancy between granting clause and preceding or succeeding recitals, granting clause will prevail. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

Section as Curing Repugnancy between Granting Clause and Habendum. — The premises of a deed to land read, among other things, "unto said M.G., her heirs and assigns," and the habendum, "to herself, the said M.G. during her lifetime, and at her death said land is to be equally divided between" her children. It was held that since under this section, the same estate would have passed if the word "heirs," an established formula, had been omitted in the granting clause, there was no repugnance in this deed between the granting clause and habendum. The limitation of the estate in the habendum, and the creation of an estate in remainder therein, were conclusive proof that there was no intention of the grantor to create an estate in fee, but an estate for life to M.G. with a remainder over to her children. Triplett v. Williams, 149 N.C. 394, 63 S.E. 79 (1908).

Rejection of Repugnant Clause Where Granting Clause and Habendum Convey Fee. — Where the granting clause and the habendum convey the entire estate in fee simple, and the warranty is in harmony therewith, a clause in any other part of the instrument which undertakes to divest or limit the fee simple title will be rejected as repugnant to the estate and interest conveyed. Artis v. Artis, 228 N.C. 754, 47 S.E.2d 228 (1948); Pilley v. Smith, 230 N.C. 62, 51 S.E.2d 923 (1949).

Where the granting clause in a deed purported to convey the fee and the habendum and warranties were in harmony therewith, a clause in the description referring to the property conveyed as a right-of-way 100 feet wide did not limit the conveyance to an easement, and the contention that a fee simple was conveyed was supported by this section. McCotter v. Barnes, 247 N.C. 480, 101 S.E.2d 330 (1958).

When the granting clause, the habendum, and the warranty in a deed are clear and unambiguous, and fully sufficient to pass immediately a fee simple estate to the grantee or grantees, a paragraph inserted between the description and the habendum in which grantor seeks to reserve a life estate in himself or another, or to otherwise limit the estate conveyed, will be rejected as repugnant to the estate and interest therein conveyed. Lackey v. Hamlet City Bd. of Educ., 258 N.C. 460, 128 S.E.2d 806 (1963).

Where a reverter clause and purposes for which property was to be held as expressed in the habendum were not irreconcilable with or repugnant to the granting clause, a fee simple determinable was conveyed, it being apparent that the grantors intended to convey an estate of less dignity than a fee simple absolute. Lackey v. Hamlet City Bd. of Educ., 258 N.C. 460, 128 S.E.2d 806 (1963).

Provisions for Reverter Appearing Only in Description Not Valid. — Provisions in a deed for the reverter of title to the grantor are not valid and effective where they appear only at the end of the description and are not referred to elsewhere in the deed. Whetsell v. Jernigan, 29 N.C. 136, 223 S.E.2d 397 (1976).

III. ILLUSTRATIVE CASES.

The language "for the purpose above named for the term of this conveyance" clearly limits the effect of the conveyance to less than a fee simple absolute. Etheridge v. United States, 218 F. Supp. 809 (E.D.N.C. 1963).

Deed to Husband and Wife and Heirs of Wife. — A deed to a husband and wife, and only to the heirs of the latter, does not pass the fee to the former by virtue of this section, for as to him it is plainly intended that the grantor meant to convey an estate of less dignity. Sprinkle v. Spainhour, 149 N.C. 223, 62 S.E. 910 (1908).

Deed Held to Create Fee on Condition Subsequent. — The words used in a deed "upon condition however," then fully setting out the conditions, followed by a provision that "if and when" the grantee fails to carry out the specified conditions, "the said land shall revert to, and the title shall vest in the grantor, her heirs and assigns, with the same force and effect as if this deed had not been made, executed or delivered," were sufficient to show the grantor intended to create a fee on condition subsequent, and by this language did create such estate. Mattox v. State, 280 N.C. 471, 186 S.E.2d 378 (1972).

Deed Held Not to Impose Condition Subsequent. — A habendum in a deed to incorporators and trustees of a college, "To have and to hold the aforesaid lands and premises to the party of the second part and their successors in office forever, for the only proper use and behalf of said Claremont Female College as foresaid," did not have the effect of appropriating the specific property to school purposes under condition subsequent, but was held to express only the purpose of the grantor in making the deed, and as to third persons the power of the trustees or other corporate authority to convey the property was not impaired. Claremont College v. Riddle, 165 N.C. 211, 81 S.E. 283 (1914).

No Clear Expression of Reversion or Termination. — A deed conveyed a fee simple absolute rather than a fee simple determinable, where the deed conveying land to the United States contained no clear expression of reversion or termination, despite the phrase "use and occupy" in the granting clause and the word "term" in the warranty clause, in which grantor warranted peaceable possession "for the purposes above named for the term of this covenant." Station Assocs. v. Dare County, 350 N.C. 367, 513 S.E.2d 789 (1999).

Deed Held to Create Defeasible Fee. — The section was applied where the intent of the donor, appearing by proper construction of a deed, was to give a defeasible fee simple estate of his granddaughter, which was to become absolute upon the birth of a child to her. Sharpe v. Brown, 177 N.C. 294, 98 S.E. 825 (1919).

Section Applied to Reservation of Easement. — This section was applied in holding that a reservation of an easement was a reservation in fee, as no contravening intent appeared from the conveyance. Ruffin v. Seaboard Air Line Ry., 151 N.C. 330, 66 S.E. 317 (1909).

Retention of Mineral Rights. — Under this section where a deed conveys land "with the exception of one half of all the mineral found upon the premises, which is hereby expressly reserved," the grantor retains the fee in one half the mineral rights. Central Bank & Trust Co. v. Wyatt, 189 N.C. 107, 126 S.E. 93 (1925).

Deed Allowing Removal of Structures from Conveyed Land. — Since the parties stipulated in the deed that the defendant be allowed to remove from the conveyed land all structures whenever it thought proper, it is obvious that the parties intended a conveyance in other than fee simple. Etheridge v. United States, 218 F. Supp. 809 (E.D.N.C. 1963).

§ 39-1.1. In construing conveyances court shall give effect to intent of the parties.

(a) In construing a conveyance executed after January 1, 1968, in which there are inconsistent clauses, the courts shall determine the effect of the instrument on the basis of the intent of the parties as it appears from all of the provisions of the instrument.

(b) The provisions of subsection (a) of this section shall not prevent the application of the rule in Shelley's case. (1967, c. 1182.)

Legal Periodicals. — For comment on the rule in Shelley's case, see 4 Wake Forest Intra. L. Rev. 132 (1968).

For note on the continued use of the Artis-Oxendine rule in the construction of deeds, see 13 Wake Forest L. Rev. 478 (1977).

For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

CASE NOTES

Legislative Intent. — By the passage of this section it would appear that it is the legislative will that the intention of the grantor and not the technical words of the common law shall govern. Whetsell v. Jernigan, 291 N.C. 128, 229 S.E.2d 183 (1976); Johnson v. Burrow, 42 N.C. App. 273, 256 S.E.2d 811 (1979).

When the legislature passed this section, it was their primary intention to abolish past rules of construction which required courts to disregard certain clauses if they contradicted the granting clause of a deed. Instead, for conveyances executed after 1 January 1968, the courts would, under this section, consider equally all clauses in a deed when as the intent of parties. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

This section does not apply to conveyances executed prior to January 1, 1968. Whetsell v. Jernigan, 291 N.C. 128, 229 S.E.2d 183 (1976); Gamble v. Williams, 39 N.C. App. 630, 251 S.E.2d 625 (1979).

Construction of Conveyances Executed Prior to January 1, 1968. — Since the General Assembly provided that this section should apply to all conveyances executed after January 1, 1968, the court should not change the proposition voiced in Artis v. Artis, 228 N.C. 754, 47 S.E.2d 228 (1948) and Oxendine v. Lewis, 252 N.C. 669, 114 S.E.2d 706 (1960) and other earlier cases in interpreting conveyances executed prior to that date. Waters v. North Carolina Phosphate Corp., 32 N.C. App. 305, 232 S.E.2d 275, cert. denied, Webb v. Bowler, 50 N.C. 362 (1858); Hurdle v. Outlaw, 55 N.C. 75 (1854).

In construing deeds executed prior to January 1, 1968, courts must look to common-law rules. Frye v. Arrington, 58 N.C. App. 180, 292 S.E.2d 772 (1982).

This section is inapplicable to a quitclaim deed that was executed in 1924. Robinson v. King, 68 N.C. App. 86, 314 S.E.2d 768 (1984).

Deeds executed prior to January 1, 1968, are to be construed according to common law rules, as opposed to the statutory rule of construction found in subsection (a) of this section. Ives v. Real-Venture, Inc., 97 N.C. App. 391, 388 S.E.2d 573, cert. denied, 327 N.C. 139, 394 S.E.2d 174 (1990), reconsideration denied, 328 N.C. 271, 400 S.E.2d 452 (1991).

Construction so as to Effectuate Intent. — In construing a conveyance of an easement, whether or not executed prior to January 1, 1968, the effective date of this section, the deed is to be construed in such a way as to effectuate the intention of the parties, as gathered from the entire instrument. Higdon v. Davis, 315 N.C. 208, 337 S.E.2d 543 (1985).

In construing a conveyance, the intention of the parties is to be given effect whenever that can be done consistently with rational construction. Robertson v. Hunsinger, 132 N.C. App. 495, 512 S.E.2d 480 (1999).

Deed is to be construed by the court, and meaning of its terms is question of law, not of fact. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

The meaning of the terms of the deed is a question of law, not of fact. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Intent of Parties to Be Determined by Judge. — In light of the purpose of subsection (a) of this section, the statute's requirement that "the courts" interpret the deed did not change the traditional rule that it is the judge's role to determine the intent of the parties. It was not the legislature's intent to change *who* interprets the intent of the parties in a deed; rather, the statute was an effort by the legislature to state *how* "the courts" should interpret the deed. Therefore, under the statute it is the judge's role to determine the intent of the parties. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990); Robertson v. Hunsinger, 132 N.C. App. 495, 512 S.E.2d 480 (1999).

Court Has Power to Determine Intent But Not Issues of Fact. — Generally, where there is no waiver of jury trial or agreement as to facts nor evidence offered, the court is without power to decide a controverted issue of fact raised by the pleadings. However, ambiguous deeds traditionally have been construed by the courts according to rules of construction, rather than by having juries determine factual questions of intent. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Ascertaining Intent of Parties. — In some situations it is necessary to look beyond the four corners of the deed to ascertain the intent of the parties. Intention, as a general rule, must be sought in the terms of the instrument; but if the words used leave the intention in doubt, resort may be had to the circumstances attending the execution of the instrument and the situation of the parties at that time; the tendency of the modern decisions is to treat all uncertainties in a conveyance as ambiguities to be explained by ascertaining, in the manner indicated the intention of the parties; where trial judge chose not to hear evidence of "circumstances attending the execution of the instrument and the situation of the parties at that time," and instead, reasoned that he was able to determine the intent of the parties by considering the entire deed, summary judgment was proper. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Deed is to be construed to ascertain intention of grantor as expressed in language used, construed from four corners of instrument. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

Introductory Recital Repugnant to Granting Clause. — Introductory recital that defendants claimed created tenancy by entirety was repugnant to granting clause and had to be disregarded. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

Introductory Recital Was Not Given Effect Over Granting Habendum and Warranty Clauses. — Introductory recital, by virtue of being first in deed, not given effect over granting habendum and warranty clauses which were in accord with each other but inconsistent with introductory recital. Elliot v. Cox, 100 N.C. App. 536, 397 S.E.2d 319 (1990).

Jury Trial Held Unnecessary. — Where the cause of action is in fraud, the defendants would have a basic right to a jury trial. However, judge in action to quiet title based on fraud and on construction of deed considered only the intent of the parties in the deed in question and did not reach the issue of fraud. Once the intent was determined from the four corners of the deed, "fraud" no longer mattered and no jury trial was necessary. The judge was able to dispose of the case on a judgment on the pleadings. Mason-Reel v. Simpson, 100 N.C. App. 651, 397 S.E.2d 755 (1990).

Applied in Waters v. North Carolina Phosphate Corp., 50 N.C. App. 252, 273 S.E.2d 517 (1981); Biggers v. Evangelist, 71 N.C. App. 35, 321 S.E.2d 524 (1984).

§ 39-2. Vagueness of description not to invalidate.

No deed or other writing purporting to convey land or an interest in land shall be declared void for vagueness in the description of the thing intended to be granted by reason of the use of the word "adjoining" instead of the words "bounded by," or for the reason that the boundaries given do not go entirely around the land described: Provided, it can be made to appear to the satisfaction of the jury that the grantor owned at the time of the execution of such deed or paper-writing no other land which at all corresponded to the description contained in such deed or paper-writing. (1891, c. 465, s. 2; Rev., s. 948; C.S., s. 992.)

Cross References. — As to vagueness of description in paper-writing offered as evidence, see G.S. 8-39.

Legal Periodicals. — For note as to the transfer of land by wills in light of Stephenson v. Rowe, 315 N.C. 330, 338 S.E.2d 301 (1986), see 65 N.C.L. Rev. 1488 (1987).

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This section does not operate retrospectively. See Lowe v. Harris, 112 N.C. 472, 17 S.E. 539 (1893); Hamphill v. Annis, 119 N.C. 514, 26 S.E. 152 (1896).

Section Applies Only Where There Is a Description. — In Harris v. Woodard, 130 N.C. 580, 41 S.E. 790 (1902), it was said that the statute applies only where there is a description which can be aided, but not when there is no description. Bryson v. McCoy, 194 N.C. 91, 138 S.E. 420 (1927); Powell v. Allen, 75 N.C. 450 (1876).

Construction so as to Effectuate Intent. — In construing a conveyance of an easement, whether or not executed prior to January 1, 1968, the effective date of this section, the deed is to be construed in such a way as to effectuate the intention of the parties, as gathered from the entire instrument. Higdon v. Davis, 315 N.C. 208, 337 S.E.2d 543 (1985).

A deed which fails to describe any land is as void now as it was prior to the passage of this section. Moore v. Fowle, 139 N.C. 51, 51 S.E. 796 (1905).

Description Too Vague and Indefinite. — A deed which fails to describe with certainty the property sought to be conveyed, does not fix a beginning point or any of the boundaries, and contains no reference to anything extrinsic by reference to which the description could be made certain, is too vague and indefinite to admit of parol evidence of identification, and it being impossible to identify the land sought to be conveyed, the deed is inoperative, this section not applying to such cases. Katz v. Daughtrey, 198 N.C. 393, 151 S.E. 879 (1930); Holloman v. Davis, 238 N.C. 386, 78 S.E.2d 143 (1953).

Description Capable of Being Reduced to Certainty. — A description contained in a deed or contract to convey lands is sufficiently definite to admit of parol evidence of identification when it is capable of being reduced to certainty by reference to something extrinsic to which the instrument refers. Patton v. Sluder, 167 N.C. 500, 83 S.E. 818 (1914).

Descriptions Held Sufficient. — A description in a mortgage of a life estate in lands as being in a certain county and township, containing 20 acres more or less, a part of a certain estate, and giving the names of two parties whose lands join it, is sufficient to admit parol evidence to fit the locus in quo to the description in the instrument, and is not void for vagueness of description under this section. Bissette v. Strickland, 191 N.C. 260, 131 S.E. 655 (1926).

A description of land in a deed, which designates all that tract of land in two certain counties, lying on "both sides of old road between" designated points, and bounded by lands of named owners, "and others," being parts of certain State grants, conveyed by the patentee or enterer to certain grantees, etc., is sufficient under this section to admit of parol evidence in aid of the identification of the lands as those intended to be conveyed. Buckhorn Land & Timber Co. v. Yarbrough, 179 N.C. 335, 102 S.E. 630 (1920).

When land is described as adjoining or bounded by certain other tracts, and (1) there are certain other identifying terms such as "known as the A tract," or (2) there are references to an identifiable muniment or source of title, such as the same land conveyed by B to C, or (3) the land is designated by such a term as the home place of D, or (4) adjoining landowners are named and it is shown that grantor has no other land in the vicinity which may be embraced within such bounds, the description is not void for vagueness and it may be aided by parol evidence. Peel v. Calais, 224 N.C. 421, 31 S.E.2d 440 (1944).

Sufficiency of Description in Will. — Where a will leaves to the widow of the testator for life, "at least 75 acres of land ... to include the dwelling house and to be located as she may want it to be, and as near four-square as is consistent," it is sufficient under this section to be located by parol evidence. Heirs at Law of Freeman v. Ramsey, 189 N.C. 790, 128 S.E. 404 (1925).

Applied in Biggers v. Evangelist, 71 N.C. App. 35, 321 S.E.2d 524 (1984).

Cited in Brown v. Hurley, 243 N.C. 138, 90 S.E.2d 324 (1955).

§ 39-3: Repealed by Session Laws 1961, c. 52.

§ 39-4. Conveyances by infant trustees.

When an infant is seized or possessed of any estate in trust, whether by way of mortgage or otherwise, for another person who may be entitled in law to have a conveyance of such estate, or may be declared to be seized or possessed, in the course of any proceeding in the superior court, the court may decree that the infant shall convey and assure such estate, in such manner as it may direct, to such other person; and every conveyance and assurance made in pursuance of such decree shall be as effectual in law as if made by a person of full age. (1821, c. 1116, ss. 1, 2; R.C., c. 37, s. 27; Code, s. 1265; Rev., s. 1036; C.S., s. 994.)

Legal Periodicals. — For discussion of section, see 3 N.C.L. Rev. 110 (1925).

CASE NOTES

The general rule is that contracts of an infant are voidable at the option of the infant, and when avoided, the contract is null and void ab initio. Pippen v. Mutual Benefit Life Ins. Co., 130 N.C. 23, 40 S.E. 822 (1902).

Exception for Necessaries. — To the general rule, there is one exception as old as the rule itself: "An infant may bind himself for necessaries." Jordan v. Coffield, 70 N.C. 110 (1874); Turner v. Gaither, 83 N.C. 357, 35 Am. Rep. 574 (1880).

Section Calls for Proceeding in Equity. — The language of this section that "the court may decree" is indicative of a proceeding in equity. Riddick v. Davis, 220 N.C. 120, 16 S.E.2d 662 (1941).

Remedy is Exclusive. — The remedy prescribed by this section, relating to the foreclosure of a deed of trust, must be, under our form of civil procedure, an action in the nature of an equitable proceeding to foreclose a mortgage. No other remedy is given by statute. Hence, it is exclusive and must be resorted to, and in the manner prescribed. Riddick v. Davis, 220 N.C. 120, 16 S.E.2d 662 (1941).

Trustors are necessary parties to an action by a purchaser at a foreclosure sale to obtain authority for an infant trustee to execute the deed. Riddick v. Davis, 220 N.C. 120, 16 S.E.2d 662 (1941).

Cited in Coker v. Virginia-Carolina Joint-Stock Land Bank, 208 N.C. 41, 178 S.E. 863 (1935).

§ 39-5. Official deed, when official selling or empowered to sell is not in office.

When a sheriff, coroner, or tax collector, in virtue of his office, sells any real or personal property and goes out of office before executing a proper deed therefor, he may execute the same after his term of office has expired; and when he dies or removes from the State before executing the deed, his successor in office shall execute it. When a sheriff or tax collector dies having a tax list in his hands for collection, and his personal representative or surety, in collecting the taxes, makes sale according to law, his successor in office shall execute the conveyance for the property to the person entitled. (R.C., c. 37, s. 30; Code, s. 1267; 1891, c. 242; Rev., ss. 950, 951; C.S., s. 995; 1971, c. 528, s. 36.)

Cross References. — As to authority of sheriff to execute deed to land sold under execution, see G.S. 1-309. As to sheriff's deed for trust estate, see G.S. 1-316. As to sheriff's deed on sale of equity of redemption, see G.S. 1-317.

CASE NOTES

Section Does Not Extend to Clerks. — This section does not extend to clerks, and they cannot exercise the power herein conferred after going out of office. Shew v. Call, 119 N.C. 450, 26 S.E. 33 (1896).

A tax deed executed by an "ex-sheriff" may be authorized under this section. Southern Immigration, Imp. & Mfg. Co. v. Rosey, 144 N.C. 370, 57 S.E. 2 (1907); McNair v. Boyd, 163 N.C. 478, 79 S.E. 966 (1913).

Deed Executed by Successor in Office. — A deed made by a succeeding sheriff or coroner operates by virtue of this section to pass the title to what was sold. Isler v. Andrews, 66 N.C. 552 (1872); Edwards v. Tipton, 77 N.C. 222 (1877).

Successor May Demand Evidence of Sale and Payment. — Before a successor in office can be required to make a conveyance sought under this section he is entitled to demand clear and conclusive evidence that a sale was made by his predecessor, and also that the purchase price was paid. Harris v. Irwin, 29 N.C. 432 (1847); Isler v. Andrews, 66 N.C. 552 (1872).

Deeds as Evidence. — A sheriff's deed made pursuant to this section after he has gone out of office is still subject to the rule that such deeds are prima facie evidence of sale and execution. But the recitals in a deed made by a successor of the sheriff are only hearsay, as they constitute his opinion based on information and not his own knowledge. Curlee v. Smith, 91 N.C. 172 (1884). See McPherson v. Hussey, 17 N.C. 323 (1833); Edwards v. Tipton, 77 N.C. 222 (1877).

Power to Correct Deeds. — A sheriff's deed is under control of the court, and the court can compel a sheriff to correct his deed; if the sheriff who executes the deed dies, the court can compel his successor to correct the deed, pursuant to this section, hence, the court may on motion during the trial of a suit correct such a deed. Millsaps v. McCormick, 71 N.C. 531 (1874).

§ 39-6. Revocation of deeds of future interests made to persons not in esse.

The grantor in any voluntary conveyance in which some future interest in real estate is conveyed or limited to a person not in esse may, at any time before he comes into being, revoke by deed such interest so conveyed or limited. This deed of revocation shall be registered as other deeds; and the grantor of like interest for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner. The grantor, maker or trustor who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the use and benefit of himself or of any other person or persons in esse with a future contingent interest to some person or persons not in esse or not determined until the happening of a future event may at any time, prior to the happening of the contingency vesting the future estates, revoke the grant of the interest to such person or persons not in esse or not determined by a proper instrument to that effect; and the grantor of like interest for a valuable consideration may, with the joinder of the person from whom the consideration moved, revoke said interest in like manner: Provided, that in the event the instrument creating such estate has been recorded, then the deed of revocation of such estate shall be likewise recorded before it becomes effective: Provided, further, that this section shall not apply to any instrument hereafter executed creating such a future contingent interest when said instrument shall expressly state in effect that the grantor, maker, or trustor may not revoke such interest: Provided, further, that this section shall not apply to any instrument heretofore executed whether or not such instrument contains express provisions that it is irrevocable unless the grantor, maker, or trustor shall within six months after the effective date of this proviso either revoke such future interest, or file with the trustee an instrument stating or declaring that it is his intention to retain the power to revoke under this section: Provided, further, that in the event the instrument creating such estate has been recorded, then the revocation or declaration shall likewise be recorded before it becomes effective. (1893, c. 498; Rev., s. 1045; C.S., s. 996; 1929, c. 305; 1941, c. 264; 1943, c. 437.)

Cross References. — As to validation of certain deeds of revocation not in conformity with this section, see G.S. 39-6.1. As to registration of deeds, see G.S. 47-17 et seq.

Legal Periodicals. — For comment on the 1941 amendment, see 19 N.C.L. Rev. 507 (1941).

For article on this section, see 20 N.C.L. Rev. 278 (1942).

For comment on the 1943 amendment, see 21 N.C.L. Rev. 359 (1943).

For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

CASE NOTES

The constitutionality of this section was upheld in Stanback v. Citizen's Nat'l Bank, 197 N.C. 292, 148 S.E. 313 (1929).

The 1929 amendment to this section is constitutional as applied to trusts created before the effective date of the amendment. Stanback v. Citizen's Nat'l Bank, 197 N.C. 292, 148 S.E. 313 (1929), distinguishing Roe v. Journegan, 175 N.C. 261, 95 S.E. 495 (1918), and Roe v. Journegan, 181 N.C. 180, 106 S.E. 680 (1921).

1943 Amendment Is Constitutional. — Even though the statutory power of revocation of a voluntary conveyance of future interests in lands limited to persons not in esse be regarded as a vested right, the 1943 amendment to this section, giving the grantor six months after its effective date to exercise the right of revocation or to file notice of intention to do so, is a reasonable limitation, and therefore the application of the limitation of the amendment to deeds executed prior to its effective date is constitutional. Pinkham v. Unborn Children of Pinkham, 227 N.C. 72, 40 S.E.2d 690 (1946).

Purpose of 1943 Amendment. — The 1943 amendment was no doubt enacted to resolve a doubtful situation which had arisen through uncertainty as to the effect of this section on the revocability of trusts, and the incidence of federal taxation on trusts already set up, or hereafter to be created. It was intended to bring North Carolina into line with other states where the irrevocability of trusts could be assured to the grantor or settlor when made. Pinkham v. Unborn Children of Pinkham, 227 N.C. 72, 40 S.E.2d 690 (1946).

Revocation within Six Months of Effective Date of 1943 Amendment. — This section was applied, as to revocation within six months after the effective date of the 1943 amendment, in Kirkland v. Deck, 228 N.C. 439, 45 S.E.2d 538 (1947).

Contingent Interests May Be Affected by Retroactive Laws. — Though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust with the limitation over upon a contingency determinable at some future time as to the persons who take thereunder, the power of revocation of a trust given by this section is not within the constitutional inhibition. Stanback v. Citizen's Nat'l Bank, 197 N.C. 292, 148 S.E. 313 (1929).

Mere expectancies of future contingent interests provided for persons not in esse do not constitute vested rights such as would deprive the legislature of the power to enact this section authorizing revocation of a voluntary grant. MacMillan v. Branch Banking & Trust Co., 221 N.C. 352, 20 S.E.2d 276 (1942).

Section before 1929 Amendment Not Retroactive. — This section as it stood before the 1929 amendment did not apply to deeds executed prior to its enactment. Roe v. Journegan, 175 N.C. 261, 95 S.E. 495 (1918); Roe v. Journegan, 181 N.C. 180, 106 S.E. 680 (1921). See Stanback v. Citizen's Nat'l Bank, 197 N.C. 292, 148 S.E. 313 (1929).

Power of Revocation Is Not a Vested Right. — The right to revoke a voluntary conveyance of future interests in lands limited to persons not in esse is a personal power and privilege created by this section and not a vested right within constitutional protection. Pinkham v. Unborn Children of Pinkham, 227 N.C. 72, 40 S.E.2d 690 (1946).

Trustor May Not Withdraw Vested Interest of One in Esse When Trust Created. — This section gives the trustor no right to withdraw a vested interest in property held by one who was in esse when the trust was created, but only to withdraw a future contingent interest to some person or persons not in esse or not determinable until the happening of a future event. Washington v. Ellsworth, 253 N.C. 25, 116 S.E.2d 167 (1960).

Equity Jurisdiction Over Trusts Is Not Involved. — In determining the validity a deed revoking a voluntary conveyance of future interests limited to persons not in esse, the equitable jurisdiction of the court over trust estates is not involved. Pinkham v. Unborn Children of Pinkham, 227 N.C. 72, 40 S.E.2d 690 (1946).

Power of Revocation Rests Solely in Grantor. — The power to revoke future interests conveyed by voluntary deeds to persons not in esse under the provisions of this section, rests solely in the grantor conveying such interests, and where deeds are executed by owner of lands to each of his children for the purpose of dividing his lands among them, the fact that each of the children joins in the deeds to the others gives them no right upon the death of the grantor to revoke the contingent limitation over to unborn children of one of them, since they cannot succeed the grantor in the power of revocation and are strangers to that power. Pinkham v. Unborn Children of Pinkham, 227 N.C. 72, 40 S.E.2d 690 (1946).

A waiver of the right of revocation by the trustor of a voluntary trust when made without consideration, does not preclude the trustor from exercising his right to revoke under this section. MacMillan v. Branch Banking & Trust Co., 221 N.C. 352, 20 S.E.2d 276 (1942).

Voluntary Trusts. — A trust estate in personalty created by the donor in consideration of $1.00 and natural love and affection is a voluntary trust revocable by the donor under this section. Stanback v. Citizen's Nat'l Bank, 197 N.C. 292, 148 S.E. 313 (1929).

Deed in Marriage Settlement. — Where a woman received property without restriction from her father's estate and executed a deed in marriage settlement in trust without consideration, the deed was a voluntary trust in contemplation of this section. MacRae v. Commerce Union Trust Co., 199 N.C. 714, 155 S.E. 614 (1930).

Trust Revocable Where Vesting of Remainder Depended on Future Contingency. — Where a voluntary trust was created for the life of the donor's nephew or until he reached the age of 50 years, and at the termination to the nephew's issue or in the absence of issue to his next of kin, those who would take in remainder would take upon a contingency, the vesting of which depended upon the uncertain happening of a future event, and the trust might be revoked by the donor. Stanback v.

Citizen's Nat'l Bank, 197 N.C. 292, 148 S.E. 313 (1929).

Trust for Benefit of Children Who May Be Born of Marriage. — Where a woman executes a trust deed of settlement upon her marriage for the benefit of her children who may be born of the marriage, depending upon their reaching a certain age, the trust interest subject to be changed by her during her life, after the birth of children their interests do not ipso facto become vested, and she may revoke the trust upon giving a sufficient deed to that effect and in compliance with the statute. MacRae v. Commerce Union Trust Co., 199 N.C. 714, 155 S.E. 614 (1930).

Revocation with Consent of Only Beneficiary of Remainder in Esse. — Plaintiff executed a voluntary trust in personalty with direction that the income therefrom be paid to her for life and upon her death the trust estate be distributed to her surviving children, and in the event plaintiff should die without issue, the trust estate should be paid to a named beneficiary if living and if he were not then living then to plaintiff's heirs generally. Plaintiff had no children, and executed an instrument in writing revoking the trust upon the payment of a specified sum to the only beneficiary of the remainder in esse, who consented to the revocation of the trust upon the payment to him of the amount agreed. It was held that under the provisions of this section plaintiff was entitled to the revocation of the trust. MacMillan v. Branch Banking & Co., 221 N.C. 352, 20 S.E.2d 276 (1942).

Law Governing Power of Revocation of Trust Settlement. — Where the daughter of a British subject took property absolutely from the trustees under his will upon her marriage, and married in North Carolina, executing in this State a deed of settlement in trust, without consideration, for beneficiaries of this State, upon certain contingencies, the lex loci contractu governing the marriage settlement was that of North Carolina and the settlement was controlled by the provisions of our statutes as to its revocation. MacRae v. Commerce Union Trust Co., 199 N.C. 714, 155 S.E. 614 (1930).

When Child "in Being". — Grantor executed deed to his son for life and then to his son's children in fee. Thereafter the grantor and the grantee undertook to revoke the restrictive provision in the deed and joined in conveying the title to a third person. A child was born of the marriage of the grantee in the original deed less than 280 days after the attempted revocation. It was held that the child was in esse at the time of the attempted revocation and therefore the revocation was ineffectual. For the purpose of capacity to take under a deed, and for the purpose of inheritance, it will be presumed, in the absence of evidence to the contrary, that a child is in esse 280 days prior to its birth. Mackie v. Mackie, 230 N.C. 152, 52 S.E.2d 352 (1949).

Applied in Cutter v. American Trust Co., 213 N.C. 686, 197 S.E. 542 (1938); Wachovia Bank & Trust Co. v. Sevier, 41 N.C. App. 762, 255 S.E.2d 636 (1979).

Cited in Starling v. Taylor, 1 N.C. App. 287, 161 S.E.2d 204 (1968).

§ 39-6.1. Validation of deeds of revocation of conveyances of future interests to persons not in esse.

All deeds or instruments heretofore executed, revoking any conveyance of future interest made to persons not in esse, are hereby validated insofar as any such deed of revocation may be in conflict with the provisions of G.S. 39-6.

All such deeds of revocation heretofore executed are hereby validated and no such deed of revocation shall be held to be invalid by reason of not having been executed within the six-month period prescribed in the third proviso of G.S. 39-6. (1947, c. 62.)

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

§ 39-6.2. Creation of interest or estate in personal property.

Any interest or estate in personal property which may be created by last will and testament may also be created by a written instrument of transfer. (1953, c. 198.)

Legal Periodicals. — For comment on this section, see 31 N.C.L. Rev. 408 (1953).

For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

CASE NOTES

The restriction upon the right to create a remainder in personal property after a life estate by deed, or other written instrument, has been eliminated by this section. Ridge v. Bright, 244 N.C. 345, 93 S.E.2d 607 (1956).

§ 39-6.3. Inter vivos and testamentary conveyances of future interests permitted.

(a) The conveyance, by deed or will, of an existing future interest shall not be ineffective on the sole ground that the interest so conveyed is future or contingent. All future interests in real or personal property, including all reversions, executory interests, vested and contingent remainders, rights of entry both before and after breach of condition and possibilities of reverter may be conveyed by the owner thereof, by an otherwise legally effective conveyance, inter vivos or testamentary, subject, however, to all conditions and limitations to which such future interest is subject.

(b) The power to convey as provided in subsection (a), can be exercised by any form of conveyance, inter vivos or testamentary, which is otherwise legally effective in this State at the date of such conveyance to transfer a present estate of the same duration in the property.

(c) This section shall apply only to conveyances which become operative to transfer title on or after October 1, 1961. (1961, c. 435.)

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For article, "The North Carolina Historic Preservation and Conservation Agreements Act: Assessment and Implications for Historic Preservation," see 11 N.C. Cent. L.J. 362 (1980).

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

Future Interests in Personal Property. — As to personal property permanent in nature the generally accepted rule is that the same future interests that are permissible in the field of real property law are also permissible in the law of personal property. Poindexter v. Wachovia Bank & Trust Co., 258 N.C. 371, 128 S.E.2d 867 (1963).

The grantee can take no greater estate than that possessed by his grantor. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

The grantee of a future interest takes it subject to the same conditions or contingencies imposed upon his grantor. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

Contingent interests are transmissible to executors, and are not lost by the death of the person before the event happens on which they are to vest in possession. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

Contingent Interests May Be Sold, Assigned, Transmitted, or Devised. — Contingent interests, such as contingent remainders, springing uses and executory devises may be sold, assigned, transmitted, or devised provided the identity of the persons who will take the estate upon the happening of the contingency be ascertained. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

Contingent interests may be assigned both in real and personal estate, and by any mode of conveyance by which they might be transferred had they been vested remainders. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

Contingent future interests are subject to execution by a judgment creditor of a remainderman. North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987), overruling Watson v. Dodd, 68 N.C. 528 (1873), and Bourne v. Farrar, 180 N.C. 135, 104

S.E. 170 (1920), to the extent that they are inconsistent with this holding.

The interest in an executory devise or bequest is transmissible to the heir or executor of one dying before the happening of the contingency upon which it depends. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

Executory devises are not considered as mere possibilities, but as certain interests and estates. Jernigan v. Lee, 279 N.C. 341, 182 S.E.2d 351 (1971).

Applied in Duplin County Bd. of Educ. v. Carr, 15 N.C. App. 690, 190 S.E.2d 653 (1972).

§ 39-6.4. Creation of easements, restrictions, and conditions.

(a) The holder of legal or equitable title of an interest in real property may create, grant, reserve, or declare valid easements, restrictions, or conditions of record burdening or benefiting the same interest in real property.

(b) Subsection (a) of this section shall not affect the application of the doctrine of merger after the severance and subsequent reunification of title to all of the benefited or burdened real property or interests therein. (1997-333, s. 1.)

§ 39-6.5. Elimination of seal.

The seal of the signatory shall not be necessary to effect a valid conveyance of an interest in real property; provided, that this section shall not affect the requirement for affixing a seal of the officer taking an acknowledgment of the instrument. (1999-221, s. 2.)

Editor's Note. — Session Laws 1999-221, s. 5, made this section effective June 25, 1999, and applicable to instruments registered before, on, or after that date, except that they shall not apply to litigation pending on that date or to any instrument directly or indirectly involved in litigation pending on that date.

§ 39-6.6. Subordination agreements.

(a) A subordination agreement shall be given effect in accordance with its terms and is not required to state any interest rate, principal amount secured, or other financial terms.

(b) The trustee of a deed of trust shall not be a necessary party to a subordination agreement unless the deed of trust provides otherwise.

(c) For purposes of G.S. 1-47, a subordination agreement is deemed a conveyance of an interest in real property.

(d) This section is not exclusive. No subordination agreement that is otherwise valid shall be invalidated by this section.

(e) This section applies to a subordination agreement regardless of when the agreement was signed by the party or parties thereto, except that this section does not apply to an agreement that (i) is the subject of litigation pending on the effective date of this subsection, and (ii) was filed or recorded before October 1, 2003.

(f) In this section:

(1) "Interest in real property" includes all rights, title, and interest in and to land, buildings, and other improvements of an owner, tenant, subtenant, secured lender, materialman, judgment creditor, lienholder, or other person, whether the interest in real property is evidenced by a deed, easement, lease, sublease, deed of trust, mortgage, assignment of leases and rents, judgment, claim of lien, or any other record, instrument, document, or entry of court.

(2) "Subordination agreement" means a written commitment or agreement to subordinate or that subordinates an interest in real property signed by a person entitled to priority. (2003-219, s. 1; 2005-212, s. 1.)

§ 39-6.7. Construction of conveyances to or by trusts.

(a) A deed, will, beneficiary designation, or other instrument that purports to convey, devise, or otherwise transfer any ownership or security interest in real or personal property to a trust shall be deemed to be a transfer to the trustee or trustees of that trust.

(b) A deed or other instrument which purports to convey or otherwise transfer any ownership or security interest in real or personal property by a trust shall be deemed to be a transfer by the trustee or trustees of that trust. This rule of construction shall apply:

(1) Regardless of whether the instrument is signed by the trustee or trustees as such, or by the trustee or trustees purportedly for or on behalf of the trust; and

(2) Regardless of whether the instrument by which the trustee or trustees acquired title transferred that title to the trustee or trustees as such, or purportedly to the trust.

(c) A deed or other instrument by which the trustee or trustees of a trust convey or otherwise transfer any ownership or security interest in real or personal property shall be deemed sufficient:

(1) Regardless of whether the instrument is signed by the trustee or trustees as such, or by the trustee or trustees purportedly for or on behalf of the trust; and

(2) Regardless of whether the instrument by which the trustee or trustees acquired title transferred that title to the trustee or trustees as such, or purportedly to the trust.

(d) The trustee or trustees of a trust may convey or otherwise transfer any ownership or security interest in real or personal property as trustee or trustees even though the deed or instrument by which the trustee or trustees acquired title purported to convey or transfer that title to the trust.

(e) Nothing in this section shall be construed to limit the manner in which title to real or personal property may be conveyed or transferred to or by trustees. (2007-106, s. 53.)

Editor's Note. — Session Laws 2007-106, s. 56, provides: "This act becomes effective October 1, 2007, and applies to (i) all trusts created, and to all conveyances, devises, beneficiary designations, or other transfers occurring before, on, or after that date; (ii) all judicial proceedings concerning trusts or transfers to or by trusts commenced on or after that date; and (iii) all judicial proceedings concerning trusts or transfers to or by trusts commenced before that date unless the court finds that application of a particular provision of this act would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the law as it existed on September 30, 2007, shall apply."

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-7. Instruments affecting married person's title; joinder of spouse; exceptions.

(a) In order to waive the elective life estate of either husband or wife as provided for in G.S. 29-30, every conveyance or other instrument affecting the estate, right or title of any married person in lands, tenements or hereditaments must be executed by such husband or wife, and due proof or acknowledgment thereof must be made and certified as provided by law.

(b) A married person may bargain, sell, lease, mortgage, transfer and convey any of his or her separate real estate without joinder or other waiver by his or her spouse if such spouse is incompetent and a guardian or trustee has been appointed as provided by the laws of North Carolina, and if the appropriate instrument is executed by the married person and the guardian or trustee of the incompetent spouse and is probated and registered in accordance with law, it shall convey all the estate and interest as therein intended of the married person in the land conveyed, free and exempt from the elective life estate as provided in G.S. 29-30 and all other interests of the incompetent spouse.

(c) Subsection (a) shall not be construed to require the spouse's joinder or other waiver of the elective life estate of such spouse as provided for in G.S. 29-30 where a different provision is made or provided for in the General Statutes including, but not limited to, G.S. 39-13, 39-13.3, 39-13.4, 31A-1(d), and 52-10. (C.C.P., s. 429; subsec. 6; 1868-9, c. 277, s. 15; Code, s. 1256; 1899, c. 235, s. 9; Rev., s. 952; C.S., s. 997; 1945, c. 73, s. 4; 1957, c. 598, s. 3; 1965, c. 855.)

Cross References. — See N.C. Const., Art. X, § 4. As to abolition of dower, see G.S. 29-4. As to acknowledgment at different times and places and before different officers, and order of acknowledgment, see G.S. 39-8. For validation of certain instruments executed without private examination of married woman, see G.S. 39-13.1. For repeal of laws requiring private examination of married women, see G.S. 47-14.1. As to husband's acknowledgement and wife's acknowledgement before the same officer, see G.S. 47-40. As to married persons generally, see G.S. 52-1 et seq.

Legal Periodicals. — For comment on this section prior to the 1957 and 1965 amendments, see 12 N.C.L. Rev. 68 (1934).

For note on wife's conveyance of her realty by virtue of husband's power of attorney, see 31 N.C.L. Rev. 228 (1953).

For comment on the enforceability of marital contracts, see 47 N.C.L. Rev. 815 (1969).

CASE NOTES

I. General Consideration.
II. Execution by Both Husband and Wife.
  A. In General.
  B. Husband's Acknowledgment and Proof of Execution.
III. Effect of Feme Covert's Deed.

I. GENERAL CONSIDERATION.

Editor's Note. — *Many of the cases cited in the notes to this section construe the section prior to the 1965 amendment.*

Constitutionality. — This section is constitutional. Council v. Pridgen, 153 N.C. 443, 69 S.E. 404 (1910); Jackson v. Beard, 162 N.C. 105, 78 S.E. 6 (1913); Graves v. Johnson, 172 N.C. 176, 90 S.E. 113 (1916).

This section is not in conflict with the constitutional provision which secures to the wife her entire estate, notwithstanding her coverture. Southerland v. Hunter, 93 N.C. 310 (1885).

Compliance with Section Necessary. — Unless the formalities of this section are complied with, the deed is absolutely void. Jackson v. Beard, 162 N.C. 105, 78 S.E. 6 (1913).

Compliance with the statutory requirement in effect at the time the deed was executed was necessary to its validity. Failure to comply with the requirements rendered the deed of a married woman to her husband absolutely void. Noble v. Pittman, 241 N.C. 601, 86 S.E.2d 89 (1955).

The section admits no distinction between legal and equitable interests, and embraces every "estate, right or title," which a married woman may possess in land, and such is the construction put upon it by the court. Clayton v. Rose, 87 N.C. 106 (1882).

Creation of Trust. — A woman under coverture cannot create a trust in land by parol or in any other manner except by embodying it in a written instrument executed in accordance with this section. Ricks v. Wilson, 154 N.C. 282, 70 S.E. 476 (1911).

A power of attorney given by a married

woman to dismiss an action concerning her land need not be registered to give it validity. Hollingsworth v. Harman, 83 N.C. 153 (1880).

Deed Executed Same Day That Absolute Divorce Decree Was Rendered. — Where a decree of absolute divorce was rendered and a quitclaim deed from the wife to the husband was executed on the same day, and the requirements necessary to the validity of a deed from a married woman to her husband as prescribed by the statute then in effect were not observed, it was held that if the deed was executed and delivered prior to the rendition of the divorce decree, it would be void, and if it was executed and delivered subsequent thereto, it would be valid. An instruction that if the deed were executed and delivered at approximately the same time as the rendition of the divorce decree as a simultaneous transaction, the deed would be valid, was error. Noble v. Pittman, 241 N.C. 601, 86 S.E.2d 89 (1955).

Liability of Married Woman for Breach of Contract. — Since the enactment of the Martin Act (G.S. 52-2), it is held that contracts wrongfully broken by married women will subject them to liability for damages, even though they cannot be compelled to convey unless they have been privily examined according to forms of law. In other words they may be liable for damages, although specific performance cannot be required. Lipinsky v. Revell, 167 N.C. 508, 83 S.E. 820 (1914); Royal v. Southerland, 168 N.C. 405, 84 S.E. 708 (1915); Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915).

Cited in Owens v. Blackwood Lumber Co., 212 N.C. 133, 193 S.E. 219 (1937); Heller v. Heller, 7 N.C. App. 120, 171 S.E.2d 335 (1969); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

II. EXECUTION BY BOTH HUSBAND AND WIFE.

A. In General.

It is necessary that a wife's deed be signed by the husband and acknowledged by both husband and wife. Joiner v. Firemen's Ins. Co., 6 F. Supp. 103 (M.D.N.C. 1934).

Veto Power of Husband. — While the husband has no interest in the wife's property, he has a "veto" power over the alienation of her realty by withholding his written assent, without which her conveyances of realty are invalid. Stallings v. Walker, 176 N.C. 321, 97 S.E. 25 (1918).

Husband and Wife Must Execute Same Instrument. — This section clearly contemplates that the same instrument of writing shall be executed by both husband and wife. Green v. Bennett, 120 N.C. 394, 27 S.E. 142 (1897); Slocomb v. Ray, 123 N.C. 571, 31 S.E. 829 (1898).

Reason for Joinder of Husband. — The purpose of this section in making the requirements as to the deeds of a feme covert is stated by Chief Justice Smith in Ferguson v. Kinsland, 93 N.C. 337 (1885), as follows: "The requirement that the husband should execute the same deed with the wife was to afford her his protection against the wiles and insidious arts of others, while her separate and private examination was to secure her against coercion and undue influence from him." And Conner, J., in Ball v. Paquin, 140 N.C. 83, 52 S.E. 410 (1905), says: "For the purpose of throwing around her the protection of her husband's counsel and advice, the legislature declared that with certain exceptions she could not contract without the written consent of her husband." Jackson v. Beard, 162 N.C. 105, 78 S.E. 6 (1913).

Husband May Execute First. — The deed is nonetheless effectual to pass the title of the wife because the husband executes it before she does. Lineberger v. Tidwell, 104 N.C. 506, 10 S.E. 758 (1889).

Binding Dower Interest by Mortgage. — To bind the dower interest by mortgage the husband and wife must join in the execution of the deed; separate conveyances will not comply with the requirement of this section. Slocomb v. Ray, 123 N.C. 571, 31 S.E. 829 (1898), decided prior to the enactment of § 29-4 which abolished dower.

Effect of Husband's Minority. — The part of this section requiring execution by the husband when his wife's lands are conveyed is contractual in its nature; hence when the husband is a minor the conveyance is subject to the usual rules applying to infant's contracts, and he may avoid or ratify it upon reaching his majority. Jackson v. Beard, 162 N.C. 105, 78 S.E. 6 (1913). But see § 39-13.2 which makes married persons under 21 competent to execute certain deeds.

B. Husband's Acknowledgment and Proof of Execution.

Acknowledgment or Proof of Execution Necessary to Pass Title. — The law has been changed to permit the acknowledgment of the husband to be taken after that of the wife and before a different officer (see G.S. 39-8), but this section still requires the acknowledgment of the husband or proof of his execution of the deed to pass the title or interest of the wife; and the principle that the General Assembly has power to prescribe the form in which the assent of the husband to the execution of a deed by the wife shall be evidenced, is unimpaired, and was fully recognized in Warren v. Dail, 170 N.C. 406, 87 S.E. 126 (1915); Graves v. Johnson, 172 N.C. 176, 90 S.E. 113 (1916).

The case of Southerland v. Hunter, 93 N.C. 310 (1885), which has been approved on this point in Lineberger v. Tidwell, 104 N.C. 506, 10

S.E. 758 (1889), and in Slocomb v. Ray, 123 N.C. 571, 31 S.E. 829 (1898), construes § 1256 of the Code (1883), Revisal, § 952, Consolidated Statutes, § 992, which is this section, and it is there held that a deed signed by the husband, but not proved as to him, was ineffectual to pass the title of the wife, although her acknowledgment and private examination were taken. The fact that the General Assembly saw fit to change the statute requiring proof as to the the husband and wife to be taken before the same officer, and that proof as to the husband should precede proof as to the wife, after the decisions of McGlennery v. Miller, 90 N.C. 215 (1884), and Ferguson v. Kinsland, 93 N.C. 337 (1885), and left the statute unchanged as to the requirements that the deed must be proved as to the husband to pass the title or interest of the wife, after the decision in Southerland v. Hunter, furnishes the strongest possible evidence that the General Assembly thought the latter a safeguard which ought to be retained. Graves v. Johnson, 172 N.C. 176, 90 S.E. 113 (1916).

Time of Acknowledgment. — While the husband and wife must both be parties to the same deed, there is manifestly no requirement in the language of the section that the act of acknowledgment by both should be contemporaneous. Lineberger v. Tidwell, 104 N.C. 506, 10 S.E. 758 (1889).

Acknowledgment after Wife's Death. — A deed to lands is only complete upon delivery, and a married woman's deed to her lands requires the written consent of her husband under the form provided for by this section requiring that such conveyance be signed by both the husband and wife; and a deed made and signed in due form by the wife, in which thereafter the husband writes in his name as a grantor, and after her death acknowledges its execution before the clerk, is invalid to pass title. Hensley v. Blankinship, 174 N.C. 759, 94 S.E. 519 (1917).

Consent Proved and Recorded after Wife's Death. — No title is conveyed by a married woman's deed of her separate property where her husband's consent thereto was not proved and recorded until after the death of the wife. Green v. Bennett, 120 N.C. 394, 27 S.E. 142 (1897).

III. EFFECT OF FEME COVERT'S DEED.

How Lands of Feme Covert Bound. — In Green v. Branton, 16 N.C. 500 (1830), the court says that a feme covert can be bound as to her land in only two ways: First, by her deed executed jointly with her husband with her privy examination thereto, and, secondly, by the judgment of a competent court. Smith v. Ingram, 130 N.C. 100, 40 S.E. 984 (1902), petition to rehear dismissed, 132 N.C. 959, 44 S.E. 643 (1903).

Delivery of Deed Not Presumed. — The delivery of a deed will not be presumed from the acknowledgment of the husband and the acknowledgment and privy examination of the wife. Tarlton v. Griggs, 131 N.C. 216, 42 S.E. 591 (1902).

When Deed is Inoperative. — In Scott v. Battle, 85 N.C. 184 (1881), it is held that a feme covert's deed, not executed in the prescribed mode, is wholly inoperative. Clayton v. Rose, 87 N.C. 106 (1882).

A purchase-money deed given by a feme covert, living with her husband, in which the husband does not join and which does not contain any privy examination of the wife, is void because not complying with this section and Art. X, § 6 (see now N.C. Const., Art. X, § 4). Hardy v. Abdallah, 192 N.C. 45, 133 S.E. 195 (1926).

A married woman is not estopped by a deed not executed in the mode prescribed by the statute. Towles v. Fisher, 77 N.C. 437 (1877); Smith v. Ingram, 130 N.C. 100, 40 S.E. 984 (1902), petition to rehear dismissed, 132 N.C. 959, 44 S.E. 643 (1903).

§ 39-7.1. Certain instruments affecting married woman's title not executed by husband validated.

No conveyance, power of attorney, or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments which was executed by such married woman prior to June 8, 1965, shall be invalid for the reason that the instrument was not also executed by the husband of such married woman. (1965, c. 857; 1973, c. 853, s. 1.)

Legal Periodicals. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

CASE NOTES

Cited in Faucette v. Griffin, 35 N.C. App. 7, 239 S.E.2d 712 (1978).

§ 39-8. Acknowledgment at different times and places; before different officers; order immaterial.

In all cases of deeds, or other instruments executed by husband and wife and requiring registration, the probate of such instruments as to the husband and due proof or acknowledgment of the wife may be taken before different officers authorized by law to taken probate of deeds, and at different times and places, whether both of said officials reside in this State or only one in this State and the other in another state or country. And in taking the probate of such instruments executed by husband and wife, it is immaterial whether the execution of the instrument was proven as to or acknowledged by the husband before or after due proof as to or acknowledgment of the wife. (1895, c. 136; 1899, c. 235, s. 9; Rev., s. 953; C.S., s. 998; 1945, c. 73, s. 5.)

Cross References. — For repeal of laws requiring private examination of married women, see G.S. 47-14.1.

CASE NOTES

Acknowledgment of Husband Still Required. — The acknowledgment of the husband or proof of his execution of the deed is still required to pass the title or interest of the wife. Graves v. Johnson, 172 N.C. 176, 90 S.E. 113 (1916).

Need Not Be at Same Time or before Same Officer. — It is not necessary that the husband should actually sign at the same time as the wife, or in her presence; nor is it necessary that the proof or acknowledgment of the execution should be at the same time or before the same officer. Lineberger v. Tidwell, 104 N.C. 506, 10 S.E. 758 (1889).

§ 39-9. Absence of wife's acknowledgment does not affect deed as to husband.

When an instrument purports to be signed by a husband and wife the instrument may be ordered registered, if the acknowledgment of the husband is duly taken, but no such instrument shall be the act or deed of the wife unless proven or acknowledged by her according to law. (1889, c. 235, s. 8; 1901, c. 637; Rev., s. 954; C.S., s. 999; 1945, c. 73, s. 6.)

Cross References. — For provision that clerk of superior court pass on certificate of acknowledgment and order registration, see G.S. 47-14. For repeal of laws requiring private examination of married women, see G.S. 47-14.1.

CASE NOTES

When Assent of Wife Required. — An unembarrassed owner of land, no matter when the land was acquired, can convey the same, absolutely, or by way of trust or mortgage, free of all homestead rights, without the assent of his wife, subject only to her right of dower (dower was abolished by G.S. 29-4) except in the following cases: (1) Where the land in question has been allotted to him as a homestead, either on his own petition or by an officer, in accordance with law; (2) where no homestead has been allotted, but there are judgements against him which constitute a lien on the land, and upon which execution might issue and make it necessary to have his homestead allotted; (3) where no homestead has been allotted, but he has made a mortgage, reserving an undefined homestead, which mortgage constitutes a lien on the land that could not be foreclosed without allotting a homestead; (4) where the conveyance is fraudulent as to creditors, and no homestead has been allotted in other lands. Hughes v. Hodges, 102 N.C. 236, 102 N.C. 262, 9 S.E. 437, 9 S.E. 437 (1889).

By the eighth section of the tenth article of the Constitution (see N.C. Const., Art. X., § 2(4)), a deed made by the owner of a homestead without the voluntary signature and assent of his wife is void. Wittkowsky v. Gidney, 124 N.C. 437, 32 S.E. 731 (1899).

When Probate Does Not Authorize Registration. — Where the probate of a deed recites the acknowledgment and privy examination of the wife of the grantor only, it is insufficient and does not authorize registration. Hatcher v. Hatcher, 127 N.C. 200, 37 S.E. 207 (1900).

§ 39-10: Repealed by Session Laws 1977, c. 375, s. 16.

§ 39-11. Certain conveyances not affected by fraud if acknowledgment or privy examination regular.

No deed conveying lands nor any instrument required or allowed by law to be registered, executed by husband and wife since the eleventh of March, 1889, if the acknowledgment or private examination of the wife is thereto certified as prescribed by law, shall be invalid because its execution or acknowledgment was procured by fraud, duress or undue influence, unless it is shown that the grantee or person to whom the instrument was made participated in the fraud, duress or undue influence, or had notice thereof before the delivery of the instrument. Where such participation or notice is shown, an innocent purchaser for value under the grantee or person to whom the instrument was made shall not be affected by such fraud, duress or undue influence. (1889, c. 389; 1899, c. 235, s. 10; Rev., s. 956; C.S., s. 1001; 1945, c. 73, s. 7.)

Cross References. — For repeal of laws requiring private examination of married women, see G.S. 47-14.1. As to sufficiency of probate and registration without livery, see G.S. 47-17.

Legal Periodicals. — For discussion of section, see 12 N.C.L. Rev. 71 (1934).

CASE NOTES

When Privy Examination Was Not Taken. — In an action to invalidate a deed to lands because, in fact, the privy examination of the feme covert, the owner and plaintiff, had not been taken, though it was expressed to have been taken, as required in the certificate of the justice of the peace (now magistrate) the plaintiff may by clear, cogent, and convincing proof show that her examination had not been taken at all, and when, under a proper charge thereon from the judge, the jury has found that such examination was not taken, the verdict will stand, though the grantee may not have been fixed with notice. Davis v. Davis, 146 N.C. 163, 59 S.E. 659 (1907).

Same — Irregularity. — Where the privy examination of a wife was not taken, or was taken in a manner insufficient to fulfill the requirements of the law, though the grantee had no knowledge thereof, the matter is open to judicial investigation. Benedict v. Jones, 129 N.C. 470, 40 S.E. 221 (1901). But see Brite v. Penny, 157 N.C. 110, 72 S.E. 964 (1911).

Presence and Undue Influence of Husband. — The presence and undue influence of the husband at the ceremony of the privy examination would not vitiate a certificate to a deed in all respects regular as against the grantee, unless the grantee had notice of it, and the burden would be upon the plaintiff attacking the validity of the deed for that reason. Brite v. Penny, 157 N.C. 110, 72 S.E. 964 (1911), citing Butner v. Blevins, 125 N.C. 585, 34 S.E. 629 (1899); Davis v. Davis, 146 N.C. 163, 59 S.E. 659 (1907).

Fraud of Probate Officer. — Where a married woman has signed a mortgage or deed of trust to secure borrowed money, she may not have it set aside upon allegation of fraud of a probate officer in taking her separate examination, when she admits that the examination was taken in substantial compliance with the requirement of the statute, and she signed the conveyance, and there is no evidence that the mortgagee participated in the fraud. Whitaker v. Sikes Co., 187 N.C. 613, 122 S.E. 468 (1924).

Even if the justice (now magistrate) practice a fraud upon her, where she does not allege that the party to whom the instrument was made, had any knowledge thereof, or participated in any way in the alleged fraud, she is precluded now from having it adjudged invalid and set aside. Whitaker v. Sikes Co., 187 N.C. 613, 122 S.E. 468 (1924).

Note Procured by Duress. — Upon the principle embodied in this section, a note given by a husband and wife, where the husband procured the wife's execution by duress, is voidable only, and is good in the hands of a bona fide holder. L.A. Randolph Co. v. Lewis, 196 N.C. 51, 144 S.E. 545 (1928).

Guilt of Grantee Must Be Alleged. — A defense by a married woman that her privy examination as to her execution of a deed was procured by fraud and imposition is unavailing unless supported by an allegation that the grantee had notice of or participated in the same. Wachovia Nat'l Bank v. Ireland, 122 N.C. 571, 29 S.E. 835 (1898).

Innocent Purchaser Protected from Guilty Grantee. — This section protects the title of an innocent purchaser for value from a grantee who did have notice of such fraud, duress or undue influence. Butner v. Blevins, 125 N.C. 585, 34 S.E. 629 (1899).

As to married woman's attack upon certificate of acknowledgment and privy examination, see Lee v. Rhodes, 230 N.C. 190, 52 S.E.2d 674 (1949).

§ 39-12. Power of attorney of married person.

Every competent married person of lawful age is authorized to execute, without the joinder of his or her spouse, instruments creating powers of attorney affecting the real and personal property of such married person naming either third parties or, subject to the provisions of G.S. 52-10 or 52-10.1, his or her spouse as attorney-in-fact. When such a married person executes a power of attorney authorized by the preceding sentence naming his or her spouse as attorney in fact the acknowledgment by the spouse of the grantor is not necessary. Such instruments may confer upon the attorney, and the attorney may exercise, any and all powers which lawfully can be conferred upon an attorney-in-fact, including, but not limited to, the authority to join in conveyances of real property for the purpose of waiving or quitclaiming any rights which may be acquired as a surviving spouse under the provisions of G.S. 29-30. (1798, c. 510; R.C., c. 37, s. 11; Code, s. 1257; Rev., s. 957; C.S., s. 1002; 1965, c. 856; 1977, c. 375, s. 7; 1979, c. 528, s. 8.)

Cross References. — As to registration of power of attorney, see G.S. 47-28.

Editor's Note. — Session Laws 1979, c. 525, which added the second sentence, provided, in s. 9, that: "A power of attorney executed by a married person naming his or her spouse as attorney in fact during the period between January 1, 1978, and the effective date of this act [May 8, 1979] shall not be invalid because the spouse named as attorney in fact did not acknowledge the power of attorney if otherwise executed in accordance with G.S. 39-12," and provided, in s. 12, that the amendment to this section would not affect pending litigation.

§ 39-13. Spouse need not join in purchase-money mortgage.

The purchaser of real estate who does not pay the whole of the purchase money at the time when he or she takes a deed for title may make a mortgage or deed of trust for securing the payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against his or her spouse as well as the purchaser, without requiring the spouse to join in the execution of such mortgage or deed of trust. (1868-9, c. 204; Code, s. 1272; Rev., s. 958; 1907, c. 12; C.S., s. 1003; 1965, c. 852.)

Legal Periodicals. — For article analyzing North Carolina's tenancy by the entirety reform legislation of 1982, see 5 Campbell L. Rev. 1 (1982).

Cross References. — As to abolition of dower, see G.S. 29-4.

CASE NOTES

Dower Right Subject to Defeat. — The dower right (since abolished by G.S. 29-4) of a feme covert may be defeated by a mortgage of the husband alone, when for part of the purchase money. State ex rel. Corporation Comm'n v. Dunn, 174 N.C. 679, 94 S.E. 481 (1917).

Deeds of Trust Substituted for Purchase-Money Deed. — Where two deeds of trust are executed and substituted for the original purchase-money deed of trust, which is canceled, the wife of the grantee acquires no dower right in land, the original debt for the purchase money not having been extinguished. Case v. Fitzsimons, 209 N.C. 783, 184 S.E. 818 (1936).

§ 39-13.1. Validation of certain deeds, etc., executed by married women without private examination.

(a) No deed, contract, conveyance, leasehold or other instrument executed since the seventh day of November, 1944, shall be declared invalid because of the failure to take the private examination of any married woman who was a party to such deed, contract, conveyance, leasehold or other instrument.

(b) Any deed, contract, conveyance, lease or other instrument executed prior to February 7, 1945, which is in all other respects regular except for the failure to take the private examination of a married woman who is a party to such deed, contract, conveyance, lease or other instrument is hereby validated and confirmed to the same extent as if such private examination had been taken, provided that this section shall not apply to any instruments now involved in any pending litigation. (1945, c. 73, s. 211/2; 1969, c. 1008, s. 1.)

CASE NOTES

What Deeds Are Cured Under Subsection (a). — The plain language of subsection (a) of this section purports to cure deeds which are void because of failure to conduct a private examination of the wife. Subsection (a) does not purport to cure, and does not in fact cure, deeds which are void because the certifying officer taking the acknowledgment of the wife failed to state in his certificate his findings of fact and conclusions that the conveyance is not "unreasonable or injurious to her," as required under former G.S. 47-39 and 52-12. West v. Hays, 82 N.C. App. 574, 346 S.E.2d 690 (1986).

Deed Validated under Subsection (b). — In determining the validity of a 1922 deed from a wife to a husband which was required to be in writing and acknowledged before a certifying officer who was required to make a private examination of the wife touching upon her voluntary execution of the contract, where the only omission was the certificate that the deed was not unreasonable or injurious to her and the deed was in all other respects regular, and there was no contention that there was any defect in the premises, the granting clause, the description, the habendum, or the warranties or that there was anything about the deed which was not regular except the lack of the certificate of the certifying officer as to injury or unreasonableness, this was certainly one of the situations to which this section was intended to apply. Otherwise, the curative statute would be stripped of all meaning. The deed was validated by subsection (b) of this section. Johnson v. Burrow, 42 N.C. App. 273, 256 S.E.2d 811 (1979).

This section would not validate a deed which failed to comply with former § 52-12; even if this section would operate to validate the deed for failure of the certifying officer to conduct a private examination, the deed would still be invalid because the certifying officer failed to find whether or not the deed was unreasonable or injurious to the wife. Dunn v. Pate, 98 N.C. App. 351, 390 S.E.2d 712, appeal dismissed and cert. denied, 327 N.C. 427, 395 S.E.2d 676 (1990).

A contract between a husband and wife to make a joint will was void as to the wife because it was not executed by her in accordance with former G.S. 52-6, and its invalidity was not affected by the curative statutes, G.S. 52-8 and this section, where both curative statutes were enacted after the rights of the parties under the contract vested upon the death of the husband, and the contract was not "in all other respects regular" except for the failure to privately examine the wife as required by the curative statutes. Mansour v. Rabil, 277 N.C. 364, 177 S.E.2d 849 (1970).

Cited in Faucette v. Griffin, 35 N.C. App. 7, 239 S.E.2d 712 (1978); DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980).

§ 39-13.2. Married persons under 18 made competent as to certain transactions; certain transactions validated.

(a) Any married person under 18 years of age is authorized and empowered and shall have the same privileges as are conferred upon married persons 18 years of age or older to:

(1) Waive, release or renounce by deed or other written instrument any right or interest which he or she may have in the real or personal property (tangible or intangible) of the other spouse; or

(2) Jointly execute with his or her spouse, if such spouse is 18 years of age or older, any note, contract of insurance, deed, deed of trust, mortgage, lien of whatever nature or other instrument with respect to real or personal property (tangible or intangible) held with such other spouse either as tenants by the entirety, joint tenants, tenants in common, or in any other manner.

(b) Any transaction between a husband and wife pursuant to this section shall be subject to the provisions of G.S. 52-10 or 52-10.1 whenever applicable.

(c) No renunciation of dower or curtesy or of rights under G.S. 29-30(a) by a married person under the age of 21 years after June 30, 1960, and until April 7, 1961, shall be invalid because such person was under such age. No written assent by a husband under the age of 21 years to a conveyance of the real property of his wife after June 30, 1960, and until April 7, 1961, shall be invalid because such husband was under such age. (1951, c. 934, s. 1; 1955, c. 376; 1961, c. 184; 1965, c. 851; c. 878, s. 2; 1971, c. 1231, s. 1; 1977, c. 375, s. 8.)

Legal Periodicals. — For brief comment on this section, see 29 N.C.L. Rev. 379 (1951).

For article on tenancy by the entirety in North Carolina, see 41 N.C.L. Rev. 67 (1962).

For article, "The Contracts of Minors Viewed from the Perspective of Fair Exchange," see 50 N.C.L. Rev. 517 (1972).

CASE NOTES

Cited in Gastonia Personnel Corp. v. Rogers, 276 N.C. 279, 172 S.E.2d 19 (1970).

§ 39-13.3. Conveyances between husband and wife.

(a) A conveyance from a husband or wife to the other spouse of real property or any interest therein owned by the grantor alone vests such property or interest in the grantee.

(b) A conveyance of real property, or any interest therein, by a husband or a wife to such husband and wife vests the same in the husband and wife as tenants by the entirety unless a contrary intention is expressed in the conveyance.

(c) A conveyance from a husband or a wife to the other spouse of real property, or any interest therein, held by such husband and wife as tenants by the entirety dissolves such tenancy in the property or interest conveyed and vests such property or interest formerly held by the entirety in the grantee.

(d) The joinder of the spouse of the grantor in any conveyance made by a husband or a wife pursuant to the foregoing provisions of this section is not necessary.

(e) Any conveyance authorized by this section is subject to the provisions of G.S. 52-10 or 52-10.1, except that acknowledgment by the spouse of the grantor is not necessary. (1957, c. 598, s. 1; 1965, c. 878, s. 3; 1977, c. 375, s. 9.)

Legal Periodicals. — For article on tenancy by the entirety in North Carolina including brief discussion of this section, see 41 N.C.L. Rev. 67 (1962).

For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

For comment on tenancy by the entirety in North Carolina, see 59 N.C.L. Rev. 997 (1980).

CASE NOTES

Section 39-13.5 Creates Exception to Rule in Subsection (b) of This Section. — Section 39-13.5 requires that in order to create a tenancy by the entirety by division deed, the tenant in common must clearly state his intention in the granting clause. Where this was not done, the intention can be supplied by G.S. 39-13.3(b). Section 39-13.5 creates an exception to the rule of G.S. 39-13.3(b) that unless a contrary intent is shown, a deed to a husband and wife vests an estate in them as tenants by the entirety. Under G.S. 39-13.5, it is necessary to say so in the granting clause in order to create a tenancy by the entirety by a division deed. Brown v. Brown, 59 N.C. App. 719, 297 S.E.2d 619 (1982), cert. denied, 307 N.C. 696, 301 S.E.2d 388 (1983).

Effect of Separation Agreement on Tenancy by Entirety. — Subsection (c) of this section was not applicable in a divorce action on the issue of whether a separation agreement contractually altered the character of the ownership of a tenancy by the entirety. Branstetter v. Branstetter, 36 N.C. App. 532, 245 S.E.2d 87 (1978).

Wife May Convey as Freely as Husband. — This section and former G.S. 52-6 express a clear legislative intent that so long as the provisions of former G.S. 52-6 are complied with, a wife may convey her separate property to her husband, or to her husband and herself, as freely and with the same consequences as the husband may convey his property to his wife. Skinner v. Skinner, 28 N.C. App. 412, 222 S.E.2d 258, cert. denied, 289 N.C. 726, 224 S.E.2d 674 (1976).

Property Not Removed from Equitable Distribution Act by Dissolution of Tenancy by Entirety. — Though conveyances from wife to husband dissolved the tenancy by the entirety in the parcels of land and vested title thereto solely in husband, as G.S. 39-13.3(c) provides, he nevertheless acquired title to the property thereunder, not by gift, but during the course of the marriage and before the parties separated, and property so acquired, so the General Assembly has declared, is ipso facto marital property. Thus, contrary to husband's contention, dissolving the tenancy by the entirety did not remove the property involved from the ambit of the Equitable Distribution Act, and the trial judge did not err in finding and concluding otherwise. Beroth v. Beroth, 87 N.C. App. 93, 359 S.E.2d 512, cert. denied, 321 N.C. 296, 362 S.E.2d 778 (1987).

Cited in Council v. Pitt, 272 N.C. 222, 158 S.E.2d 34 (1967); Young v. Young, 43 N.C. App. 419, 259 S.E.2d 348 (1979); Biesecker v. Biesecker, 62 N.C. App. 282, 302 S.E.2d 826 (1983); Davis v. Davis, 360 N.C. 518, 631 S.E.2d 114, 2006 N.C. LEXIS 593 (2006).

§ 39-13.4. Conveyances by husband or wife under deed of separation.

Any conveyance of real property, or any interest therein, by the husband or wife who have previously executed a valid and lawful deed of separation which authorizes said husband or wife to convey real property or any interest therein without the consent and joinder of the other and which deed of separation or a memorandum of the deed of separation setting forth such authorization is recorded in the county where the land lies, shall be valid to pass such title as the conveying spouse may have to his or her grantee and shall pass such title free and clear of all rights in such property and free and clear of such interest in property that the other spouse might acquire solely as a result of the marriage, including any rights arising under G.S. 29-30, unless an instrument in writing canceling the deed of separation or memorandum thereof and properly executed and acknowledged by said husband and wife is recorded in the office of said register of deeds. The instrument which is registered under this section to authorize the conveyance of an interest in real property or the cancellation of the deed of separation or memorandum thereof shall comply with the provisions of G.S. 52-10 or 52-10.1.

All conveyances of any interest in real property by a spouse who had previously executed a valid and lawful deed of separation, or separation agreement, or property settlement, which authorized the parties thereto to convey real property or any interest therein without the consent and joinder of the other, when said deed of separation, separation agreement, or property settlement, or a memorandum of the deed of separation, separation agreement, property settlement, setting forth such authorization, had been previously recorded in the county where the property is located, and when such conveyances were executed before October 1, 1981, shall be valid to pass such title as the conveying spouse may have to his or her grantee, and shall pass such to him free and clear of rights in such property and free and clear of such interest in such property that the other spouse might acquire solely as a result of the marriage, including any rights arising under G.S. 29-30, unless an instrument in writing canceling the deed of separation, separation agreement, or property settlement, or memorandum thereof, properly executed and acknowledged by said husband and wife, is recorded in the office of said register of deeds. The instrument which is registered under this section to authorize the conveyance of an interest in real property or the cancellation of the deed of separation, separation agreement, property settlement, or memorandum thereof shall comply with G.S. 52-10 or 52-10.1. (1959, c. 512; 1973, c. 133; 1977, c. 375, s. 10; 1981, c. 599, ss. 10, 11.)

Legal Periodicals. — For article analyzing North Carolina's tenancy by the entirety reform legislation of 1982, see 5 Campbell L. Rev. 1 (1982).

CASE NOTES

"Free Trader". — Characterization of a plaintiff as a "free trader" is, in effect, no more than a shorthand description of a woman's freedom to convey realty under this section. The term is derived from practice under old statutes before 1965, and is currently devoid of legal significance. Britt v. Smith, 6 N.C. App. 117, 169 S.E.2d 482 (1969).

§ 39-13.5. Creation of tenancy by entirety in partition of real property.

When either a husband or a wife owns an undivided interest in real property as a tenant in common with some person or persons other than his or her spouse and there occurs an actual partition of the property, a tenancy by the entirety may be created in the husband or wife who owned the undivided interest and his or her spouse in the manner hereinafter provided:

(1) In a division by cross-deed or deeds, between or among the tenants in common provided that the intent of the tenant in common to create a tenancy by the entirety with his or her spouse in this exchange of deeds must be clearly stated in the granting clause of the deed or deeds to such tenant and his or her spouse, and further provided that the deed or deeds to such tenant in common and his or her spouse is signed by such tenant in common and is acknowledged before a certifying officer in accordance with G.S. 52-10;

(2) In a judicial proceeding for partition. In such proceeding, both spouses have the right to become parties to the proceeding and to have their pleadings state that the intent of the tenant in common is to create a tenancy by the entirety with his or her spouse. The order of partition shall provide that the real property assigned to such tenant and his or her spouse shall be owned by them as tenants by the entirety. (1969, c. 748, s. 1; 1977, c. 375, s. 11.)

Legal Periodicals. — For comment on resulting trusts in entireties property when the wife furnishes purchase money, see 17 Wake Forest L. Rev. 415 (1981).

CASE NOTES

This Section Creates Exception to Rule in § 39-13.3(b). — This section requires that in order to create a tenancy by the entirety by division deed, the tenant in common must clearly state his intention in the granting clause. Where this was not done, the intention can be supplied by G.S. 39-13.3(b). This section creates an exception to the rule of G.S. 39-13.3(b) that unless a contrary intent is shown, a deed to a husband and wife vests an estate in them as tenants by the entirety. Under this section it is necessary to say so in the granting clause in order to create a tenancy by the entirety by a division deed. Brown v. Brown, 59 N.C. App. 719, 297 S.E.2d 619 (1982), cert. denied, 307 N.C. 696, 301 S.E.2d 388 (1983).

Cited in Miller v. Miller, 34 N.C. App. 209, 237 S.E.2d 552 (1977); Young v. Young, 43 N.C. App. 419, 259 S.E.2d 348 (1979); Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

§ 39-13.6. Control of real property held in tenancy by the entirety.

(a) A husband and wife shall have an equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety. Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse. This section shall not be construed to require the spouse's joinder where a different provision is made under G.S. 39-13, G.S. 39-13.3, G.S. 39-13.4, or G.S. 52-10.

(b) A conveyance of real property, or any interest therein, to a husband and wife vests title in them as tenants by the entirety when the conveyance is to:
(1) A named man "and wife," or
(2) A named woman "and husband," or
(3) Two named persons, whether or not identified in the conveyance as husband and wife, if at the time of conveyance they are legally married;
unless a contrary intention is expressed in the conveyance.

(c) For income tax purposes, each spouse is considered to have received one-half (1/2) the income or loss from property owned by the couple as tenants by the entirety. (1981 (Reg. Sess., 1982), c. 1245, s. 1; 1983, c. 449, ss. 1, 2.)

Legal Periodicals. — For article analyzing North Carolina's tenancy by the entirety reform legislation of 1982, see 5 Campbell L. Rev. 1 (1982).

For article discussing the doctrine of color of title in North Carolina, see 13 N.C. Cent. L.J. 123 (1982).

For survey of 1982 law relating to family law, see 61 N.C.L. Rev. 1155 (1983).

For comment discussing the status of the presumption of purchase money resulting trust for wives in light of Mims v. Mims, 305 N.C. 41, 286 S.E.2d 779 (1982), see 61 N.C.L. Rev. 576 (1983).

For note, "Branch Banking & Trust Co. v. Wright — Creditors' Rights to Entireties Property Awarded to Nondebtor Spouse Upon Divorce," see 64 N.C.L. Rev. 1471 (1986).

For note on the retroactive application of G.S. 39-13.6 under a vested rights analysis, see 65 N.C.L. Rev. 1195 (1987).

For note, "McLean v. McLean: North Carolina Adopts the Gift Presumption in Equitable Distribution," see 68 N.C. L. Rev. 1269 (1990).

For article, "A Spouse's Right to Control Assets During Marriage: Is North Carolina Living in the Middle Ages?", see 18 Campbell L. Rev. 203 (1996).

CASE NOTES

This section is reflective of changed circumstances in economic relationship and responsibilities among married persons and expresses a public policy of this State that their rights in property should be equalized. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Rights of Judgment Creditor Upon Dissolution of Marriage or Death. — A judgment creditor with a claim against one spouse may not have a lien against the entirety property, but the judgment creditor does have rights with respect to the property upon dissolution of the marriage or upon the death of the judgment debtor's spouse. In re Ulmer, 211 Bankr. 523 (Bankr. E.D.N.C. 1997).

This section expressly changes the common-law incidents of tenancy by the entirety for all real property acquired on and after January 1, 1983. Boyce v. Boyce, 60 N.C. App. 685, 299 S.E.2d 805, cert. denied, 308 N.C. 190, 302 S.E.2d 242 (1983).

Applicability to tenancies by the entireties which existed prior to January 1, 1983. — Provisions of subsection (a) of this section should generally be construed to apply to tenancies by the entirety which preexisted the effective date of the statute (January 1, 1983) and such application is not, in and of itself, unconstitutional. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

The General Assembly has clearly manifested its intention that this section, including the "equal right to control" provision of subsection (a), apply to estates by the entirety created before January 1, 1983. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

A tenant in common has a right to demand an accounting from a co-tenant; furthermore, plaintiff's action for an accounting was still ripe because the statute of limitations did not begin running until her demand for an accounting was refused. Beam v. Beam, 92 N.C. App. 509, 374 S.E.2d 636 (1988), rev'd on other grounds, 325 N.C. 428, 383 S.E.2d 656 (1989).

Affirmative Defense. — Where neither the defendants' original nor amended answer included an affirmative defense, the defense was waived even though the lease for land held by a husband and wife was not signed by the wife. Purchase Nursery, Inc. v. Edgerton, 153 N.C. App. 156, 568 S.E.2d 904, 2002 N.C. App. LEXIS 1073 (2002).

Dismissal of Complaint. — Because a wife never signed a contract for sale or an authorized agency, pursuant to G.S. 39-13.6(a), the trial court, inter alia, properly granted the husband and wife's N.C. R. Civ. P. 12(b)(6) motion to dismiss a buyer's complaint for breach of contract and specific performance for failing to state a legally sufficient claim. Burgin v. Owen, — N.C. App. —, 640 S.E.2d 427, 2007 N.C. App. LEXIS 363 (2007), appeal dismissed, 2007 N.C. LEXIS 552 (2007).

The claim of a vested property right may not rest upon state enforcement of common law which is unconstitutionally discriminatory. Thus, to the extent that defendant husband's claims to the exclusive right of control and income of pre-1983 estates by the entirety were based solely upon the common-law incidents of the tenancy, they would fail, as the right recognized by the common law could not be said to be a "vested property right." Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Burden of Proving Vested Rights. — There may be circumstances under which a husband's rights to income and control of pre-1983 tenancy by the entirety property, to the exclusion of his wife, may be classified as "vested rights" for reasons other than the common-law incidents of that estate. In such cases, the burden will be upon the husband to demonstrate facts showing why his rights are "vested rights" such that application of the "equal control" provisions of subsection (a) of this section to the estate would violate due process. Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986), appeal dismissed, 320 N.C. 170, 357 S.E.2d 925 (1987).

Claimant spouse's assertion of the "innocent owner" defense provided by 18 U.S.C.S. § 983(d) in her claim to a camper, failed because the spouse could not establish that the camper was owned as tenants by the entirety; the spouse had not presented any evidence regarding the "co-owner" requirement of G.S. 41-2.5, nor had the spouse presented any evidence regarding the general requirement with entireties properties that spouses be identified either by name or title in the ownership document. United States v. 1999 Starcraft Camper Trailer, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 76839 (M.D.N.C. Oct. 10, 2006).

Once the parties were divorced, they no longer held the property as tenants by the entirety but as tenants in common. Smith v. Smith, 249 N.C. 669, 107 S.E.2d 530 (1959); Beam v. Beam, 92 N.C. App. 509, 374 S.E.2d 636 (1988), rev'd on other grounds, 325 N.C. 428, 383 S.E.2d 656 (1989).

Attribution of Income for Child Support Purposes. — Although under the Child Support Guidelines income from rental property is included in the calculation of a parent's gross income, because father and his wife owned property in tenancy by the entirety, he was considered to have received only one-half of the income, or $487.50 per month; it was therefore error for the trial court to attribute the full amount of rental income from the property to father. Kennedy v. Kennedy, 107 N.C. App. 695, 421 S.E.2d 795 (1992).

Property Not Available to Satisfy Debts Held Solely by One Tenant. — Debtor's exemptions were properly claimed as property held as tenants by the entirety and the property was not available to the trustee to satisfy general unsecured debt that was held solely in the name of debtor. In re Knapp, 285 Bankr. 176, 2002 Bankr. LEXIS 1407 (Bankr. M.D.N.C. 2002).

Ineffective Power of Attorney. — Creditor did not hold a properly secured lien against property held by a Chapter 7 debtor and his wife as tenants by the entirety because a power of attorney executed by the wife in favor of the debtor did not authorize the granting of a lien on the property in favor of the creditor. In re Doerfer, — Bankr. —, 2006 Bankr. LEXIS 3085 (Bankr. M.D.N.C. Nov. 1, 2006).

Cited in Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984); Lawrence v. Lawrence, 100 N.C. App. 1, 394 S.E.2d 267 (1990).

§ **39-14:** Repealed by Session Laws 1943, c. 543.

Article 3.

Fraudulent Conveyances.

§§ **39-15 through 39-23:** Repealed by Session Laws 1997-291, s. 1.

Article 3A.

Uniform Fraudulent Transfer Act.

Editor's Note. — Permission to include the Official Comments was granted by the National Conference of Commissioners on Uniform State Laws and The American Law Institute. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

NORTH CAROLINA INTRODUCTORY COMMENT

Prior to enactment of the Uniform Fraudulent Transfer Act (the "UFTA"), the statutory law of fraudulent conveyances in North Carolina was governed principally by former N.C. Gen. Stat. § 39-15, which in turn was a substantial reenactment of the Statute of 13 Elizabeth (1570). *See Bank of New Hanover v. Adrian,* 116 N.C. 537, 21 S.E. 792 (1895). As a reenactment of Elizabethan law, the statute was written in archaic language and was difficult to interpret.

In 1914 the North Carolina Supreme Court clarified fraudulent conveyance law in *Aman v. Walker,* 165 N.C. 224, 815 S.E. 162 (1914), by articulating five distinct rules governing recovery under former N.C. Gen. Stat. § 39-15. Most published decisions after that date used *Aman v. Walker* as their point of reference in deciding fraudulent conveyance issues under North Carolina law. Prior to enactment of the UFTA, however, fraudulent conveyance law in North Carolina was developed by a series of ad hoc appellate decisions that are not altogether uniform or consistent.

The UFTA was drafted by the National Conference of Commissioners on Uniform State Laws (the "NCCUSL") and approved by that organization in 1984. It subsequently was approved by the American Bar Association in 1985. It is the modern successor to the Uniform Fraudulent Conveyance Act, which was promulgated by the NCCUSL in 1918. Among other changes from the old act, the UFTA was broadened to make clear that it reaches transfers of personal as well as real property. The UFTA further is intended to function more congruently with the Uniform Commercial Code (codified as Chapter 25 of the North Carolina General Statutes) and the United States Bankruptcy Code (Title 11, U.S. Code).

While there are a number of differences between the UFTA and the old Uniform Fraudulent Conveyance Act, there are a number of close parallels, and interpretations of the Uniform Fraudulent Conveyance Act can be useful in understanding the intent of the various provisions of the UFTA. A 1972 note by E. Cader Howard that appeared in the North Carolina Law Review comparing the Uniform Fraudulent Conveyance Act with North Carolina law therefore is of special relevance in considering the changes effected by enactment of the UFTA in North Carolina. Note, "The Law of Fraudulent Conveyances in North Carolina: An Analysis and Comparison With the Uniform Fraudulent Conveyances Act," 50 *N.C. L. Rev.* 872 (1972).

For purposes of the North Carolina comments that follow, the rules articulated by *Aman v. Walker* are identified as the respective "principles"; and the note by E. Cader Howard is cited as "Howard," with appropriate page references to the North Carolina Law Review

Scope of Repeal. S.L. 1997-291 repealed former fraudulent conveyance law in Article 3 of Chapter 39 of the General Statutes.

The insurance law contains its own provisions concerning fraudulent transfers by insurance companies within one year prior to insolvency. *See* N.C. Gen. Stat. § 58-30-140. This statute, based on the comparable provision in bankruptcy law (11 U.S.C. § 548), complements general fraudulent conveyance law and concerns itself solely with transfers made within one year prior to the filing of a petition for liquidation or rehabilitation of an insurance company. N.C. Gen. Stat. § 58-30-140 is not affected by the enactment of the UFTA.

Other references to fraudulent conveyances or transfers are found in Rule 18(b) of the Rules of Civil Procedure; in N.C. Gen. Stat. § 25-2-402(b) and 25-2A-308(2) (sales and leases under the UCC); and in N.C. Gen. Stat. § 105-242 (dealing with the time within which judgments for taxes are enforceable). None of these statutes is affected by the enactment of the UFTA.

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 433.

§ 39-23.1. Definitions.

As used in this Article:

(1) "Affiliate" means:
  a. A person who directly or indirectly owns, controls, or holds with power to vote, twenty percent (20%) or more of the outstanding voting securities of the debtor, other than a person who holds the securities,
    1. As a fiduciary or agent without sole discretionary power to vote the securities; or
    2. Solely to secure a debt, if the person has not exercised the power to vote;
  b. A corporation twenty percent (20%) or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, twenty percent (20%) or more of the outstanding voting securities of the debtor, other than a person who holds the securities,
    1. As a fiduciary or agent without sole power to vote the securities; or
    2. Solely to secure a debt, if the person has not in fact exercised the power to vote;
  c. A person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or
  d. A person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but the term does not include:
  a. Property to the extent it is encumbered by a valid lien;
  b. Property to the extent it is generally exempt under nonbankruptcy law; or
  c. An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured,

unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

- a. If the debtor is an individual,
  - 1. A relative of the debtor or of a general partner of the debtor;
  - 2. A partnership in which the debtor is a general partner;
  - 3. A general partner in a partnership in which the debtor is a general partner; or
  - 4. A corporation of which the debtor is a director, officer, or person in control;
- b. If the debtor is a corporation,
  - 1. A director of the debtor;
  - 2. An officer of the debtor;
  - 3. A person in control of the debtor;
  - 4. A partnership in which the debtor is a general partner;
  - 5. A general partner in a partnership in which the debtor is a general partner; or
  - 6. A relative of a general partner, director, officer, or person in control of the debtor;
- c. If the debtor is a partnership,
  - 1. A general partner in the debtor;
  - 2. A relative of a general partner in, a general partner of, or a person in control of the debtor;
  - 3. Another partnership in which the debtor is a general partner;
  - 4. A general partner in a partnership in which the debtor is a general partner; or
  - 5. A person in control of the debtor;
- d. An affiliate, or an insider of an affiliate as if the affiliate were the debtor; and
- e. A managing agent of the debtor.

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual related by consanguinity within the third degree as determined in accordance with G.S. 104A-1, a spouse, or an individual related to a spouse within the third degree as so determined, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) The definition of "affiliate" is derived from § 101(2) of the Bankruptcy Code.

(2) The definition of "asset" is substantially to the same effect as the definition of "assets" in § 1 of the Uniform Fraudulent Conveyance Act. The definition in this Act, unlike that in the earlier Act, does not, however require a determination that the property is liable for the debts of the debtor. Thus, an unliquidated claim for damages resulting from personal injury or a contingent claim of a surety for reimbursement, contribution, or subrogation may be counted as an asset for the purpose of determining whether the holder of the claim is solvent as a debtor under § 2 of this Act, although applicable law may not allow such an asset to be levied on and sold by a creditor. Cf. Manufacturers & Traders Trust Co. v. Goldman (In re Ollag Construction Equipment Corp.), 578 F.2d 904, 907-09 (2d Cir. 1978).

Subparagraphs (i), (ii), and (iii) provide clarification by excluding from the term not only generally exempt property but also an interest in a tenancy by the entirety in many states and an interest that is generally beyond reach by unsecured creditors because subject to a valid lien. This Act, like its predecessor and the Statute of 13 Elizabeth, declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims. The laws protecting valid liens against impairment by levying creditors, exemption statutes, and the rules restricting levyability of interest in entireties property are limitations on the rights and remedies of unsecured creditors, and it is therefore appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of "asset" for the purposes of this Act.

A creditor of a joint tenant or tenant in common may ordinarily collect a judgment by process against the tenant's interest, and in some states a creditor of a tenant by the entirety may likewise collect a judgment by process against the tenant's interest. See 2 American Law of Property 10, 22, 28-32 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 48 Am.Bankr.L.J. 255, 258-59 (1974). The levyable interest of such a tenant is included as an asset under this Act.

The definition of "assets" in the Uniform Fraudulent Conveyance Act excluded property that is exempt from liability for debts. The definition did not, however, exclude all property that cannot be reached by a creditor through judicial proceedings to collect a debt. Thus, it included the interest of a tenant by the entirety although in nearly half the states such an interest cannot be subjected to liability for a debt unless it is an obligation owed jointly by the debtor with his or her cotenant by the entirety. See 2 American Law of Property 29 (1952); Craig, An Analysis of Estates by the Entirety in Bankruptcy, 48 Am.Bankr.L.J. 255, 258 (1974). The definition in this Act requires exclusion of interests in property held by tenants by the entirety that are not subject to collection process by a creditor without a right to proceed against both tenants by the entirety as joint debtors.

The reference to "generally exempt" property in § 1(2)(ii) recognizes that all exemptions are subject to exceptions. Creditors having special rights against generally exempt property typically include claimants for alimony, taxes, wages, the purchase price of the property, and labor or materials that improve the property. See Uniform Exemptions Act § 10 and the accompanying Comment. The fact that a particular creditor may reach generally exempt property by resorting to judicial process does not warrant its inclusion as an asset in determining whether the debtor is insolvent.

Since this Act is not an exclusive law on the subject of voidable transfers and obligations (see Comment (8) to § 4 infra), it does not preclude the holder of a claim that may be collected by process against property generally exempt as to other creditors from obtaining relief from a transfer of such property that hinders, delays, or defrauds the holder of such a claim. Likewise the holder of an unsecured claim enforceable against tenants by the entirety is not precluded by the Act from pursuing a remedy against a transfer of property held by the entirety that hinders, delays, or defrauds the holder of such a claim.

Nonbankruptcy law is the law of a state or federal law that is not part of the Bankruptcy Code, Title 11 of the United States Code. The definition of an "asset" thus does not include property that would be subject to administration for the benefit of creditors under the Bankruptcy Code unless it is subject under other applicable law, state or federal, to process for the collection of a creditor's claim against a single debtor.

(3) The definition of "claim" is derived from § 101(4) of the Bankruptcy Code. Since the purpose of this Act is primarily to protect unsecured creditors against transfers and obligations injurious to their rights, the words "claim" and "debt" as used in the Act generally have reference to an unsecured claim and debt. As the context may indicate, however, usage of the terms is not so restricted. See, e.g.§§ 1(1)(i)(B) and 1(8).

(4) The definition of "creditor" in combination with the definition of "claim" has substantially

the same effect as the definition of "creditor" under § 1 of the Uniform Fraudulent Conveyance Act. As under that Act, the holder of an unliquidated tort claim or a contingent claim may be a creditor protected by this Act.

(5) The definition of "debt" is derived from § 101(11) of the Bankruptcy Code.

(6) The definition of "debtor" is new.

(7) The definition of "insider" is derived from § 101(28) of the Bankruptcy Code. The definition has been restricted in clauses (i)(C), (ii)(E), and (iii)(D) to make clear that a partner is not an insider of an individual, corporation, or partnership if any of these latter three persons is only a limited partner. The definition of "insider" in the Bankruptcy Code does not purport to make a limited partner an insider of the partners or of the partnership with which the limited partner is associated, but it is susceptible of a contrary interpretation and one which would extend unduly the scope of the defined relationship when the limited partner is not a person in control of the partnership. The definition of "insider" in this Act also differs from the definition in the Bankruptcy Code in omitting the reference in 11 U.S.C. § 101(28)(D) to an elected official or relative of such an official as an insider of a municipality. As in the Bankruptcy Code (see 11 U.S.C. § 102(3)), the word "includes" is not limiting, however. Thus, a court may find a person living with an individual for an extended time in the same household or as a permanent companion to have the kind of close relationship intended to be covered by the term "insider." Likewise, a trust may be found to be an insider of a beneficiary.

(8) The definition of "lien" is derived from paragraphs (30), (31), (43), and (45) of § 101 of the Bankruptcy Code, which define "judicial lien," "lien," "security interest," and "statutory lien" respectively.

(9) The definition of "person" is adapted from paragraphs (28) and (30) of § 1-201 of the Uniform Commercial Code, defining "organization" and "person" respectively.

(10) The definition of "property" is derived from § 1-201(33) of the Uniform Probate Code. Property includes both real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable.

(11) The definition of "relative" is derived from § 101(37) of the Bankruptcy Code but is explicit in its references to the spouse of a debtor in view of uncertainty as to whether the common law determines degrees of relationship by affinity.

(12) The definition of "transfer" is derived principally from § 101(48) of the Bankruptcy Code.

(13) The definition of "conveyance" in § 1 of the Uniform Fraudulent Conveyance Act was similarly comprehensive, and the references in this Act to "payment of money, release, lease, and the creation of a lien or incumbrance" are derived from the Uniform Fraudulent Conveyance Act. While the definition in the Uniform Fraudulent Conveyance Act did not explicitly refer to an involuntary transfer, the decisions under that Act were generally consistent with an interpretation that covered such a transfer. See, e.g., Hearn 45 St. Corp. v. Jano, 283 N.Y. 139, 27 N.E.2d 814, 128 A.L.R. 1285 (1940) (execution and foreclosure sales); Lefkowitz v. Finkelstein Trading Corp., 14 F.Supp. 898, 899 (S.D.N.Y. 1936) (execution sale); Langan v. First Trust & Deposit Co., 277 App.Div. 1090, 101 N.Y.S.2d 36 (4th Dept. 1950), aff'd, 302 N.Y. 932, 100 N.E.2d 189 (1951) (mortgage foreclosure); Catabene v. Wallner, 16 N.J.Super. 597, 602, 85 A.2d 300, 302 (1951) (mortgage foreclosure). The definition of "valid lien" is new. A valid lien includes an equitable lien that may not be defeated by a judicial lien creditor. See, e.g., Pearlman v. Reliance Insurance Co., 371 U.S. 132, 136 (1962) (upholding a surety's equitable lien in respect to a fund owing a bankrupt contractor).

NORTH CAROLINA COMMENT

The definitions of "affiliate," "insider" and "relative" in subdivisions (1), (7) and (11) relate to liability for transfers to insiders described in N.C. Gen. Stat. § 39-23.5(b). This subsection had no counterpart under prior North Carolina law and, accordingly, these definitions have no prior North Carolina equivalent insofar as fraudulent conveyance law is concerned.

The definition of "asset" in subdivision (2) excludes property to the extent it is encumbered by a lien, is generally exempt from the claims of creditors or is held as entireties property. The intent of this definition is that only those transfers that adversely affect unsecured creditors can occasion liability. This is consistent with prior North Carolina law, which disregarded transfers of assets that were entireties property, *L & M Gas Co. v. Leggett,* 273 N.C. 547, 553, 161 S.E.2d 23, 27-28 (1968), or were subject to a resulting trust, *Kelly Springfield Tire Co. v. Lester,* 190 N.C. 411, 415, 130 S.E. 45, 47 (1925).

The definition of "claim" in subdivision (3) is broad and includes potential liability on contingent claims. This seems consistent with prior North Carolina law: N.C. Gen. Stat. § 1A-1, Rule 18(b), allows a claim for fraudulent conveyance to be joined with a claim to establish the indebtedness that provides the foundation for the fraudulent conveyance claim. Subdivisions (4), (5) and (6) (providing definitions of "creditor," "debt" and "debtor") are based on the definition of "claim."

The definition of "transfer" in subdivision (12) is broad; this breadth appears to be consistent with prior North Carolina law. *See* Howard, 50 *N.C. L. Rev.* at 876-77 (1972).

The remaining definitions (of "lien," "valid lien," "person" and "property" in subdivisions (8), (13), (9) and (10)) appear to be straightforward. Prior North Carolina fraudulent conveyance law does not appear to have concerned itself with defining or explaining these terms.

CASE NOTES

Editor's Note. *— Most of the cases cited below were decided under former G.S. 39-15 through 39-23.*

I. General Consideration.
II. What Conveyances Fraudulent.
  A. In General.
  B. Intent.
  C. Badges of Fraud.
III. Rights and Liabilities of Parties and Purchasers.
IV. Rights and Remedies of Creditors.
V. Pleading and Practice.
VI. Marriage Settlements.

I. GENERAL CONSIDERATION.

A prior similar provision is a substantial reenactment of the statute 13 Eliz., c. 5, s. 2. Bank of New Hanover v. Adrian, 116 N.C. 537, 21 S.E. 792 (1895).

Prior to enactment of a prior similar provision it was necessary to invoke the aid of a court of equity to have a deed declared void for fraud, and where, under a statutory provision, deeds were pronounced void as against creditors in order to secure a formal declaration of their invalidity, the moving party must have asked for relief that would have been formerly administered solely in a court of equity. Farthing v. Carrington, 116 N.C. 315, 22 S.E. 9 (1895).

At an early period in the judicial history of this State, it was held that courts of law might hear evidence and pass even incidentally upon the question whether a deed was fraudulent under 13 Eliz. Logan v. Simmons, 18 N.C. 13 (1834); Lee v. Flannagan, 29 N.C. 471 (1847); Hardy & Bro. v. Skinner, 31 N.C. 191 (1848); Helms v. Green, 105 N.C. 251, 11 S.E. 470 (1890).

The statute of 13 Eliz., is declaratory of the common law so far as regards existing creditors; in this sense the statute is sometimes spoken of as being in affirmance of the common law. The remedy given to subsequent creditors rests entirely upon the enactment of the statute. Long v. Wright, 48 N.C. 290 (1856).

The case of Aman v. Walker, 165 N.C. 224, 81 S.E. 162 (1914), is the cornerstone of the North Carolina fraudulent conveyance law. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Section Applies to State. — The statute dealing with fraudulent conveyances applies to the State as well as to individuals, and the State cannot rely on its prerogative. Hoke v. Henderson, 14 N.C. 12 (1831).

It applies to voluntary conveyances of personalty, as well as realty, as against creditors. Garrison v. Brice, 48 N.C. 85 (1855).

It Prevents Passing of Any Estate. — A prior similar provision made fraudulent conveyances absolutely void, and in that way prevented the passing of any estate whatever, as against creditors of the grantor. Flynn v. Williams, 29 N.C. 32 (1846).

It Applies Only to Conveyances Made by Debtor. — The section operating, as it does, to wholly avoid the conveyances coming within its purview, it can be applied only to conveyances made by the debtor himself. Gowing v. Rich, 23 N.C. 553 (1841); United States v. Haddock, 144 F. Supp. 720 (E.D.N.C. 1956); Havee v. Belk, 775 F.2d 1209 (4th Cir. 1985).

Mortgagor Considered Owner. — In expounding the statute against fraudulent conveyances, the mortgagor is considered the owner of the estate, and the mortgagee but an encumbrancer. Wall v. White, 14 N.C. 105 (1831).

For discussion of what constituted valuable consideration under prior similar provisions, see North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979); Smith-Douglass v. Kornegay, 70 N.C. App. 264, 318 S.E.2d 895 (1984).

Deed of Gift Insufficient Consideration. — Where plaintiffs received their property by deed of gift, the transfer was for insufficient consideration. Thus, the government need only show that the taxpayers were insolvent in order to void the conveyance, and thereby maintain a lien upon plaintiffs' property. Ross v. United States, 861 F. Supp. 406 (E.D.N.C. 1994).

Notice of Claim Sufficient. — Where plaintiff alleged and presented evidence of a claim under former G.S. 39-17 instead of former G.S. 39-15, under the notice pleading requirements of G.S. 1A-1, Rule 8(a), his complaint adequately stated a claim under former G.S. 39-15 because it gave sufficient notice of the claim to enable the defendants to answer and prepare for trial; the complaint was sufficient to put defendants on notice, and the plaintiff was not held to the more stringent requirements found under G.S. 39-17. Lewis v. Blackman, 116 N.C. App. 414, 448 S.E.2d 133 (1994).

Question for Jury. — Whether a conveyance, whatever its form, was in substance and fact a conveyance by the debtor-bankrupt, or by another such as a pledgee, is a jury question. Havee v. Belk, 775 F.2d 1209 (4th Cir. 1985).

Summary judgment is generally inappropriate in an action for fraud because the existence of fraud necessarily involves a question concerning the existence of fraudulent intent, and the intent of a party is a state of mind generally within the exclusive knowledge of the party and that state of mind must, by necessity, be proved by circumstantial evidence. Lewis v. Blackman, 116 N.C. App. 414, 448 S.E.2d 133 (1994).

The statute 27 Elizabeth, from which former § 39-16 is derived, enacts that conveyances of land, made with intent to defraud purchasers, shall only, as against purchasers for good consideration, be void. Under the act it was, of course, held that notice of the fraudulent deed did not impeach the title of the purchaser, because the bad faith of the deed vitiated it, and, with notice of the deed, the purchaser had also notice of the fraud. The legislature thought proper in 1840 to alter this, and to declare that no person shall be deemed a purchaser unless he purchased the land for the full value thereof, without notice, at the time of his purchase, of the conveyance by him alleged to be fraudulent. Hiatt v. Wade, 30 N.C. 340 (1848). See also dissenting opinion in Bank of New Hanover v. Adrian, 116 N.C. 537, 21 S.E. 792 (1895).

Section Construed with Registration Act. — A prior similar provision and the Registration Act (G.S. 47-17 to 47-20) were both intended to prevent fraud, and must be construed together with that view. Austin v. Staten, 126 N.C. 783, 36 S.E. 338 (1900).

First Bona Fide Purchaser from Vendor or Vendee Protected. — The statute of 27 Elizabeth being intended for the benefit of purchasers, the first bona fide purchaser, whether from the fraudulent vendor or vendee, is within its operation. Hoke v. Henderson, 14 N.C. 12 (1831).

Equity Will Not Deprive of Legal Advantage. — No one has claims to the consideration of a court of equity superior to those of a purchaser without notice; and there is no case in which the court has interfered to deprive such a purchaser of a legal advantage. Crump v. Black, 41 N.C. 321 (1849).

"Purchaser" Defined. — The term "purchaser" was not used in a prior similar provision in its technical sense for one who comes to an estate by his own act. It was to be received in its popular meaning as denoting one who buys for money and buys fairly and of course at a fair price. Fullenwider v. Roberts, 20 N.C. 420 (1839).

Good faith and a fair price are requisite to constitute a good purchase. Fullenwider v. Roberts, 20 N.C. 420 (1839).

What Is Full Value. — The second purchaser must now, as before the Act of 1885, still be a bona fide purchaser, and for full value. We do not mean to say that he should have paid every dollar the land was worth, but he should have paid a reasonably fair price, such as would indicate fair dealing and not be suggestive of fraud. Austin v. Staten, 126 N.C. 783, 36 S.E. 338 (1900).

Purchase for "a Petty Sum". — When the consideration is pecuniary, a "petty" sum as compared to the value of the land would not help a second over the head of a first conveyance. Fullenwider v. Roberts, 20 N.C. 420 (1839).

One-Half or Two-Thirds Value. — Under a prior similar provision a man could not be held to be a purchaser for a valuable consideration who gives for the land not more than one half or two thirds of the value. Harris v. DeGraffenreid, 33 N.C. 89 (1850).

A mortgage to secure a present loan constitutes the mortgagee a purchaser for value within the meaning of the section. Fowle v. McLean, 168 N.C. 537, 84 S.E. 852 (1915).

Mortgage to Secure Past Indebtedness. — And the same principle obtains in reference to mortgages and deeds of trust to secure a past indebtedness, except as to an estate or interest existent in the property conveyed. Potts v. Blackwell, 57 N.C. 58 (1858); Brem v. Lockhart, 93 N.C. 191 (1885); Fowle v. McLean, 168 N.C. 537, 84 S.E. 852 (1915).

A deed in trust to sell property and pay certain creditors is supported by a valuable consideration, and is valid against a prior deed of gift as being a subsequent sale to a purchaser for a valuable consideration under this section. Ward v. Wooten, 75 N.C. 413 (1876).

Assignee of Fraudulent Vendee. — An assignee for the benefit of creditors of a fraudulent vendee, incurring no new liability on the faith of his title, is not protected. Wallace v. Cohen, 111 N.C. 103, 15 S.E. 892 (1892).

Assignee of a fraudulent vendee takes title subject to any equity, or other right, that attaches to the property in the hands of the debtor. Carpenter v. Duke, 144 N.C. 291, 56 S.E. 938 (1907).

Possession by Third Person Legal Notice. — Where one purchases land which he knows to be in the possession of a person other than the vendor, he is affected with legal notice and must inquire into the title of the possessor. Bost v. Setzer, 87 N.C. 187 (1882).

It is clear that the possession here spoken of is not a possession continued by the fraudulent donor, but is that of the donee himself or his tenant, taken under the conveyance, and that such possession of the donee or for him amounts to notice in respect only to those tracts or parcels to which that possession extends, and cannot affect a person who buys a parcel which is not, at the time of his purchase, in the possession of the fraudulent donee. Wade v. Hiatt, 32 N.C. 302 (1849).

Burden of Proof. — Where both parties claim by deed from a common grantor, the deed of the plaintiff being the younger, but registered first, the plaintiff makes out a prima facie case, and the burden of proof is shifted upon the defendant to attack the bona fides of the plaintiff's deed, and to defeat it, if he can, by establishing fraud. Austin v. Staten, 126 N.C. 783, 36 S.E. 338 (1900).

Section Applies Only to Gifts Inter Vivos. — A prior similar provision makes a qualification in the maxim "A man must to just before he is generous" in cases where the donor, at the time of the gift retained property, fully sufficient and available for the satisfaction of all of his then creditors. But this modification is confined to gifts inter vivos. In respect to legacies, or gifts by will, there has been no modification of the maxim; on the contrary, the legislation upon the subject tends to enforce a strict adherence to it, and the assent of an executor to a legacy, before he has paid all of the debts of the testator, is void as to creditors. Pullen v. Hutchins, 67 N.C. 428 (1872).

When Conveyance May Be Set Aside as Fraudulent. — Before a conveyance may be set aside as fraudulent, the finder of fact must find that the conveyance was voluntary, that the conveyance was made without fair and reasonable consideration and that the conveyance was either made with the intent to defraud creditors or made so that at the time of the conveyance the transferor did not retain sufficient property to satisfy his then existing debts. Valdese Gen. Hosp. v. Burns, 79 N.C. App. 163, 339 S.E.2d 23 (1986).

Voluntariness of Conveyance. — A conveyance is voluntary when it is not for value, i.e., when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

When Voluntary Deed Void Per Se. — A voluntary deed of land or other property made to a son by a father unable to pay his debts is void per se as to creditors; indeed, such a deed to any person is void, and such a deed appearing, the court declares it void in law. McCanless v. Flinchum, 89 N.C. 373 (1883).

It is a well-settled rule of law in this State that no voluntary deed can be upheld as against creditors, when the bargainor is unable to pay his debts at the time of the execution of the deed. McCanless v. Flinchum, 89 N.C. 373 (1883).

Protection for All Creditors. — One need not be a judgment creditor to be entitled to the protection of this section. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Rights of Prior and Subsequent Creditors. — The controlling principle is stated in Aman v. Walker, 165 N.C. 224, 81 S.E. 162 (1914), as follows: "If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally." Sutton v. Wells, 177 N.C. 524, 99 S.E. 365 (1919).

Creditor's Action Prior to Transfer of Assets. — A creditor beginning an action prior to the transfer of assets by defendant is entitled to attack the transfer as fraudulent as to him, although he does not obtain judgment against the defendant until after the transfer of the assets has been accomplished. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Where Grantor Retains Sufficient Property to Pay Debts. — A conveyance of lands to husband and wife by entireties which was paid for by the husband will not be considered as fraudulent with respect to his creditors, when he retained property amply sufficient to pay them at the time of the deed. Finch v. Cecil, 170 N.C. 114, 86 S.E. 991 (1915).

Where a husband makes a gift of land to his wife, without any valuable consideration, but it is admitted he had no fraudulent intent, and he retains property sufficient to pay his debts in existence at the time of the gift, it is not fraudulent as to creditors. Taylor v. Eatman, 92 N.C. 601 (1885).

Sufficiency of Property Retained. — In an action to set aside a deed, evidence that the grantor retained $11,625 to pay debts to the amount of $11,500 was not sufficient to show that the grantor retained property sufficient to pay his debts, in view of the fact the $1,000 worth of the property was of a perishable nature, and the debtor was entitled to $1,000 worth of real estate as his homestead exemption, and $500 worth of property as his personal property exemption. Williams v. Hughes, 136 N.C. 58, 48 S.E. 518 (1904).

Creditor's motion for summary judgment was properly granted where the record showed that the creditor met his burden of proof by uncontroverted evidence that immediately after the conveyances in question, defendant owed plaintiff $56,000, and that she had property worth only $300.00. North Carolina Nat'l Bank v. Johnson Furn. Co., 34 N.C. App. 134, 237 S.E.2d 313 (1977).

Deed of gift may be fraudulent, though the donor honestly believed that he had property sufficient, at the time of the gift, to satisfy all his debts then existing, when in fact he was mistaken. Black v. Sanders, 46 N.C. 67 (1853).

Corporation Sold Subject to Its Corporate Debt. — A corporation holds its property subject to the payment of the corporate debts, and when a corporation sells or transfers its entire property to a purchaser, knowing the fact, the latter is chargeable with knowledge that the property is subject to the corporate debts and that equity will, in proper cases, allow the corporate creditors to follow the property into the hands of the purchaser, for satisfaction of their claims. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

When a corporation purchases all or substantially all of the assets of another corporation for grossly inadequate consideration, the transfer will be deemed fraudulent as to the selling corporation's creditors, regardless of whether the parties had the actual intent to defraud. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

Good will is an asset capable of being fraudulently conveyed, and where the good will is put beyond reach of creditors, equity will allow a money damage award equal to the value of the good will. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

Where one corporation purchases all or substantially all of the assets of another corporation, including the good will, in a manner deemed fraudulent, the selling corporation's creditors may follow the good will into the hands of the purchasing corporation and obtain a money damage award equal to its value. Budd Tire Corp. v. Pierce Tire Co., 90 N.C. App. 684, 370 S.E.2d 267 (1988).

Judgment in Partition Proceeding as Voluntary Transfer. — A bankrupt was allotted an undivided interest in certain lands as his homestead, and the remainder in such undivided interest was sold to make assets, and at the sale was bought by the bankrupt's wife. The land was then partitioned by order of court, and in the partition proceeding the husband acknowledged the interest in remainder of his wife. It was held that, if the sale of the reversionary interest to the wife was invalid, the judgment in the partition proceeding estopped the husband from denying the interest of his wife, and operated as a gift to her within the meaning of this section, and in the absence of allegations that the husband had debts at the time of the partition, and that he did not retain sufficient assets to pay them, the land could not be reached by a subsequent creditor of the husband. Wallace v. Phillips, 195 N.C. 665, 143 S.E. 244 (1928).

Transfer in Consideration of Support of Debtor for Life. — A contract was made in consideration of support by a son of his father and mother for life, for $100 and certain shares of stock of the father, of the value of $7,000, and the father did not retain sufficient property out of which to pay his then existing creditors. The son acted in good faith without notice or knowledge. It was held that the transfer of the stock to the son was not valid as against his father's creditors beyond the amount he had expended for the support for which he was liable under the terms of the contract. People's Bank & Trust Co. v. Mackorell, 195 N.C. 741, 143 S.E. 518 (1928).

Transfer in Consideration of Support of Debtor's Invalid Children. — Where a deed from father to son provided that the grantee should support his invalid brothers (naming them) and comply with the conditions imposed, it was not voluntary within the meaning of this section, but rests upon a valuable consideration. Worthy v. Brady, 91 N.C. 265 (1884), petition for rehearing dismissed, 108 N.C. 440, 12 S.E. 1034 (1891).

Deed Made for Benefit of Debtor's Family. — Where a deed, conveying all of a debtor's property, and made without consideration, expresses on its face that it is made for the benefit of the debtor and his family, the court can itself pronounce it fraudulent and void as against a then existing creditor. Sturdivant v. Davis, 31 N.C. 365 (1849).

Where Grantor Afterwards Pays Debt. — A voluntary conveyance to a son is not avoided by the fact that the grantor was indebted at the time, if he afterwards paid the debt. Smith v. Reavis, 29 N.C. 341 (1847).

Gifts of Visible Estate and Retention of Choses in Action. — Gifts of visible estate cannot be defeated where the debtor has resources in stocks or other securities of value to meet his liabilities. Worthy v. Brady, 91 N.C. 265 (1884), petition for rehearing dismissed, 108 N.C. 440, 12 S.E. 1034 (1891).

Holder of Bearer Note Secured by Deed of Trust Held Not Necessary Party. — Where the note which a deed of trust purports to secure is payable to bearer, the plaintiff alleges it is "a false and fictitious paper-writing" and that the identity of the supposed bearer "remains unknown to plaintiff," the trustee in the deed of trust which purports to secure the payment of such note is a party to the action and has participated actively in its defense, whatever may be the situation where the holder of the indebtedness is named in the deed of trust and known, the holder of the alleged note cannot be deemed a necessary party to the action to set aside the deed of trust which purports to secure it. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Cited in Triangle Bank v. Eatmon, 143 N.C. App. 521, 547 S.E.2d 92, 2001 N.C. App. LEXIS 306 (2001); Strawbridge v. Sugar Mt. Resort, Inc., 243 F. Supp. 2d 472, 2003 U.S. Dist. LEXIS 1513 (W.D.N.C. 2003).

II. WHAT CONVEYANCES FRAUDULENT.

A. In General.

Rule Stated. — The principles to be deduced from the authorities as to fraudulent conveyances, are: (1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid. (2) If the conveyance is voluntary, and the grantor does not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally. (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained. (4) If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee and of which intent he had no notice, it is valid. (5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he has notice, it is void. Aman v. Walker, 165 N.C. 224, 81 S.E. 162 (1914); North Carolina Nat'l Bank v. Evans, 35 N.C. App. 322, 241 S.E.2d 379 (1978), rev'd on other grounds, 296 N.C. 374, 250 S.E.2d 231 (1979); Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979); Wurlitzer Distrib. Corp. v. Schofield, 44 N.C. App. 520, 261 S.E.2d 688 (1980); Wilkinson v. United States, 741 F. Supp. 577 (W.D.N.C. 1990).

Prerequisites for Establishing Fraud. — When a conveyance is made by a debtor for valuable consideration, it is fraudulent and may be set aside only when the conveyance was (1) made with the intent to defraud creditors, and (2) the grantee either participated in the intent or had notice of it. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979), aff'd, 53 N.C. App. 492, 281 S.E.2d 86 (1981).

What Constitutes Transfer. — There is no requirement that borrower must have seen the actual proceeds of the loan in order for her to be able to transfer those proceeds; the immediate application of the proceeds of the loan to the debt incurred by borrower's husband, at her direction, constituted a transfer of funds. Butler v. NationsBank, 58 F.3d 1022 (4th Cir. 1995).

Effect of Consideration. — Although a purchaser may pay a full price for the property, yet if he purchased with the intent to aid his vendor to defeat the latter's creditors his purchase will be void. Eigenbrun v. Smith, 98 N.C. 207, 4 S.E. 122 (1887).

If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee, or of which he has notice, it is void. Orta v. Schafer, 284 F.2d 114 (4th Cir. 1960), quoting Aman v. Walker, 165 N.C. 224, 81 S.E. 162 (1914).

A valuable consideration in the law of fraudulent conveyance is not the same as a valuable consideration in the law of contracts. North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979).

Valuable consideration is deemed to have been given by the transferee when he suffers a legal detriment and the transferor receives a corresponding benefit. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979), aff'd, 53 N.C. App. 492, 281 S.E.2d 86 (1981).

A deed of trust or a mortgage made to secure an existing debt is a conveyance for a valuable consideration. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979), aff'd, 53 N.C. App. 492, 281 S.E.2d 86 (1981).

Preferences. — Every conveyance of property by an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the sole purpose of such a conveyance be the discharge of an honest debt, it does not fall under operation of the statute against fraudulent conveyances. Hafner v. Irwin, 23 N.C. 490 (1841).

But an agreement by which a conveyance, made for the purpose of preferring a creditor, is to be kept secret until the debtor has an opportunity to get beyond the reach of process issued by his other creditors, renders the conveyance fraudulent towards other creditors, as intended to hinder, delay, or defeat them. Hafner v. Irwin, 23 N.C. 490 (1841).

Intent to defraud creditors may be presumed when the debtor does not retain property sufficient to pay his then-existing debts. Edwards v. Northwestern Bank, 39 N.C. App. 261, 250 S.E.2d 651 (1979), aff'd, 53 N.C. App. 492, 281 S.E.2d 86 (1981).

Conveyance to Trustee for Use of Creditors. — A conveyance to a trustee for the use of creditors, if made with intent to defraud any one of the vendor's creditors, is void, though the trustee be ignorant of such intent, and his conduct is bona fide. Eigenbrun v. Smith, 98 N.C. 207, 4 S.E. 122 (1887). See Royster v. Stallings, 124 N.C. 55, 32 S.E. 384 (1899).

Conveyance to Defeat Claim for Tort. — A secret conveyance of a mill made to defeat, hinder or delay a party injured by the erection thereof in the recovery of his damages, is fraudulent and void as to such party, and the former owner of the mill, notwithstanding such conveyance, continues liable for the damage. Purcell v. McCallum, 18 N.C. 221 (1835).

Where a deed was executed to evade the payment of any judgment that might be recovered against the grantor in an action for slander pending at the time of its execution, it is fraudulent, under a prior similar provision, as to his creditors. Helms v. Green, 105 N.C. 251, 11 S.E. 470 (1890).

Voluntariness of Conveyance. — A conveyance is voluntary when it is not for value, i.e., when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

A conveyance is deemed to be voluntary when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud. North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979).

A determination that a conveyance was not made for valuable consideration means that the conveyance was "voluntary." North Carolina Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979).

A transfer is "voluntary" when the purchaser does not give value, i.e. does not pay a reasonably fair price. Butler v. NationsBank, 58 F.3d 1022 (4th Cir. 1995).

A transfer is voluntary if the transferor does not receive reasonably equivalent value for her transfer. Butler v. NationsBank, 58 F.3d 1022 (4th Cir. 1995).

If a conveyance is voluntary, and grantor fails to retain sufficient assets to pay his then-existing indebtedness, such conveyance is invalid as to creditors. Tuttle v. Tuttle, 38 N.C. App. 651, 248 S.E.2d 896 (1978), cert. denied, 296 N.C. 589, 254 S.E.2d 32 (1979).

Secret Trusts. — In Clement v. Cozart, 109 N.C. 173, 13 S.E. 862 (1891), it was said that if a deed be made, showing upon its face a full valuable consideration, but upon the secret trust that the vendee shall not pay anything therefor, but shall hold the same in contemplation of insolvency for the benefit of the vendor, so as to protect and shield the property against any debts that he may owe at the time, or any liabilities that he may subsequently incur, under a prior similar provision such a deed would be void as to all persons whose claims "are, shall or might be" defrauded thereby. See Morgan v. McLelland, 14 N.C. 82 (1831).

Absolute Transfers Intended as Security. — A deed absolute but executed upon a parol agreement for redemption, is, in law, fraudulent and void against the creditors of the vendor. Gregory v. Perkins, 15 N.C. 50 (1833).

A deed absolute on its face, which is mere security for a debt, is void as against creditors of the grantor. Bernhardt v. Brown, 122 N.C. 587, 29 S.E. 884 (1898).

A deed absolute on its face, but intended as a mortgage only, is fraudulent and void against creditors and purchasers, and against subsequent as well as prior creditors. Halcombe v. Ray, 23 N.C. 340 (1840).

A bond given as a pretext to enable one person to set up a claim to the property of another, so as to defraud the creditors of that other, is void even as between the parties to the same. John G. Powell & Co. v. Inman, 53 N.C. 436 (1862).

Feigned and Covinous Judgment. — A feigned and covinous judgment is made utterly void as against the person who is in anywise hindered, delayed, or defrauded of his debts. Powell v. Howell, 63 N.C. 283 (1869).

Assignment of Life Insurance Policy. — A life insurance policy issued to one for the benefit of himself is an integral part of his estate, and a voluntary assignment thereof to his children, made when he is insolvent, is fraudulent and void. Burton v. Farinholt, 86 N.C. 260 (1882).

Conveyance to Wife or to Wife and Self by Entireties. — Complaint brought by individual who succeeded to the rights of existing creditor by virtue of bond and payment thereunder, alleging that while unable to pay a claim that had been pending against him for two years and while he had no other assets with which to pay his creditors, defendant husband gratuitously conveyed his solely owned real property to himself and defendant wife by the entireties and gratuitously had title to other land that he purchased later put in her name stated a claim for relief against defendant wife, as if the alleged circumstances were established the conveyances would be invalid to existing creditors as a matter of law. Nye v. Oates, 96 N.C. App. 343, 385 S.E.2d 529 (1989).

Conveyance Following Separation Agreement. — Despite contention of creditor of husband that separation agreement executed by husband and wife destroyed tenancy by the entirety and vested a property interest in husband against which creditor was entitled to levy, where husband and wife were not divorced until over 8 months following the conveyance of the marital property to husband's parents, the property remained entirety property at the time of the conveyance, and could not be the subject of a conveyance in defraud of husband's individual creditors. The trial court erred in ordering that creditor was entitled to receive the proceeds of the sale of this property. Dealer Supply Co. v. Greene, 108 N.C. App. 31, 422 S.E.2d 350 (1992), cert. denied, 333 N.C. 343, 426 S.E.2d 704 (1993).

When Insolvent Debtor Improves Wife's Estate. — An insolvent debtor cannot withdraw money from his own estate and give it to his wife to be invested by her in the purchase or improvement of her property, and to that extent, when it is done, creditors may subject the property so purchased or improved to the payment of their claims. Michael v. Moore, 157 N.C. 462, 73 S.E. 104 (1911).

Money of Debtor Deposited in Wife's Name. — Where the wife participates in her husband's depositing his money in her name at a bank for the purpose of defrauding his creditors, the attempted appropriation is void under a prior similar provision, which was enacted to prevent fraudulent gifts, and in an appropriate action the deposit will be considered and dealt with as if it stood in the name of the husband. Moore v. Greenville Banking & Trust Co., 173 N.C. 180, 91 S.E. 793 (1917).

B. Intent.

Intent as Essential Element. — The intent is the essential and poisonous element in the transaction, and not merely the effect; since in every conveyance and appropriation of property, the property conveyed is placed beyond the creditor's reach, and he is so far obstructed in the pursuit of his remedy against the debtor's estate. But the inquiry is, was this the purpose of the assignment; and if so, and it was participated in by the assignee or party to take benefit under it, the assignment is invalid, though the debt or liability professed to be the object to be secured be bona fide due, and itself tinged with no vicious ingredient. Moore v. Hinnant, 89 N.C. 455 (1883), petition to modify denied, 90 N.C. 163 (1884).

A prior similar provision was meant to prevent deeds, etc., fraudulent in their concoction, and not merely such as in their effect might delay or hinder other creditors. Moore v. Hinnant, 89 N.C. 455 (1883), petition to modify denied, 90 N.C. 163 (1884).

Intent as Objective Element. — Acts fraudulent in view of the law, because of their necessary tendency to delay or obstruct the creditor in pursuit of his legal remedy, do not cease to be such because the fraud as an independent fact was not then in mind. If a person does and intends to do that which from its consequences the law pronounces fraudulent, he is held to have intended the fraud inseparable from the act. Cheatham v. Hawkins, 80 N.C. 161 (1879).

Sufficiency of Intent. — It is not necessary that there should have been an intent to hinder, delay, and defraud. An intent either to hinder and delay, or an intent to defraud, is sufficient. Peeler v. Peeler, 109 N.C. 628, 14 S.E. 59 (1891); Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Intent Shown by Acts and Conduct. — It is not necessary that intent to defraud be proven by expressed declarations, but it may be shown by the acts and conduct of the parties, from which it may be reasonably inferred. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Intent Presumed. — Intent to defraud may be presumed where the transferor fails to retain property sufficient to pay his or her debts. Butler v. NationsBank, 58 F.3d 1022 (4th Cir. 1995).

Deed of Trust Executed with Intent to Delay. — A deed of trust executed by a corporation, or an individual, for the purpose of gaining time at the expense of creditors, in order to dispose of property to advantage and prevent a sacrifice by a sale for cash, when the company or individual has the means and resources from which enough might be realized to pay all the debts, is fraudulent and void as against creditors. London v. Parsley, 52 N.C. 313 (1859).

Fraud a Compound Question of Law and Fact. — In Crow v. Holland, 12 N.C. 481 (1828), it was said: "Fraud is a compound question of law and fact. The facts going to establish it are decided by a jury. Whether, when proved, they will amount to such a fraud as will vacate a grant is a question of law for the court to decide."

Intention Ascertained from "Badges of

Fraud". — It is true that courts and juries cannot see and know the intent of an assignor except from his words and acts. Where he expresses his intent — his purpose — to be to defraud his creditors, we need not look further. This will avoid the assignment. But if he has not so declared his purpose, then we have to look to his acts to ascertain the intention with which the assignment was made — to what are called the "badges of fraud." Royster v. Stallings, 124 N.C. 55, 32 S.E. 384 (1899).

Family Relationship as Evidence of Intent. — When property is sold to a family member for less than its reasonable value and the grantor is unable to pay his debts, the close family relationship is strong evidence of fraudulent intent. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Consideration for the conveyance was another circumstance from which the jury inferred fraudulent intent; although defendants contended that there was valuable consideration in that grantee agreed to assume defendants' indebtedness to a third party in the amount of $93,000 grantee was not making regular payments on the note and the noteholder, who was related to the individual defendants, was allowing grantee to pay off the debt by doing work for him. Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989).

Evidence of Other Debts Admissible to Show Intent. — Where plaintiff's evidence tended to show that defendants owed debts to plaintiff other than the 1981 judgment and that they had not been able to pay those debts, existence of the other debts was relevant on the issue of defendants' intent. Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989).

Evidence Held Sufficient to Show Intent. — There was sufficient evidence to support the jury's finding that conveyance was made with the actual intent to defraud plaintiff where plaintiff's evidence showed that defendants owed several debts to plaintiff which they were unable to pay and that plaintiff attempted to collect a $5,000 account balance shortly before the conveyance occurred. Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989).

C. Badges of Fraud.

"Badges of Fraud" Defined. — It frequently becomes necessary, in order to ascertain the debtor's intentions, to look for what are designated as "badges of fraud." These badges of fraud are suspicious circumstances that overhang a transaction, and where the parties to it withhold testimony that it is exclusively within their power to produce, and that would remove all uncertainty, if believed, as to its character, the law puts the interpretation upon such conduct most unfavorable to the suppressing party as it does in all cases where a party purposely or negligently fails to furnish evidence under his control and not accessible to his adversary. Helms v. Green, 105 N.C. 251, 11 S.E. 470 (1890).

The usual badges of fraud are continuation of possession, or a secret trust, or some provision for the ease and comfort or benefit of the assignor, or the insertion of some feigned debt not due by the assignor. Royster v. Stallings, 124 N.C. 55, 32 S.E. 384 (1899).

Retention of Possession Not Fraudulent Per Se. — Possession retained by the vendor of chattel does not, per se, make the sale fraudulent in law. It is but presumptive evidence of fraud, proper to be left to a jury. To repel this presumption the vendee may show that consideration passed, though none is stated in the bill of sale. Howell v. Elliott, 12 N.C. 76 (1826).

Permitting Mortgagor to Remain in Possession of and Sell Stock of Merchandise. — Where mortgagees expressly agree to permit mortgagor to remain in possession of the stock of merchandise and sell the same in the usual course of trade, but do not require him to account for the proceeds of same, until he is adjudged bankrupt, the mortgage is presumptively fraudulent in law, and the burden is upon the mortgagor to rebut that presumption by proof that there were no preexisting debts at the time the mortgage was executed, or that the mortgagor had assets sufficient and available to pay the existing debts exclusive of the property embraced in the mortgage. In re Joseph, 43 F.2d 252 (M.D.N.C. 1930). See Morris Plan Bank v. Cook, 55 F.2d 176 (4th Cir. 1932).

Reservation of Exemptions. — The reservation of exemptions allowed by law in a deed of assignment is no evidence of a fraudulent intent. Barber v. Buffaloe, 111 N.C. 206, 16 S.E. 386 (1892).

Secrecy. — It is a mark of fraud if the transaction is secret; and it is secret if it is done in the presence only of near relatives, who are such persons as may be relied on not to disclose what they know to the neighborhood, or if it is done at such distance from the neighborhood that it is unlikely that the affair will become known to them. Vick v. Kegs, 3 N.C. 126 (1800).

That the only parties present at a conveyance of all the vendor's land in satisfaction of old debts were the vendor and vendee, who were brothers-in-law, and the subscribing witness, also a brother-in-law of the vendee, is a fact calculated to throw suspicion upon the transaction, i.e., is a badge of fraud. Peebles v. Horton, 64 N.C. 374 (1870).

Employing an attorney who resides at some distance, and in another county, to draw the deed of assignment, and making a provision therein authorizing public or private sale for cash, are not circumstances of fraud. Barber v. Buffaloe, 111 N.C. 206, 16 S.E. 386 (1892).

Authorizing Private Sale. — It is no ground for a court to pronounce a deed of trust fraudulent per se, as against other creditors, that the property conveyed was to be sold at a private sale. Burgin v. Burgin, 23 N.C. 453 (1841). See Barber v. Buffaloe, 111 N.C. 206, 16 S.E. 386 (1892).

Evidence of Fraud in Assignment for Creditors. — In Barber v. Buffaloe, 122 N.C. 128, 29 S.E. 336 (1898), it was held that there was sufficient evidence of fraud in an assignment for the benefit of creditors to take the case to the jury. There the party preferred, a relative of the assignor, went 16 miles on Sunday night with the attorney who drew the deed of assignment, bought in the property, with the debt secured, and allowed the assignor to remain in possession free of rent; this was evidence of a secret trust and benefit to the assignor, and the turning point in the case. Royster v. Stallings, 124 N.C. 55, 32 S.E. 384 (1899).

Effect of Testimony as to Bona Fides of Transaction. — The rule laid down in Reiger v. Davis, 67 N.C. 185 (1872), was that when a debtor, much embarrassed, conveys property of much value to a near relative, and the transaction is secret and no one is present to witness the trade but these near relatives, it is regarded as fraudulent, but when these relatives are made witnesses in the cause, and depose to the fairness and bona fides of the transaction, and that, in fact, there was no purpose of secrecy, it then becomes a question for the jury to determine the intent which influenced the parties, and to find it fraudulent, or otherwise, as the evidence may satisfy them. Helms v. Green, 105 N.C. 251, 11 S.E. 470 (1890).

III. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

Conveyance Is Valid Between the Parties. — The power of the court to set aside a fraudulent conveyance at the instance of creditors is derived from a prior similar provision, which has not penalized such a transaction by declaring the deed utterly void as against all persons and for all purposes, but has expressly limited the remedy to the aggrieved creditor and has left the deed as it stands between the parties. Lane v. Becton, 225 N.C. 457, 35 S.E.2d 334 (1945).

Valid Against Maker. — A conveyance made with an intent to defraud creditors is nevertheless valid against the maker and all others except creditors and those who purchase under a sale made for their benefit. Saunders v. Lee, 101 N.C. 3, 7 S.E. 590 (1888).

When Parties in Pari Delicto. — In York v. Merritt, 77 N.C. 213 (1877), the action was by the grantee against the grantor for possession of the land conveyed to defraud creditors. The court held that when the parties have united in a transaction to defraud another or others, or the public, or the due administration of justice, or which is against the public policy or contra bonos mores, the courts will not enforce it against either party. Bank of New Hanover v. Adrian, 116 N.C. 537, 21 S.E. 792 (1895).

Grantee Must Be Purchaser for Value to Be Protected. — North Carolina law protects bona fide purchasers from creditors of the grantor. In order to be protected a grantee must first be a purchaser for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Deed of trust to secure a present loan constitutes the beneficiary a purchaser for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

Bona Fide Purchaser from Fraudulent Grantor. — A bona fide purchaser of personal property, without notice, acquires a good title, though his vendor may have made a prior fraudulent conveyance to a third person. Plummer v. Worley, 35 N.C. 423 (1852).

Purchaser with Notice of Former Fraudulent Conveyance. — Since the passage of the Act of 1840 a purchaser of land with notice at the time of a former fraudulent conveyance is not protected in his purchase, although he paid value therefor. Hiatt v. Wade, 30 N.C. 340 (1848); Triplett v. Witherspoon, 70 N.C. 589 (1874).

Bona Fide Purchaser from Fraudulent Grantee. — A purchaser for a valuable consideration, and without notice, from a fraudulent grantee, acquires a good title against the creditors of the fraudulent grantor. Saunders v. Lee, 101 N.C. 3, 7 S.E. 590 (1888).

Whatever may be said about fairness or unfairness towards creditors, the legislative will gives preference to a bona fide purchaser, for valuable consideration at full price and without notice of the fraud and covin. Saunders v. Lee, 101 N.C. 3, 7 S.E. 590 (1888).

Constructive Notice. — A purchaser from a trustee, under a conveyance containing upon its face evidence of a fraudulent purpose to defeat creditors, takes with notice of such evidence. Eigenbrun v. Smith, 98 N.C. 207, 4 S.E. 122 (1887).

Burden of Proof. — The burden is on the purchaser of property conveyed to defraud creditors to show that he bought for a valuable consideration and without notice. Cox v. Wall, 132 N.C. 730, 44 S.E. 635 (1903).

Where a conveyance from an insolvent husband to his wife is attacked for fraud, the onus is upon the wife to show that a consideration, in the shape of money paid, the discharge of a debt due from him to her, or something of value, actually passed. Peeler v. Peeler, 109 N.C. 628, 14 S.E. 59 (1891).

Section Is Intended as Proviso. — The purpose of the legislature in enacting former G.S. 39-19 was to constitute an independent provision, operating as a proviso to the other sections on fraudulent conveyances. Cox v. Wall, 132 N.C. 730, 44 S.E. 635 (1903).

Scope and Effect. — The proviso can only be made operative by giving to it the scope and effect of purging the original conveyance of the fraud with which it was tainted, by allowing the bona fides and the full valuable consideration of the second conveyance to supply the want of these qualities to the first, so as to perfect the title to the bona fide purchaser, by carrying it back to the donor and claiming the title from him, and thus prevent the title of the first purchaser from being impeached and made void. Young v. Lathrop, 67 N.C. 63, 12 Am. Rep. 603 (1872). See Cox v. Wall, 132 N.C. 730, 44 S.E. 635 (1903).

How Grantee May Protect His Title. — When a grantor executes a deed with intention to defraud his creditors, the grantee can only protect his title by showing that he is a purchaser for a valuable consideration, and without notice of a fraudulent intent on the part of his grantor. Cansler v. Cobb, 77 N.C. 30 (1877); Saunders v. Lee, 101 N.C. 3, 7 S.E. 590 (1888); Morgan v. Bostic, 132 N.C. 743, 44 S.E. 639 (1903).

Bona Fide Purchaser from Fraudulent Vendor Gets Good Title. — Under a prior similar provision, a purchaser for value and without notice of any fraud got good title by conveyance or transfer from a fraudulent vendor. People's Bank & Trust Co. v. Mackorell, 195 N.C. 741, 143 S.E. 518 (1928).

Bona Fide Purchaser from Fraudulent Grantee Before Execution Sale. — Where a fraudulent grantee of land conveyed it to a bona fide purchaser for value without notice of the fraud, after a creditor of the fraudulent grantor had obtained a judgment against him, but before the land was sold under an execution issued on such judgment and teste of the terms where it was obtained, it was held that by force of the proviso obtained in this section (4th section of the 50th ch. of the Rev. Code, 13 Eliz., c. 5, s. 6), the title of the bona fide purchaser from the fraudulent grantee was to be preferred to that of the purchaser under the execution of the creditor of the fraudulent grantor. Young v. Lathrop, 67 N.C. 63, 12 Am. Rep. 603 (1872).

Trustees and Mortgagees Take Subject to Equities. — It is a settled principle, acted upon every day, that the trustee or mortgagee is a purchaser for a valuable consideration within the provisions of 13 and 27 Elizabeth; but it would seem they take subject to any equity that attached to the property in the hands of the debtor, and cannot discharge themselves from it on the ground of being purchasers without notice. Potts v. Blackwell, 56 N.C. 449 (1857), appeal dismissed, 57 N.C. 58 (1858).

Good Consideration. — "Good consideration" means valuable consideration, or a fair price. Young v. Lathrop, 67 N.C. 63, 12 Am. Rep. 603 (1872); Arrington v. Arrington, 114 N.C. 151, 19 S.E. 351 (1894).

Conveyance to Daughter in Consideration of Services. — Where A made a deed to his daughter, in consideration of services rendered and to be rendered in the future for attending upon him in his old age, with intent to defraud his creditors, the deed is void, even though the daughter had no knowledge of such fraudulent intent. Cansler v. Cobb, 77 N.C. 30 (1877).

When Wife Takes with Notice of Fraud. — Where a husband's conveyance to his wife is executed with a fraudulent intent, and the wife, with a knowledge of his purpose, accepts the benefit of the act and claims under it, she puts herself beyond the pale of the protection offered to innocent purchasers by the section. Peeler v. Peeler, 109 N.C. 628, 14 S.E. 59 (1891).

Section Relates to Matters of Defense. — The matters herein stated were intended to be strictly of a defensive character, and are required to be averred and proved by the party who relies on their existence in order to validate a conveyance which the law has declared to be void because made with a fraudulent intent. Cox v. Wall, 132 N.C. 730, 44 S.E. 635 (1903).

Burden of Proving Consideration and Lack of Notice. — When a deed is made with a fraudulent intent, the law condemns it and pronounces it void, and it remains void, of course, until it is shown for some reason to be valid. Nothing else appearing, it is void, and he who claims under it must aver and prove whatever is necessary to sustain its validity. The burden is on the purchaser, therefore, to show, under the statute, that he purchased not only for value, but without notice. Cox v. Wall, 132 N.C. 730, 44 S.E. 635 (1903), distinguishing Lassiter v. Davis, 64 N.C. 498 (1870); Reiger v. Davis, 67 N.C. 185 (1872). See Morgan v. Bostic, 132 N.C. 743, 44 S.E. 639 (1903).

When Some of Debts Secured Are Fictitious. — A purchaser for value without notice, under a deed in trust in which some of the debts secured are fictitious, gets a good title, even against the creditors of the fraudulent trustor. McCorkle v. Earnhardt, 61 N.C. 300 (1867).

Mortgage Note Tainted with Usury. — A prior similar provision does not purport to protect the innocent holder of a mortgage note which is tainted with usury, but the "purchaser of the estate or property" at the sale under the mortgage, who buys without notice of the usurious taint in the debt secured. The only case in our reports that seems to mitigate against the otherwise uniform tenor of the decisions on this subject is Coor v. Spicer, 65 N.C. 401 (1871), which held that a mortgage given to secure an usurious bond might be enforced in the hands of an innocent purchaser for value. The case recognizes the general rule, but takes mortgages out of it upon the supposed wording of the section. Aside from the fact that it is held expressly otherwise in the latter case of Moore v. Woodward, 83 N.C. 531 (1880), an examination of the section will show that Coor v. Spicer was a palpable inadvertence. Ward v. Sugg, 113 N.C. 489, 18 S.E. 717 (1893).

Where a deed of trust is made to secure certain specified debts, one of which is tainted with usury, and a purchaser buys at the trustee's sale for a valuable consideration without notice of the illegality of the consideration of the said debt, his title is not affected thereby. McNeill v. Riddle, 66 N.C. 290 (1872).

IV. RIGHTS AND REMEDIES OF CREDITORS.

Minor children are not creditors of their father for their past support furnished them by another, and for which their personal estate was not invaded, and a conveyance executed by him prior to the institution of their action may not be set aside by them under a prior similar provision. Bryant v. Bryant, 212 N.C. 6, 192 S.E. 864 (1937).

Prior and Subsequent Creditors. — Indebtedness at the time of making a voluntary conveyance of part only of the grantor's property is, in respect to subsequent creditors seeking satisfaction out of the property conveyed, merely evidence of fraud, the consideration of which belongs to the jury; but in respect to prior creditors, where debts cannot be otherwise satisfied, it constitutes fraud in law to be declared by the court. O'Daniel v. Crawford, 15 N.C. 197 (1833).

A voluntary conveyance is necessarily and in law fraudulent when opposed to the claim of a prior creditor; as against subsequent creditors, whether the conveyance is fraudulent or not depends upon the bona fides of the transaction, and the question is one of intent, to be passed on by the jury. Clement v. Cozart, 109 N.C. 173, 13 S.E. 862 (1891). See § 39-17 and note.

Action Commenced Prior to Transfer of Assets. — A creditor beginning an action prior to the transfer of assets by defendant is entitled to attack the transfer as fraudulent as to him, although he does not obtain judgment against the defendant until after the transfer of the assets has been accomplished. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Surety on Bond. — The liability of a principal to indemnify a surety on a bond is an existing liability at the time the bond is executed, within the rule that a conveyance with intent to defraud creditors is void as to existing obligations. Graeber v. Sides, 151 N.C. 596, 66 S.E. 600 (1909).

Void in Part, Void in Toto. — If only a part of the consideration of a deed is fraudulent against creditors, the whole deed is void. Hafner v. Irwin, 23 N.C. 490 (1841).

When Trustee in Bankruptcy May Have Conveyance Set Aside. — A trustee in bankruptcy is entitled to have a fraudulent conveyance set aside and to recover the property transferred, if any creditor of the bankrupt would be entitled to do so. Cox v. Wall, 132 N.C. 730, 44 S.E. 635 (1903).

What Constitutes Aid and Assistance. — Aid or assistance is the doing of some act whereby the party is enabled, or it is made easier for him, to do the principal act, or effect some primary purpose. L.M. Wiley & Co. v. McRee, 47 N.C. 349 (1855).

Where a party persuades a debtor, who is temporarily absent from the county of his residence, not to go back into that county, but to go to distant parts, and promises, if he will do so, to send his property from his residence to him, and does afterwards send such property to him, and aids him with money to abscond from where he then is, and goes part of the way with him, for the purpose of defrauding his creditors, he is liable under the section. Moore v. Rogers, 48 N.C. 90 (1855).

Aid Consisting Mainly in Words. — There is no distinction between frauds consisting mainly in acts, and those which consist mainly in words, the criterion of the plaintiff's right of action and the defendant's liability being that the plaintiff should have been damaged in consequence of the fraud of the defendant. March v. Wilson, 44 N.C. 143 (1852).

Mere Advice Insufficient. — Simply advising a debtor to run away, though the advice be given to delay, etc., is not equivalent to aiding and assisting, and will not sustain an action under the statute against the fraudulent removing of debtors. L.M. Wiley & Co. v. McRee, 47 N.C. 349 (1855).

Carrying Debtor to Railway Station. — Where a party, with his horse and buggy, carried a debtor to a railroad station, and there procured the money to enable him to leave the State, with the intent to assist him in the purpose of avoiding his creditors, it was held to be a fraudulent removal within this section. Moffit v. Burgess, 53 N.C. 342 (1861).

Property Not Carried Entirely Out of County. — Where a debtor removes out of a county with intent to defraud his creditors, a person who, knowing of such intent, helps him by carrying him or his property a part of the way in order to assist him in getting him out of the county, becomes bound for his debts, although he did not convey the debtor or his goods entirely out of the one county into another. Godsey v. Bason, 30 N.C. 260 (1848).

Liability of Principal When Aid Rendered by Agent. — Where an agent, having money of his principal in his hands for a fair and honest purpose, paid it to his son fraudulently to assist him in absconding, the mere fact that, in a settlement of accounts between the principal and the agent, the former allowed the latter's bill for money thus applied does not amount to such a ratification as to subject the principal. Moore v. Rogers, 51 N.C. 297 (1859).

Knowledge of Particular Debt Unnecessary. — Where a person who has removed a debtor out of a county is sued by a creditor, it is not necessary to show that this person had a knowledge of any particular debt due from the debtor, but is sufficient if the circumstances of the case induce the jury to believe that the removal was made with a view to defraud creditors. Godsey v. Bason, 30 N.C. 260 (1848).

Intent of Escaped Debtor Immaterial. — The declaration of a debtor fraudulently removed, that "he intended to get the defendant into a scrape," was held to be immaterial. Moffit v. Burgess, 53 N.C. 342 (1861).

Action by Bail of One Arrested under Writ of Capias Ad Respondendum. — The bail of a person arrested under a writ of capias ad respondendum may maintain an action on the case at common law against one for fraudulently aiding and assisting the principal to remove from the county, in consequence whereof he had to pay the debt sued on. March v. Wilson, 44 N.C. 143 (1852).

Surety on Constable's Bond Not Creditor. — A surety on a constable's bond, upon which there has been a breach, but no judgment nor payment by him, is not a creditor so as to entitle him to recover against one for fraudulently removing his principal. Booe v. Wilson, 46 N.C. 182 (1853).

Measure of Damages. — In an action under this section the measure of damages is the amount of the debt due by the debtor to the plaintiff. Godsey v. Bason, 30 N.C. 260 (1848).

Same Jury in Suit by Different Creditors. — An action on the case, brought by A against B, for fraudulently removing a debtor, is tried, and a verdict found for defendant. The same jury are tendered in a case of C against B for the same act of removing, and are challenged by the plaintiff. They are under a legal bias by reason of having decided the case of A against B, and the challenge ought to be allowed, and this although additional evidence is to be adduced in the second trial. Baker v. Harris, 60 N.C. 271 (1864).

Creditors Lacked Standing. — Plaintiffs lacked standing to assert claims (1) that the joinder agreements executed by two defendants were fraudulent transfers in violation of G.S. 39-23.1 and unlawful distributions in violation of G.S. 55-8-33 and G.S. 55-6-40, for which all defendants were liable, or alternatively, (2) for unauthorized execution, because such claims could have been brought by any of the corporation's creditors who, like plaintiffs, were denied timely payment of the corporation's debts when execution of the joinder agreements led to its insolvency. Angell v. Kelly, 336 F. Supp. 2d 540, 2004 U.S. Dist. LEXIS 19003 (M.D.N.C. 2004).

V. PLEADING AND PRACTICE.

Necessary Allegations to Set Aside Gift. — In order for a creditor to set aside a gift from a debtor to his wife as fraudulent against creditors, the complaint must allege that at the time of the alleged gift the donor had not retained property fully sufficient and available to pay his then existing creditors, and in the absence of such allegation a demurrer to the complaint is good. Wallace v. Phillips, 195 N.C. 665, 143 S.E. 244 (1928).

Presumptions and Burden of Proof. — Where there is any evidence tending to show that at the time of the alleged fraudulent conveyance the grantor retained property fully sufficient and available to satisfy his then creditors, the presumption of fraud formerly arising from a voluntary conveyance is removed by this section, and the indebtedness of the grantor is evidence only from which a fraudulent intent may be inferred. Thus a requested instruction is properly refused which requires the defendant to satisfy the jury by the greater weight of the evidence that he retained property fully sufficient and available. Shuford v. Cook, 169 N.C. 52, 85 S.E. 142 (1915), citing Hobbs v. Cashwell, 152 N.C. 183, 67 S.E. 495 (1910). But see Garland v. Arrowood, 177 N.C. 371, 99 S.E. 100 (1919), wherein it was said that where there is a voluntary gift or settlement, the burden of, at least, going forward with proof of retention of sufficient property is on the defendant.

The ultimate burden of proof rests upon the plaintiff to show either actual intent by the defendant grantors to defraud their creditors or failure by them to retain property sufficient to pay the then-existing debts. North Carolina Nat'l Bank v. Johnson Furn. Co., 34 N.C. App. 134, 237 S.E.2d 313 (1977).

The burden is on plaintiff in an action to set aside a deed as being fraudulent as to creditors to prove that the grantor failed to retain property sufficient and available to pay his then existing creditors. Hood v. Cobb, 207 N.C. 128, 176 S.E. 288 (1934).

The effect of a prior similar provision is to destroy any presumption of vitiating fraud in the making of a voluntary gift or settlement solely from the indebtedness of the donor or settler, and to make the failure to retain property fully sufficient and available for the satisfaction of creditors a requisite of such presumption. Hood v. Cobb, 207 N.C. 128, 176 S.E. 288 (1934); Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Even though it is shown that a conveyance by a debtor was voluntary (that is, not for value), the burden of proof is, nevertheless, upon the plaintiff to show that the grantor did not retain property sufficient to pay his debts. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Earlier decisions of the Supreme Court were to the effect that, notwithstanding this section, there was a presumption of fraudulent intent in the case of a voluntary conveyance by a debtor and the burden rested upon the party seeking to uphold the voluntary conveyance to show retention by the grantor of property sufficient to pay his then debts. These cases may no longer be regarded as correct statements of the law of this jurisdiction with regard to the question of which party must ultimately bear the burden of proof upon the question of retention by the grantor of sufficient property to pay his then existing debts. That burden is now placed upon the party attacking the conveyance. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Intent Shown by Acts and Conduct. — It is not necessary that intent to defraud be proven by expressed declarations, but it may be shown by the acts and conduct of the parties, from which it may be reasonably inferred. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Family Relationship as Evidence of Intent. — When property is sold to a family member for less than its reasonable value and the grantor is unable to pay his debts, the close family relationship is strong evidence of fraudulent intent. Nytco Leasing, Inc. v. Southeastern Motels, Inc., 40 N.C. App. 120, 252 S.E.2d 826 (1979).

Evidence of Other Debts Admissible to Show Intent. — Where plaintiff's evidence tended to show that defendants owed debts to plaintiff other than the 1981 judgment and that they had not been able to pay those debts, existence of the other debts was relevant on the issue of defendants' intent. Dellinger Septic Tank Co. v. Sherrill, 94 N.C. App. 105, 379 S.E.2d 688 (1989).

Transfer Is Evidence of Intent to Defraud. — A prior similar provision provided that the transfer itself is evidence of an intention to defraud the creditor. New Amsterdam Cas. Co. v. Waller, 301 F.2d 839 (4th Cir. 1962).

Evidence of Tax Valuation of Property Retained. — In an action to set aside a deed as being fraudulent as to creditors, evidence of the tax valuation of the other lands of the debtor at the time of the conveyance is competent on the issue of intent to hinder, delay and defraud creditors as tending to show the debtor had reason to believe he was retaining property sufficient and available to pay his then existing creditors. Hood v. Cobb, 207 N.C. 128, 176 S.E. 288 (1934).

If, in order to survive a motion for judgment of nonsuit, the plaintiff must offer evidence sufficient in itself to show that its debtors, the defendant grantors in the deed of trust, did not retain property sufficient to pay their indebtedness to the plaintiff (no other debts being shown in the record), the judgment of nonsuit must be sustained where the only evidence offered by the plaintiff, upon this point, consisted of the tax listings by such defendants of their tangible properties in a particular county. Such tax listings do not negative the possibilities that these defendants, after executing the deed of trust in question, retained, and still retain, bank accounts or other intangible properties in the county or elsewhere, or tangible property, real or personal, located in another county, sufficient to pay the claim of the plaintiff and whatever other indebtedness these defendants may owe. Therefore, the evidence introduced by the plaintiff is not sufficient, alone, to show that the defendant grantors did not retain property sufficient to pay their debts when they executed the deed of trust now under attack. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

Subsequent Deed of Sale Not Evidence of Value. — A commissioner's deed of sale of part of the lands of the debtor, executed three years after the execution of the deed sought to be set aside as being fraudulent as to creditors, was held incompetent as evidence under this section, the issue being the value of all the debtor's lands at the time of the voluntary deed attacked in the action. Hood v. Cobb, 207 N.C. 128, 176 S.E. 288 (1934).

Evidence of Grantee's Resulting Trust in Property Conveyed. — Where a deed from a husband to his wife was sought to be set aside by his creditors for fraud, evidence tending to show that she had a resulting trust by reason of her having conveyed the same land to her husband without consideration moving to her was held inadmissible, under the principle that a grantor in a deed to lands may not engraft a resulting trust upon his conveyance of the fee simple title with full covenants and warranty of title. Kelly Springfield Tire Co. v. Lester, 192 N.C. 642, 135 S.E. 778 (1926).

Evidence Sufficient to Carry Issue of Intent to Jury. — Though the ultimate burden of proof rests upon the plaintiff to show either actual intent by the defendant grantors to defraud their creditors or failure by them to retain property sufficient to pay their then existing debts, when the plaintiff introduces an admission by the defendants that their deed of trust was "voluntary," and introduces evidence that they were then indebted to the plaintiff, which debt has not been paid, this is evidence tending to show an intent to delay, hinder, and defraud creditors sufficient to carry the case to the jury for its determination of the issue, and a judgment of nonsuit is improperly granted. Virginia-Carolina Laundry Supply Corp. v. Scott, 267 N.C. 145, 148 S.E.2d 1 (1966).

When Question of Fraud for Jury. — A prior similar provision only required the question of fraud to be submitted to a jury in cases where property fully sufficient and available to pay all creditors was retained by the donor. Black v. Sanders, 46 N.C. 67 (1853). See Sturdivant v. Davis, 31 N.C. 365 (1849).

Retention of Sufficient Property Is Question for Jury. — It is a question of fact for the determination of the jury whether the donor had retained property amply sufficient to pay his creditors at the time of his making a gift, within the intent and meaning of the section, which determines the validity of the transaction. Garland v. Arrowood, 177 N.C. 371, 99 S.E. 100 (1919).

Effect of Decree. — When the court has declared a voluntary conveyance void as to the plaintiff, and decreed that it be "set aside, revoked, rescinded, and annulled," it is avoided only as between the parties to the action. Sturges v. Portis Mining Co., 206 F. 534 (E.D.N.C. 1913).

VI. MARRIAGE SETTLEMENTS.

Gifts Between Husband and Wife. — All gifts from a husband to his wife are good inter se, and against all persons claiming under them; and good against all persons, if he is not in debt at the time; but such gifts are voidable as to existing creditors, if their rights are not secured. Walton v. Parish, 95 N.C. 259 (1886).

Husband May Surrender Curtesy Initiate. — Since the Act of 1848, a husband has the right to surrender his estate as tenant by the curtesy initiate and let it merge in the reversion of his wife, who, with the assent of her husband, may sell the same and receive the whole of the purchase money. Teague v. Downs, 69 N.C. 280 (1873). See § 29-4 which abolishes curtesy.

§ 39-23.2. Insolvency.

(a) A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(b) A debtor who is generally not paying the debtor's debts as they become due is presumed to be insolvent.

(c) A partnership is insolvent under subsection (a) of this section if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(d) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making transfer voidable under this Article.

(e) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) Subsection (a) is derived from the definition of "insolvent" in § 101(29)(A) of the Bankruptcy Code. The definition in subsection (a) and the correlated definition of partnership insolvency in subsection (c) contemplate a fair valuation of the debts as well as the assets of the debtor. As under the definition of the same term in § 2 of the Uniform Fraudulent Conveyance Act exempt property is excluded from the computation of the value of the assets. See § 1(2) supra. For similar reasons interests in valid spendthrift trusts and interests in tenancies by the entireties that cannot be severed by a creditor of only one tenant are not included. See the Comment to § 1(2) supra. Since a valid lien also precludes an unsecured creditor from collecting the creditor's claim from the encumbered interest in a debtor's property, both the encumbered interest and the debt secured thereby are excluded from the computation of insolvency under this Act. See § 1(2) supra and subsection (e) of this section.

The requirement of § 550(b)(1) of the Bankruptcy Code that a transferee be "without knowledge of the voidability of the transfer" in order to be protected has been omitted as inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee. Knowledge of the voidability of a transfer would seem to involve a legal conclusion. Determination of the voidability of the transfer ought not to require the court to inquire into the legal sophistication of the transferee.

(2) Section 2(b) establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. Such general nonpayment is a ground for the filing of an involuntary petition under § 303(h)(1) of the Bankruptcy Code. See also U.C.C. § 1-201(23), which declares a person to be "insolvent" who "has ceased to pay his debts in the ordinary course of business." The presumption imposes on the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency as defined in § 2(a) is more probable than its existence. See Uniform Rules of Evidence (1974 Act), Rule 301(a). The 1974 Uniform Rule 301(a) conforms to the Final Draft of Federal Rule 301 as submitted to the United States Supreme Court by the Advisory Committee on Federal Rules of Evidence. "The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too 'slight and evanescent' an effect." Advisory Committee's Note to Rule 301. See also 1 J.Weinstein & M.Berger, Evidence 301 [01] (1982).

The presumption is established in recognition of the difficulties typically imposed on a creditor in proving insolvency in the bankruptcy sense, as provided in subsection (a). See generally Levit, The Archaic Concept of Balance-Sheet Insolvency, 47 Am.Bankr.L.J. 215 (1973). Not only is the relevant information in the possession of a noncooperative debtor but the debtor's records are more often than not incomplete and inaccurate. As a practical matter, insolvency is most cogently evidenced by a general cessation of payment of debts, as has long been recognized by the laws of other countries and is now reflected in the Bankruptcy Code. See Honsberger, Failure to Pay One's Debts Generally as They Become Due: The Experience of France and Canada, 54 Am.Bankr.L.J. 153 (1980); J. MacLachlan, Bankruptcy 13, 63-64, 436 (1956). In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged. The case law that has developed under § 303(h)(1) of the Bankruptcy Code has not required a showing that a debtor has failed or refused to pay a majority in number and amount of his or her debts in order to prove general nonpayment of debts as they become due. See, e.g., Hill v. Cargill, Inc. (In re Hill), 8 B.R. 779, 3 C.B.C.2d 920 (Bk.D.Minn. 1981) (nonpayment of three largest debts held to constitute general nonpayment, although small debts were being paid); In re All Media Properties, Inc., 5 B.R. 126, 6 B.C.D. 586, 2 C.B.C.2d 449 (Bk.S.D.Tex. 1980) (missing significant number of payments or regularly missing payments significant in amount said to constitute general nonpayment; missing payments on more than 50% of aggregate of claims said not to be required to show general nonpayment; nonpayment for more than 30 days after billing held to establish nonpayment of a debt when it is due); In re Kreidler Import Corp., 4 B.R. 256, 6 B.C.D. 608, 2 C.B.C.2d 159 (Bk.D.Md. 1980) (nonpayment of one debt constituting 97% of debtor's total indebtedness held to constitute general nonpayment). A presumption of insolvency does not arise from nonpayment of a debt as to which there is a genuine bona fide dispute, even though the debt is a substantial part of the debtor's indebtedness. Cf. 11 U.S.C. § 303(h)(1), as amended by § 426(b) of Public Law No. 98-882, the Bankruptcy Amendments and Federal Judgeship Act of 1984.

(3) Subsection (c) is derived from the definition of partnership insolvency in § 101(29)(B) of the Bankruptcy Code. The definition conforms generally to the definition of the same term in § 2(2) of the Uniform Fraudulent Conveyance Act.

(4) Subsection (d) follows the approach of the definition of "insolvency" in § 101(29) of the Bankruptcy Code by excluding from the computation of the value of the debtor's assets any value that can be realized only by avoiding a transfer of an interest formerly held by the debtor or by discovery or pursuit of property that has been fraudulently concealed or removed.

Subsection (e) is new. It makes clear the purpose not to render a person insolvent under this section by counting as a debt an obligation secured by property of the debtor that is not counted as an asset. See also Comments to §§ 1(2) and 2(a) supra.

NORTH CAROLINA COMMENT

The drafters of the Uniform Fraudulent Conveyance Act identified confusion about the concept of insolvency as one of the three basic uncertainties in then-existing fraudulent conveyance law. *See* Prefatory Note to Uniform Fraudulent Conveyance Act; Howard, 50 *N.C. L. Rev.* at 875. N.C. Gen. Stat. § 39-23.2, in conjunction with the definitions of "asset" and "debt" (and the various definitions that are employed in connection with those terms), appears to eliminate this uncertainty. There seems to be little substantive change to North Carolina law, although uncertainty as to the meaning of North Carolina law makes this conclusion debatable.

North Carolina fraudulent conveyance cases have long determined solvency by contrasting a person's assets with his liabilities, and have rejected a test concerning whether the person is able to pay his debts in the ordinary course of business. *Silver Valley Mining Co. v. North Carolina Smelting Co.,* 119 N.C. 417, 418-19, 25 S.E. 954, 954-55 (1896); *Unaka and City National Bank of Johnson City, Tennessee v. Lewis,* 201 N.C. 148, 153, 159 S.E. 312, 314 (1931). *But see Sample v. Jackson,* 223 N.C. 335, 339, 26 S.E.2d 876, 879 (1943) *(dictum)* (stating that the North Carolina test is ability to pay debts). *Also cf.* N.C. Gen. Stat. § 25-1-201(23) (UCC definition of "insolvent" is a person who "has ceased to pay his debts in the ordinary course of business.")

Under former North Carolina fraudulent conveyance law, "insolvency" may not have been an element of a fraudulent conveyance so much as solvency (the retention of property "fully sufficient" for the satisfaction of creditors) was a defense. *See* former N.C. Gen. Stat. § 39-17; Howard, 50 *N.C. L. Rev.* at 882-85. *But see Virginia-Carolina Laundry Supply Corp. v. Scott,* 267 N.C. 145, 150, 148 S.E.2d 1, 4 (1966) (holding it was an attacking creditor's burden to demonstrate that transferor was insolvent). Whether a debtor had retained property "fully sufficient" to satisfy his creditors was a jury issue; the courts generally took a case-by-case approach and allowed juries to consider all relevant factors. *Garland v. Arrowood,* 177 N.C. 371, 373, 99 S.E. 100, 102 (1919). *Cf. Williams v. Hughes,* 136 N.C. 58, 48 S.E. 518 (1904) (property retained held as a matter of law not to be fully sufficient). Rules for determining whether retained property was "fully sufficient" did emerge: exempt property was not to be considered; contingent liabilities were to be valued at the amount of the debtor's probable ultimate liability. *Williams v. Hughes, supra; Shuford v. Cook,* 169 N.C. 52, 55, 85 S.E. 142, 144 (1915).

Subsection (b) creates a presumption that a person not generally paying his debts is insolvent. While there appear to be no North Carolina fraudulent conveyance cases that have recognized such a presumption, subsection (b) is consistent with North Carolina definitions of insolvency in some other contexts. *See* N.C. Gen. Stat. § 25-1-201(23) (UCC definition of insolvency); N.C. Gen. Stat. § 58-30-10(13) (definition of insolvency for purposes of laws dealing with insolvent insurance companies); N.C. Gen. Stat. § 53-1(3) (statute dealing with bank insolvency and including bank's inability to meet deposit liabilities within definition).

The definition of insolvency as it relates to partnerships (subsection (c)) appears to be without precedent in North Carolina fraudulent conveyance law, but follows from the concept of a partnership as an association of partners each of whom is liable for the partnership's debts. *See* N.C. Gen. Stat. § 59-45. Outside the context of fraudulent conveyance law, North Carolina has considered a partnership to be insolvent when the debts of the partnership have exceeded the assets of the partnership itself. *Farmer v. Head,* 175 N.C 273, 275-76, 95 S.E 567, 568 (1918).

No North Carolina cases have been located addressing the exclusion of assets that have been the subject of fraudulent transfers (subsection (d)) and the exclusion of debts to the extent they are secured (subsection (e)).

§ 39-23.3. Value.

(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(b) For the purposes of G.S. 39-23.4(a)(2) and G.S. 39-23.5, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous. (1997-291, s. 2; 1998-217, s. 6.)

OFFICIAL COMMENT

(1) This section defines "value" as used in various contexts in this Act, frequently with a qualifying adjective. The word appears in the following sections:

4(a)(2) ("reasonably equivalent value");
4(b)(8) ("value ... reasonably equivalent");
5(a) ("reasonably equivalent value");
5(b) ("present, reasonably equivalent value");
8(a) ("reasonably equivalent value");
8(b), (d), and (e) ("value");
8(f)(1) ("new value"); and
8(f)(3) ("present value").

(2) Section 3(a) is adapted from § 548(d)(2)(A) of the Bankruptcy Code. See also § 3(a) of the Uniform Fraudulent Conveyance Act. The definition in Section 3 is not exclusive. "Value" is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. The definition does not specify all the kinds of consideration that do not constitute value for the purposes of this Act — e.g., love and affection. See, e.g., United States v. West, 299 F.Supp. 661, 666 (D.Del. 1969).

(3) Section 3(a) does not indicate what is "reasonably equivalent value" for a transfer or obligation. Under this Act, as under § 548(a)(2) of the Bankruptcy Code, a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a discrepancy between the value of the asset transferred and the debt secured, since the amount of the debt is the measure of the value of the interest in the asset that is transferred. See, e.g., Peoples-Pittsburgh Trust Co. v. Holy Family Polish Nat'l Catholic Church, Carnegie, Pa., 341 Pa. 390, 19 A.2d 360 (1941). If, however, a transfer purports to secure more than the debt actually incurred or to be incurred, it may be found to be for less than a reasonably equivalent value. See e.g., In re Peoria Braumeister Co., 138 F.2d 520, 523 (7th Cir. 1943) (chattel mortgage securing a $3,000 note held to be fraudulent when the debt secured was only $2,500); Hartford Acc. & Indemnity Co. v. Jirasek, 254 Mich. 131, 140, 235 N.W. 836, 839 (1931) (quitclaim deed given as mortgage held to be fraudulent to the extent the value of the property transferred exceeded the indebtedness secured). If the debt is a fraudulent obligation under this Act, a transfer to secure it as well as the obligation would be vulnerable to attack as fraudulent. A transfer to satisfy or secure an antecedent debt owed an insider is also subject to avoidance under the conditions specified in Section 5(b).

(4) Section 3(a) of the Uniform Fraudulent Conveyance Act has been thought not to recognize that an unperformed promise could constitute fair consideration. See McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 414 (1933). Courts construing these provisions of the prior law nevertheless have held unperformed promises to constitute value in a variety of circumstances. See, e.g., Harper v. Lloyd's Factors, Inc., 214 F.2d 662 (2d Cir. 1954) (transfer of money for promise of factor to discount transferor's purchase-money notes given to fur dealer); Schlecht v. Schlecht, 168 Minn. 168, 176-77, 209 N.W. 883, 886-87 (1926) (transfer for promise to make repairs and improvements on transferor's homestead); Farmer's Exchange Bank v. Oneida Motor Truck Co., 202 Wis. 266, 232 N.W. 536 (1930) (transfer in consideration of assumption of certain of transferor's liabilities); see also Hummel v. Cernocky, 161 F.2d 685 (7th Cir. 1947) (transfer in consideration of cash, assumption of a mortgage, payment of certain debts, and agreement to pay other debts). Likewise a transfer in consideration of a negotiable note discountable at a commercial bank, or the purchase from an established, solvent institution of an insurance policy, annuity, or contract to provide care and accommodations clearly appears to be for value. On the other hand, a transfer for an unperformed promise by an individual to support a parent or other transferor has generally been held voidable as a fraud on creditors of the transferor. See, e.g., Springfield Ins. Co. v. Fry, 267 F.Supp. 693 (N.D.Okla. 1967); Sandler v. Parlapiano, 236 App.Div. 70, 258 N.Y.Supp. 88 (1st Dep't 1932); Warwick Municipal Employees Credit Union v. Higham, 106 R.E. 363, 259 A.2d 852 (1969); Hulsether v. Sanders, 54 S.D. 412, 223 N.W. 335 (1929); Cooper v. Cooper, 22 Tenn.App. 473, 477, 124 S.W.2d 264, 267 (1939); Note, Rights of Creditors in Property Conveyed in Consideration of Future Support, 45 Iowa L.Rev. 546, 550-62 (1960). This Act adopts the view taken in the cases cited in determining whether an unperformed promise is value.

(5) Subsection (b) rejects the rule of such cases as Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980) (nonjudicial foreclosure of a mortgage avoided as a fraudulent transfer when the property of an insolvent mortgagor was sold for less than 70% of its fair

value); and Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir. 1981), cert. denied, 454 U.S. 1164 (1982) (nonjudicial foreclosure held to be fraudulent transfer if made without fair consideration). Subsection (b) adopts the view taken in Lawyers Title Ins. Corp. v. Madrid (In re Madrid), 21 B.R. 424 (B.A.P. 9th Cir. 1982), aff'd on another ground, 725 F.2d 1197 (9th Cir. 1984), that the price bid at a public foreclosure sale determines the fair value of the property sold. Subsection (b) prescribes the effect of a sale meeting its requirements, whether the asset sold is personal or real property. The rule of this subsection applies to a foreclosure by sale of the interest of a vendee under an installment land contract in accordance with applicable law that requires or permits the foreclosure to be effected by a sale in the same manner as the foreclosure of a mortgage. See G.Osborne, G.Nelson, & D.Whitman, Real Estate Finance Law 83-84, 95-97 (1979). The premise of the subsection is that "a sale of the collateral by the secured party as the normal consequence of default . . . [is] the safest way of establishing the fair value of the collateral . . .." 2 G.Gilmore, Security Interests in Personal Property, 1227 (1965).

If a lien given an insider for a present consideration is not perfected as against a subsequent bona fide purchaser or is so perfected after a delay following an extension of credit secured by the lien, foreclosure of the lien may result in a transfer for an antecedent debt that is voidable under Section 5(b) infra. Subsection (b) does not apply to an action under Section 4(a)(1) to avoid a transfer or obligation because made or incurred with actual intent to hinder, delay, or defraud any creditor.

(6) Subsection (c) is an adaptation of § 547(c)(1) of the Bankruptcy Code. A transfer to an insider for an antecedent debt may be voidable under § 5(b) infra.

NORTH CAROLINA COMMENT

Subsection (a) concerns itself with what constitutes "value." The term, qualified with adjectives (principally "reasonably equivalent value") appears throughout N.C. Gen. Stat. § 39-23.4, -23.5 and -23.8. Two actions are stated to constitute the giving of "value": transfers of property and securing or satisfying prior debt.

Prior North Carolina law has dealt with what constitutes "full value" or "good consideration," terms that were employed in former N.C. Gen. Stat. § 39-16 and -19. The inquiry has generally focused on the amount of consideration, however, rather than on its character. Two types of consideration that have been analyzed in prior law are prior indebtedness (so-called "antecedent debt") and unfulfilled ("executory") promises. As to antecedent debt, prior North Carolina law laid down the same rule as that set out in subsection (a): antecedent debt qualified as consideration. *See Fowle v. McLean,* 168 N.C. 537, 541, 84 S.E. 852, 854 (1915). *See also* Howard, *50 N.C. L. Rev.* at 880-81.

Executory promises of support constituted consideration under prior North Carolina law, subject to a number of exceptions and limits. Services furnished to relatives were presumed to be gratuitous; the relationship of the parties could go far toward raising a presumption that a transfer involved fraudulent intent. *See* Howard, 50 *N.C. L. Rev.* at 881-82. Subsection (a) excludes from the definition of value unperformed promises to furnish support, subject only to an exception for a promise made in the ordinary course of the provisor's business. This blanket exclusion represents a change from prior North Carolina law. Subsection (a) does not expressly address unperformed promises other than to furnish support. *But see* Official Comment 4.

Subsection (b) rejects the so-called "Durrett" rule. *See Durrett v. Washington National Ins. Co.,* 621 F.2d 201 (5th Cir. 1980) (dealing with the Bankruptcy Act provision analogous to Bankruptcy Code § 548(a)(2)); Official Comment 5. The Durrett rule has been rejected by the United States Supreme Court. *BFP v. Resolution Trust Corp.,* 511 U.S. 531 (1994). There is no North Carolina law on this subject. However subsection (b) is consistent with the philosophy of North Carolina's unique Part 6 of Article 9 of the UCC (N.C. Gen. Stat. § 25-9-601 *et seq.*), which adopts a conclusive presumption that a sale conducted in a certain manner is commercially reasonable.

§ 39-23.4. Transfers fraudulent as to present and future creditors.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) With intent to hinder, delay, or defraud any creditor of the debtor; or

(2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
  a. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
  b. Intended to incur, or believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining intent under subdivision (a)(1) of this section, consideration may be given, among other factors, to whether:

(1) The transfer or obligation was to an insider;
(2) The debtor retained possession or control of the property transferred after the transfer;
(3) The transfer or obligation was disclosed or concealed;
(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
(5) The transfer was of substantially all the debtor's assets;
(6) The debtor absconded;
(7) The debtor removed or concealed assets;
(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
(10) The transfer occurred shortly before or shortly after a substantial debt was incurred;
(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor;
(12) The debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor reasonably should have believed that the debtor would incur debts beyond the debtor's ability to pay as they became due; and
(13) The debtor transferred the assets in the course of legitimate estate or tax planning. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) Section 4(a)(1) is derived from § 7 of the Uniform Fraudulent Conveyance Act. Factors appropriate for consideration in determining actual intent under paragraph (1) are specified in subsection (b).

(2) Section 4(a)(2) is derived from §§ 5 and 6 of the Uniform Fraudulent Conveyance Act but substitutes "reasonably equivalent value" for "fair consideration." The transferee's good faith was an element of "fair consideration" as defined in § 3 of the Uniform Fraudulent Conveyance Act, and lack of fair consideration was one of the elements of a fraudulent transfer as defined in four sections of the Uniform Act. The transferee's good faith is irrelevant to a determination of the adequacy of the consideration under this Act, but lack of good faith may be a basis for withholding protection of a transferee or obligee under § 8 infra.

(3) Unlike the Uniform Fraudulent Conveyance Act as originally promulgated, this Act does not prescribe different tests when a transfer is made for the purpose of security and when it is intended to be absolute. The premise of this Act is that when a transfer is for security only, the equity or value of the asset that exceeds the amount of the debt secured remains available to unsecured creditors and thus cannot be regarded as the subject of a fraudulent transfer merely because of the encumbrance resulting from an otherwise valid security transfer. Disproportion between the value of the asset securing the debt and the size of the debt secured does not, in the absence of circumstances indicating a purpose to hinder, delay, or defraud creditors, constitute an impermissible hindrance to the enforcement of other creditors' rights against the debtor-transferor. Cf. U.C.C. § 9-311.

(4) Subparagraph (i) of § 4(a)(2) is an adaptation of § 5 of the Uniform Fraudulent Conveyance Act but substitutes "unreasonably small [assets] in relation to the business or transaction" for "unreasonably small capital."

The reference to "capital" in the Uniform Act is ambiguous in that it may refer to net worth or to the par value of stock or to the consideration received for stock issued. The special meanings of "capital" in corporation law have no relevance in the law of fraudulent transfers. The subparagraph focuses attention on whether the amount of all the assets retained by the debtor was inadequate, i.e., unreasonably small, in light of the needs of the business or transaction in which the debtor was engaged or about to engage.

(5) Subsection (b) is a nonexclusive catalogue of factors appropriate for consideration by the court in determining whether the debtor had an actual intent to hinder, delay, or defraud one or more creditors. Proof of the existence of any one or more of the factors enumerated in subsection (b) may be relevant evidence as to the debtor's actual intent but does not create a presumption that the debtor has made a fraudulent transfer or incurred a fraudulent obligation. The list of factors includes most of the badges of fraud that have been recognized by the courts in construing and applying the Statute of 13 Elizabeth and § 7 of the Uniform Fraudulent Conveyance Act. Proof of the presence of certain badges in combination establishes fraud conclusively—i.e., without regard to the actual intent of the parties--when they concur as provided in § 4(a)(2) or in § 5. The fact that a transfer has been made to a relative or to an affiliated corporation has not been regarded as a badge of fraud sufficient to warrant avoidance when unaccompanied by any other evidence of fraud. The courts have uniformly recognized, however, that a transfer to a closely related person warrants close scrutiny of the other circumstances, including the nature and extent of the consideration exchanged. See 1 G. Glenn, Fraudulent Conveyances and Preferences § 307 (Rev. ed. 1940). The second, third, fourth, and fifth factors listed are all adapted from the classic catalogue of badges of fraud provided by Lord Coke in Twyne's Case, 3 Coke 80b, 76 Eng.Rep. 809 (Star Chamber 1601). Lord Coke also included the use of a trust and the recitation in the instrument of transfer that it "was made honestly, truly, and bona fide," but the use of the trust is fraudulent only when accompanied by elements or badges specified in this Act, and recitals of "good faith" can no longer be regarded as significant evidence of a fraudulent intent.

(6) In considering the factors listed in § 4(b) a court should evaluate all the relevant circumstances involving a challenged transfer or obligation. Thus the court may appropriately take into account all indicia negativing as well as those suggesting fraud, as illustrated in the following reported cases:

(a) Whether the transfer or obligation was to an insider: Salomon v. Kaiser (In re Kaiser), 722 F.2d 1574, 1582-83 (2d Cir. 1983) (insolvent debtor's purchase of two residences in the name of his spouse and the creation of a dummy corporation for the purpose of concealing assets held to evidence fraudulent intent); Banner Construction Corp. v. Arnold, 128 So.2d 893 (Fla.Dist.App. 1961) (assignment by one corporation to another having identical directors and stockholders constituted a badge of fraud); Travelers Indemnity Co. v. Cormaney, 258 Iowa 237, 138 N.W.2d 50 (1965) (transfer between spouses said to be a circumstance that shed suspicion on the transfer and that with other circumstances warranted avoidance); Hatheway v. Hanson, 230 Iowa 386, 297 N.W. 824 (1941) (transfer from parent to child said to require a critical examination of surrounding circumstances, which, together with other indicia of fraud, warranted avoidance); Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (transfer from daughter to mother said to be indicative of fraud but transfer held not to be fraudulent due to adequacy of consideration and delivery of possession by transferor).

(b) Whether the transferor retained possession or control of the property after the transfer: Harris v. Shaw, 224 Ark. 150, 272 S.W.2d 53 (1954) (retention of property by transferor said to be a badge of fraud and, together with other badges, to warrant avoidance of transfer); Stephens v. Reginstein, 89 Ala. 561, 8 So. 68 (1890) (transferor's retention of control and management of property and business after transfer held material in determining transfer to be fraudulent); Allen v. Massey, 84 U.S. (17 Wall.) 351 (1872) (joint possession of furniture by transferor and transferee considered in holding transfer to be fraudulent); Warner v. Norton, 61 U.S. (20 How.) 448 (1857) (surrender of possession by transferor deemed to negate allegations of fraud).

(c) Whether the transfer or obligation was concealed or disclosed: Walton v. First National Bank, 13 Colo. 265, 22 P. 440 (1889) (agreement between parties to conceal the transfer from the public said to be one of the strongest badges of fraud); Warner v. Norton, 61 U.S. (20 How.) 448 (1857) (although secrecy said to be a circumstance from which, when coupled with other badges, fraud may be inferred, transfer was held not to be fraudulent when made in good faith and transferor surrendered possession); W.T. Raleigh Co. v. Barnett, 253 Ala. 433, 44 So.2d 585 (1950) (failure to record a deed in itself said not to evidence fraud, and transfer held not to be fraudulent).

(d) Whether, before the transfer was made or obligation was incurred, a creditor sued or threatened to sue the debtor: Harris v. Shaw, 224 Ark. 150, 272 S.W. 2d 53 (1954) (transfer held to be fraudulent when causally connected to pendency of litigation and accompanied by other badges of fraud); Pergrem v. Smith, 255

S.W.2d 42 (Ky.App. 1953) (transfer in anticipation of suit deemed to be a badge of fraud; transfer held fraudulent when accompanied by insolvency of transferor who was related to transferee); Bank of Sun Prairie v. Hovig, 218 F.Supp. 769 (W.D.Ark. 1963) (although threat or pendency of litigation said to be an indicator of fraud, transfer was held not to be fraudulent when adequate consideration and good faith were shown).

(e) Whether the transfer was of substantially all the debtor's assets: Walbrun v. Babbitt, 83 U.S. (16 Wall.) 577 (1872) (sale by insolvent retail shop owner of all of his inventory in a single transaction held to be fraudulent); Cole v. Mercantile Trust Co., 133 N.Y. 164, 30 N.E. 847 (1892) (transfer of all property before plaintiff could obtain a judgment held to be fraudulent); Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299 (1955) (although transfer of all assets said to indicate fraud, transfer held not to be fraudulent because full consideration was paid and transferor surrendered possession).

(f) Whether the debtor had absconded: In re Thomas, 199 F. 214 (N.D.N.Y. 1912) (when debtor collected all of his money and property with the intent to abscond, fraudulent intent was held to be shown).

(g) Whether the debtor had removed or concealed assets: Bentley v. Young, 210 F. 202 (S.D.N.Y 1914), aff'd, 223 F. 536 (2d Cir. 1915) (debtor's removal of goods from store to conceal their whereabouts and to sell them held to render sale fraudulent); Cioli v. Kenourgios, 59 Cal.App. 690, 211 P. 838 (1922) (debtor's sale of all assets and shipment of proceeds out of the country held to be fraudulent notwithstanding adequacy of consideration).

(h) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred: Toomay v. Graham, 151 S.W.2d 119 (Mo.App. 1941) (although mere inadequacy of consideration said not to be a badge of fraud, transfer held to be fraudulent when accompanied by badges of fraud); Texas Sand Co. v. Shield, 381 S.W.2d 48 (Tex. 1964) (inadequate consideration said to be an indicator of fraud, and transfer held to be fraudulent because of inadequate consideration, pendency of suit, family relationship of transferee, and fact that all nonexempt property was transferred); Weigel v. Wood, 355 Mo. 11, 194 S.W.2d 40 (1946) (although inadequate consideration said to be a badge of fraud, transfer held not to be fraudulent when inadequacy not gross and not accompanied by any other badge; fact that transfer was from father to son held not sufficient to establish fraud).

(i) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation was incurred: Harris v. Shaw, 224 Ark. 150, 272 S.W. 2d 53 (1954) (insolvency of transferor said to be a badge of fraud and transfer held fraudulent when accompanied by other badges of fraud); Bank of Sun Prairie v. Hovig, 218 F.Supp. 769 (W.D. Ark. 1963) (although the insolvency of the debtor said to be a badge of fraud, transfer held not fraudulent when debtor was shown to be solvent, adequate consideration was paid, and good faith was shown, despite the pendency of suit); Wareheim v. Bayliss, 149 Md. 103, 131 A. 27 (1925) (although insolvency of debtor acknowledged to be an indicator of fraud, transfer held not to be fraudulent when adequate consideration was paid and whether debtor was insolvent in fact was doubtful).

(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred: Commerce Bank of Lebanon v. Halladale A Corp., 618 S.W. 2d 288, 292 (Mo.App. 1981) (when transferors incurred substantial debts near in time to the transfer, transfer was held to be fraudulent due to inadequate consideration, close family relationship, the debtor's retention of possession, and the fact that almost all the debtor's property was transferred).

(7) The effect of the two transfers described in § 4(b)(11), if not avoided, may be to permit a debtor and a lienor to deprive the debtor's unsecured creditors of access to the debtor's assets for the purpose of collecting their claims while the debtor, the debtor's affiliate or insider, and the lienor arrange for the beneficial use or disposition of the assets in accordance with their interests. The kind of disposition sought to be reached here is exemplified by that found in Northern Pacific Co. v. Boyd, 228 U.S. 482 (1913), the leading case in establishing the absolute priority doctrine in reorganization law. There the Court held that a reorganization whereby the secured creditors and the management-owners retained their economic interests in a railroad through a foreclosure that cut off claims of unsecured creditors against its assets was in effect a fraudulent disposition (id. at 502-05). See Frank, Some Realistic Reflections on Some Aspects of Corporate Reorganization, 19 Va. L.Rev. 541, 693 (1933). For cases in which an analogous injury to unsecured creditors was inflicted by a lienor and a debtor, see Jackson v. Star Sprinkler Corp. of Florida, 575 F.2d 1223, 1231-34 (8th Cir. 1978); Heath v. Helmick, 173 F.2d 157, 161-62 (9th Cir. 1949); Toner v. Nuss, 234 F.S. 457, 461-62 (E.D.Pa. 1964); and see In re Spotless Tavern Co., Inc., 4 F.Supp. 752, 753, 755 (D.Md. 1933).

(8) Nothing in § 4(b) is intended to affect the application of §§ 2-402(2), 9-205, 9-301, or 6-105 of the Uniform Commercial Code. Section 2-402(2) recognizes the generally prevailing rule that retention of possession of goods by a seller may be fraudulent but limits the application of the rule by negating any imputation of

fraud from "retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification." Section 9-205 explicitly negates any imputation of fraud from the grant of liberty by a secured creditor to a debtor to use, commingle, or dispose of personal property collateral or to account for its proceeds. The section recognizes that it does not relax prevailing requirements for delivery of possession by a pledgor. Moreover, the section does not mitigate the general requirement of § 9-301(1)(b) that a nonpossessory security interest in personal property must be accompanied by notice-filing to be effective against a levying creditor. Finally, like the Uniform Fraudulent Conveyance Act this Act does not pre-empt the statutes governing bulk transfers, such as Article 6 of the Uniform Commercial Code. Compliance with the cited sections of the Uniform Commercial Code does not, however, insulate a transfer or obligation from avoidance. Thus a sale by an insolvent debtor for less than a reasonably equivalent value would be voidable under this Act notwithstanding compliance with the Uniform Commercial Code.

NORTH CAROLINA COMMENTARY

This section and N.C. Gen. Stat. § 39-23.5 are the primary provisions of the UFTA, as they define which transfers are voidable.

This section differs from the version promulgated by the NCCUSL in three respects. The General Assembly deleted the phrase "or reasonably should have believed" in subsubdivision (a)(2)b. and added subdivision (b)(12). Because the drafters believed that this change converted constructive intent from an element of a conveyance deemed fraudulent to a factor to be considered in determining intent, the phrase "actual intent" was changed to "intent" in subsubdivision (a)(2)b. and the introductory language of subsection (b). The General Assembly also added subdivision (b)(13).

The reference to "obligation incurred" in subsection (a) represents a change from prior North Carolina law, and reflects a recognition that a debtor can harm creditors by incurring a fraudulent debt as well as by making a fraudulent transfer.

Except for the change described in the preceding sentence, subdivision (a)(1) does not change fraudulent transfer law in North Carolina. Under prior law, once a creditor had shown actual fraud on the part of the debtor, the transfer was void whether the creditor's claim was in existence at the time of the transaction or arose subsequently. *See generally* Howard, 50 *N.C. L. Rev.* at 887. Subdivision (a)(1) is subject to an important limitation: under N.C. Gen. Stat. § 39-23.8(a), a transfer or obligation is not voidable under subdivision (a)(1) against a person who took in good faith and for a reasonably equivalent value. With that limitation, subdivision (a)(1) is consistent with prior North Carolina law. *See* former N.C. Gen. Stat. § 39-19; *Aman v. Walker,* 165 N.C. 224, 227, 81 S.E. 162, 164 (1914) (principle four).

Subdivision (a)(2) is intended to address transactions for less than "reasonably equivalent value" that leave a debtor undercapitalized (*see* Official Comment 4) and applies both to present and subsequent creditors. It should be contrasted with N.C. Gen. Stat. § 39-23.5(a), which addresses transactions for less than "reasonably equivalent value" made when a debtor is or becomes "insolvent" but which applies only to creditors whose claims arose before the transaction.

Prior North Carolina law invalidated transactions for less than a "reasonably fair price" when the debtor failed "to retain property fully sufficient and available to pay his debts then existing." *Aman v. Walker,* 165 N.C. 224, 227, 18 S.E. 162, 164 (1914) (principle two). The rule clearly applied to transactions occurring when a debtor was "insolvent" in a "balance sheet" sense. *See* North Carolina Comment to N.C. Gen. Stat. § 39-23.2. Under prior law a subsequent creditor could use the fact that a conveyance left a business with "unreasonably small capital" as evidence of fraud, but the creditor nevertheless would have to prove fraudulent intent in order to void the conveyance. Howard, *50 N.C. L. Rev.* at 888.

Subdivision (a)(2) refers to transactions causing a debtor to incur debts beyond the debtor's ability to pay as they become due. As noted, under prior law when a debtor engaged in a transaction for less than a "reasonably fair price" and failed "to retain property fully sufficient and available to pay his creditors then existing," the transaction generally was voidable only by a creditor whose claim was in existence as of the time of the transaction in question. *See* North Carolina Comment to N.C. Gen. Stat. § 39-23.5. Subdivision (a)(2) broadens prior law since it can be invoked "whether the creditor's claim arose before or after" the transaction.

Subsection (b) is a non-exclusive list of "badges of fraud" that can be considered in establishing a debtor's fraudulent intent within the meaning of subdivision (a)(1). North Carolina law has long recognized "badges of fraud" in fraudulent conveyance litigation, *see, e.g., Peebles v. Horton,* 64 N.C. 374, 377 (1870), and decisions have identified several of the factors enumerated in subsection (b). Among these factors are close family relationship (*Wurlitzer Dist. Corp. v. Schofield,* 44 N.C. App. 520, 529, 261 S.E.2d 688, 694 (1980), *Nytco Leasing, Inc. v. Southeastern Motels, Inc.,* 40 N.C. App. 120, 130, 252 S.E.2d 826, 833 (1979), *Unaka & City Nat'l Bank v. Lewis,* 201 N.C. 148, 156, 159 S.E. 312, 316-17 (1931), *Peeler v. Peeler,* 109 N.C. 628, 634, 14 S.E. 59, 62 (1891)); retention of possession (*Piedmont Sav. Bank v. Levy,* 138 N.C. 274, 50 S.E. 657 (1905)); secrecy (*Reiger v. Davis,* 67 N.C. 185, 189 (1872)); and pending litigation (*Helms v. Green,* 105 N.C. 251, 262, 11 S.E. 470, 474 (1890)). As noted above, subdivision (b)(12) incorporates language deleted from UFTA § 4(a), where it would have had a more automatic effect, rather than being a "factor" that "may" be considered, and subdivision (b)(13) is wholly new.

Under prior law certain combinations of "badges of fraud" could give rise to a rebuttable presumption of fraudulent intent. Howard, 50 *N.C. L. Rev.* at 891-893. According to Official Comment 5, however, proof of the existence of any one or more of the factors enumerated in subsection (b) may be relevant evidence as to the debtor's intent but does not create a presumption that the debtor has engaged in a fraudulent transaction.

CASE NOTES

Intent to Defraud. — Evidence was insufficient to establish that payments made by a corporation to its president were made with intent to defraud. Norman Owen Trucking, Inc. v. Morkoski, 131 N.C. App. 168, 506 S.E.2d 267 (1998).

Real Property Transfers Found Fraudulent. — Summary judgment was properly granted to a bank seeking to set aside real property transfers by a loan guarantor to her children and their spouses based on the following statutory factors: transferring the property to insiders; retaining control and income of the property after the transfers; making the transfers after a suit had been threatened or initiated; transferring almost all of the transferor's assets; and receiving less than reasonably equivalent value for deeded property. Triangle Bank v. Eatmon, 143 N.C. App. 521, 547 S.E.2d 92, 2001 N.C. App. LEXIS 306 (2001).

Voluntary Nature of Payments. — Evidence was insufficient to establish that payments made by a corporation to its president were voluntary or "not for value" where there was no evidence as to the value, or lack thereof, of services provided by the president to the corporation in return for the payments. Norman Owen Trucking, Inc. v. Morkoski, 131 N.C. App. 168, 506 S.E.2d 267 (1998).

§ 39-23.5. Transfers fraudulent as to present creditors.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) Subsection (a) is derived from § 4 of the Uniform Fraudulent Conveyance Act. It adheres to the limitation of the protection of that section to a creditor who extended credit before the transfer or obligation described. As pointed out in Comment (2) accompanying § 4, this Act substitutes "reasonably equivalent value" for "fair consideration."

(2) Subsection (b) renders a preferential transfer—i.e., a transfer by an insolvent debtor for or on account of an antecedent debt--to an insider vulnerable as a fraudulent transfer when the insider had reasonable cause to believe that the debtor was insolvent. This subsection adopts for general application the rule of such cases as Jackson Sound Studios, Inc. v. Travis, 473 F.2d 503 (5th Cir. 1973) (security transfer of corporation's equipment to corporate principal's mother perfected on eve of bankruptcy of corporation held to be fraudulent); In re Lamie Chemical Co., 296 F. 24 (4th Cir. 1924) (corporate preference to corporate officers and directors held voidable by receiver when corporation was insolvent or nearly so

and directors had already voted for liquidation); Stuart v. Larson, 298 F. 223 (8th Cir. 1924), noted 38 Harv.L.Rev. 521 (1925) (corporate preference to director held voidable). See generally 2 G. Glenn, Fraudulent Conveyances and Preferences 386 (rev. ed. 1940). Subsection (b) overrules such cases as Epstein v. Goldstein, 107 F.2d 755, 757 (2d Cir. 1939) (transfer by insolvent husband to wife to secure his debt to her sustained against attack by husband's trustee); Hartford Accident & Indemnity Co. v. Jirasek, 254 Mich. 131, 139, 235 N.W. 836, 389 (1931) (mortgage given by debtor to his brother to secure an antecedent debt owed the brother sustained as not fraudulent).

(3) Subsection (b) does not extend as far as § 8(a) of the Uniform Fraudulent Conveyance Act and § 548(b) of the Bankruptcy Code in rendering voidable a transfer or obligation incurred by an insolvent partnership to a partner, who is an insider of the partnership. The transfer to the partner is not vulnerable to avoidance under § 4(b) unless the transfer was for an antecedent debt and the partner had reasonable cause to believe that the partnership was insolvent. The cited provisions of the Uniform Fraudulent Conveyance Act and the Bankruptcy Act make any transfer by an insolvent partnership to a partner voidable. Avoidance of the partnership transfer without reference to the partner's state of mind and the nature of the consideration exchanged would be unduly harsh treatment of the creditors of the partner and unduly favorable to the creditors of the partnership.

NORTH CAROLINA COMMENT

As in N.C. Gen. Stat. § 39-23.4(a), subsection (a) here adds "obligation incurred" as potential subjects of fraudulent transfer law. In other respects subsection (a) corresponds to principle two of *Aman v. Walker,* 165 N.C. 224, 227, 81 S.E. 162, 164 (1914), which invalidated conveyances for less than a "reasonably fair price" where the debtor "did not retain property fully sufficient and available to pay his debts then existing." Subsection (a) is narrower than prior law in one respect, however. Prior law gave standing to challenge a transaction only to creditors with claims in existence at the time of the transaction that remained unpaid, *see Powell Bros. v. McMullan Lumber Co.,* 153 N.C. 52, 58, 68 S.E. 926, 928-29 (1910), but once the transaction was voided, subsequent creditors could participate in the redistribution of assets recovered. Subsection (a), however, states only that the defined category of transactions "is fraudulent as to a creditor whose claim arose before" the transaction.

The effect of subsection (b) is to create a cause of action for "insider preferences" roughly comparable to similar claims under § 547 of the United States Bankruptcy Code (11 U.S.C. § 547). Unlike 11 U.S.C. § 547, however, subsection (b) contains the requirement that the insider must have had "reasonable cause to believe" the debtor was insolvent. N.C. Gen. Stat. § 39-23.8(f) contains several defenses addressed specifically to subsection (b).

Subsection (b) has no counterpart under prior North Carolina law.

CASE NOTES

Voluntary Nature of Payments. — Evidence was insufficient to establish that payments made by a corporation to its president were voluntary or "not for value" where there was no evidence as to the value, or lack thereof, of services provided by the president to the corporation in return for the payments. Norman Owen Trucking, Inc. v. Morkoski, 131 N.C. App. 168, 506 S.E.2d 267 (1998).

Intent to defraud. — Evidence was insufficient to establish that payments made by a corporation to its president were made with intent to defraud. Norman Owen Trucking, Inc. v. Morkoski, 131 N.C. App. 168, 506 S.E.2d 267 (1998).

Reasonably Equivalent Value. — Fund manager was denied summary judgment as to a Chapter 11 trustee's G.S. 39-23.5 fraudulent conveyance claim because a material factual dispute existed as to whether the Chapter 11 debtor had received reasonably equivalent value when it paid a $500,000 acquisition fee to the manager, after the manager deposited investment money with the debtor's corporate parent. Hutson v. Bay Harbour Mgmt., L.C. (In re E-Z Serve Convenience Stores, Inc.), 350 B.R. 203, 2006 Bankr. LEXIS 3963 (Bankr. M.D.N.C. 2006).

§ 39-23.6. When transfer is made or obligation is incurred.

For the purposes of this Article:

(1) A transfer is made:

  a. With respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and
  b. With respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this Article that is superior to the interest of the transferee.

(2) If applicable law permits the transfer to be perfected as provided in subdivision (1) of this section and the transfer is not so perfected before the commencement of an action for relief under this Article, the transfer is deemed made immediately before the commencement of the action.

(3) If applicable law does not permit the transfer to be perfected as provided in subdivision (1) of this section, the transfer is made when it becomes effective between the debtor and the transferee.

(4) A transfer is not made until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred:
  a. If oral, when it becomes effective between the parties; or
  b. If evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee. (1997-291, s. 2.)

OFFICIAL COMMENTARY

(1) One of the uncertainties in the law governing the avoidance of fraudulent transfers and obligations is the difficulty of determining when the cause of action arises. Subsection (b) clarifies this point in time. For transfers of real estate Section 6(1) fixes the time as the date of perfection against a good faith purchaser from the transferor and for transfers of fixtures and assets constituting personalty, the time is fixed as the date of perfection against a judicial lien creditor not asserting rights under this Act. Perfection typically is effected by notice-filing, recordation, or delivery of unequivocal possession. See U.C.C. §§ 9-302, 9-304, and 9-305 (security interest in personal property perfected by notice-filing or delivery of possession to transferee); 4 American Law of Property § 17.10-17.12 (1952) (recordation of transfer or delivery of possession to grantee required for perfection against bona fide purchaser from grantor). The provision for postponing the time a transfer is made until its perfection is an adaptation of § 548(d)(1) of the Bankruptcy Code. When no steps are taken to perfect a transfer that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to avoid it; without such a provision to cover that eventuality, an unperfected transfer would arguably be immune to attack. Some transfers — e.g., an assignment of a bank account, creation of a security interest in money, or execution of a marital or premarital agreement for the disposition of property owned by the parties to the agreement — may not be amenable to perfection as against a bona fide purchaser or judicial lien creditor. When a transfer is not perfectible as provided in paragraph (11), the transfer occurs for the purpose of this Act when the transferor effectively parts with an interest in the asset as provided in § 1(12) supra.

(2) Paragraph (4) requires the transferor to have rights in the asset transferred before the transfer is made for the purpose of this section. This provision makes clear that its purpose may not be circumvented by notice-filing or recordation of a document evidencing an interest in an asset to be acquired in the future. Cf. Bankruptcy Code § 547(e); U.C.C. § 9-203(1)(c).)

(3) Paragraph (5) is new. It is intended to resolve uncertainty arising from Rubin v. Manufacturers Hanover Trust Co., 661 F.2d 979, 989-91, 997 (2d Cir. 1981), insofar as that case holds that an obligation of guaranty may be deemed to be incurred when advances covered by the guaranty are made rather than when the guaranty first became effective between the parties. Compare Rosenberg, Intercorporate Guaranties and the Law of Fraudulent Conveyances: Lender Beware, 125 U.Pa.L.Rev. 235, 256-57 (1976).

An obligation may be avoided as fraudulent under this Act if it is incurred under the circumstances specified in § 4(a) or § 5(a). The debtor may receive reasonably equivalent value in exchange for an obligation incurred even though the benefit to the debtor is indirect. See Rubin v. Manufacturers Hanover Trust Co., 661 F.2d at 991-92; Williams v. Twin City Co., 251 F.2d 678, 681 (9th Cir. 1958); Rosenberg, supra at 243-46.

NORTH CAROLINA COMMENTARY

Subdivision (1) provides a general rule that is consistent with the rule found in bankruptcy law, *see* 11 U.S.C. §§ 548(d), 547(e)(1), and with the insolvency law North Carolina applies to insurance companies, *see* N.C. Gen. Stat. § 58-30-140(b).

Subdivision (4), providing that a transfer does not become effective until the debtor has rights in the collateral, mirrors the comparable provision in Article 9 of the UCC, N.C. Gen. Stat. § 25-9-203(1)(c).

CASE NOTES

Cited in Strawbridge v. Sugar Mt. Resort, Inc., 243 F. Supp. 2d 472, 2003 U.S. Dist. LEXIS 1513 (W.D.N.C. 2003).

§ 39-23.7. Remedies of creditors.

(a) In an action for relief against a transfer or obligation under this Article, a creditor, subject to the limitations in G.S. 39-23.8, may obtain:

(1) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by Article 35 of Chapter 1 of the General Statutes;

(3) Subject to applicable principles of equity and in accordance with applicable rules of civil procedure,

  a. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

  b. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

  c. Any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) This section is derived from §§ 9 and 10 of the Uniform Fraudulent Conveyance Act. Section 9 of that Act specified the remedies of creditors whose claims have matured, and § 10 enumerated the remedies available to creditors whose claims have not matured. A creditor holding an unmatured claim may be denied the right to receive payment for the proceeds of a sale on execution until his claim has matured, but the proceeds may be deposited in court or in an interest-bearing account pending the maturity of the creditor's claim. The remedies specified in this section are not exclusive.

(2) The availability of an attachment or other provisional remedy has been restricted by amendments of statutes and rules of procedure to reflect views of the Supreme Court expressed in Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969), and its progeny. This judicial development and the procedural changes that followed in its wake do not preclude resort to attachment by a creditor in seeking avoidance of a fraudulent transfer or obligation. See, e.g., Britton v. Howard Sav. Bank, 727 F.2d 315, 317-20 (3d Cir. 1984); Computer Sciences Corp. v. Sci-Tek Inc., 367 A.2d 658, 661 (Del. Super. 1976); Great Lakes Carbon Corp. v. Fontana, 54 A.D.2d 548, 387 N.Y.S. 2d 115 (1st Dep't 1976). Section 7(a)(2) continues the authorization for the use of at-

tachment contained in § 9(b) of the Uniform Fraudulent Conveyance Act, or of a similar provisional remedy, when the state's procedure provides therefor, subject to the constraints imposed by the due process clauses of the United States and state constitutions.

(3) Subsections (a) and (b) of § 10 of the Uniform Fraudulent Conveyance Act authorized the court, in an action on a fraudulent transfer or obligation, to restrain the defendant from disposing of his property, to appoint a receiver to take charge of his property, or to make any order the circumstances may require. Section 10, however, applied only to a creditor whose claim was unmatured. There is no reason to restrict the availability of these remedies to such a creditor, and the courts have not so restricted them. See, e.g., Lipskey v. Voloshen, 155 Md. 139, 143-45, 141 Atl. 402, 404-05 (1928) (judgment creditor granted injunction against disposition of property by transferee, but appointment of receiver denied for lack of sufficient showing of need for such relief); Matthews v. Schusheim, 36 Misc. 2d 918, 922-23, 235 N.Y.S.2d 973, 976-77, 991-92 (Sup.Ct. 1962) (injunction and appointment of receiver granted to holder of claims for fraud, breach of contract, and alimony arrearages; whether creditor's claim was mature said to be immaterial); Oliphant v. Moore, 155 Tenn. 359, 362-63, 293 S.W. 541, 542 (1927) (tort creditor granted injunction restraining alleged tortfeasor's disposition of property).

(4) As under the Uniform Fraudulent Conveyance Act, a creditor is not required to obtain a judgment against the debtor-transferor or to have a matured claim in order to proceed under subsection (a). See §§ 1(3) and (4) supra; American Surety Co. v. Conner, 251 N.Y. 1, 166 N.E. 783, 65 A.L.R. 244 (1929); 1 G. Glenn, Fraudulent Conveyances and Preferences 129 (Rev.ed. 1940).

(5) The provision in subsection (b) for a creditor to levy execution on a fraudulently transferred asset continues the availability of a remedy provided in § 9(b) of the Uniform Fraudulent Conveyance Act. See, e.g., Doland v. Burns Lbr. Co., 156 Minn. 238, 194 N.W. 636 (1923); Montana Ass'n of Credit Management v. Hergert, 181 Mont. 442, 449, 453, 593 P.2d 1059, 1063, 1065 (1979); Corbett v. Hunter, 292 Pa.Super. 123, 128, 436 A.2d 1036, 1038 (1981); see also American Surety Co. v. Conner, 251 N.Y. 1, 6, 166 N.E. 783, 784, 65 A.L.R. 244, 247 (1929) ("In such circumstances he [the creditor] might find it necessary to indemnify the sheriff and, when the seizure was erroneous, assumed the risk of error"); McLaughlin, Application of the Uniform Fraudulent Conveyance Act, 46 Harv.L.Rev. 404, 441-42 (1933).

(6) The remedies specified in § 7, like those enumerated in §§ 9 and 10 of the Uniform Fraudulent Conveyance Act, are cumulative. Lind v. O. N. Johnson Co., 204 Minn. 30, 40, 282 N.W. 661, 667, 119 A.L.R. 940 (1939) (Uniform Fraudulent Conveyance Act held not to impair or limit availability of the "old practice" of obtaining judgment and execution returned unsatisfied before proceeding in equity to set aside a transfer); Conemaugh Iron Works Co. v. Delano Coal Co., Inc., 298 Pa. 182, 186, 148 A. 94, 95 (1929) (Uniform Fraudulent Conveyance Act held to give an "additional optional remedy" and not to "deprive a creditor of the right, as formerly, to work out his remedy at law"); 1 G. Glenn, Fraudulent Conveyances and Preferences 120, 130, 150 (Rev. ed. 1940).

NORTH CAROLINA COMMENT

The remedies provided in N.C. Gen. Stat. § 39-23.7 are cumulative and are not exclusive. Subdivision (a)(1)'s remedy of avoiding the fraudulent transfer is consistent with prior North Carolina fraudulent conveyance law, which was derived from the Statute of 13 Elizabeth.

Attachment and other pre-judgment remedies or relief under subdivisions (a)(2) and (a)(3) are subject to applicable due process protections. They also are subject to the substantive and procedural requirements separately provided for those remedies under applicable law. *See, e.g.,* N.C. Gen. Stat. §§ 1-440.1, *et seq.*; 1A-1, Rule 65; 1-485, *et seq.*; and 1-501, *et seq.*

Any request for pre-judgment or post-judgment relief against a transferee under subsections (a)(3) or (b), or against an asset in the hands of a transferee, necessarily requires due process as to the transferee. For example, such a transferee has a right to notice and an opportunity to appear and assert the defenses and protections available under § 39-23.8. This is consistent with prior North Carolina law, which also required that the transferee be given notice of a fraudulent conveyance action. *See, e.g., Dawson Bank v. Harris,* 84 N.C. 206, 212 (1881).

§ 39-23.8. Defenses, liability, and protection of transferee.

(a) A transfer or obligation is not voidable under G.S. 39-23.4(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under G.S. 39-23.7(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c) of this section, or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) The first transferee of the asset or the person for whose benefit the transfer was made; or

(2) Any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee.

(c) If the judgment under subsection (b) of this section is based upon the value of the asset transferred, the judgment shall be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this Article, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) A lien on or a right to retain any interest in the asset transferred;

(2) Enforcement of any obligation incurred; or

(3) A reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under G.S. 39-23.4(a)(2) or G.S. 39-23.5 if the transfer results from:

(1) Termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) Enforcement of a security interest in compliance with Article 9 of Chapter 25 of the General Statutes, the Uniform Commercial Code.

(f) A transfer is not voidable under G.S. 39-23.5(b):

(1) To the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) If made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) If made pursuant to a good-faith effort to rehabilitate the debtor, and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) Subsection (a) states the rule that applies when the transferee establishes a complete defense to the action for avoidance based on Section 4(a)(1). The subsection is an adaptation of the exception stated in § 9 of the Uniform Fraudulent Conveyance Act. The person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. Chorost v. Grand Rapids Factory Showrooms, Inc., 77 F. Supp. 276, 280 (D.N.J. 1948), aff'd, 172 F.2d 327, 329 (3d Cir. 1949).

(2) Subsection (b) is derived from § 550(a) of the Bankruptcy Code. The value of the asset transferred is limited to the value of the levyable interest on the transferor, exclusive of any interest encumbered by a valid lien. See § 1(2) supra.

(3) Subsection (c) is new. The measure of the recovery of a defrauded creditor against a fraudulent transferee is usually limited to the value of the asset transferred at the time of the transfer. See, e.g., United States v. Fernon, 640 F.2d 609, 611 (5th Cir. 1981); Hamilton Nat'l Bank of Boston v. Halstead, 134 N.Y. 520, 31 N.E. 900 (1892); cf. Buffum v. Peter Barceloux Co., 289 U.S. 227 (1932) (transferee's objection to trial court's award of highest value of asset between the date of the transfer and the date of the decree of avoidance rejected because an award measured by value as of time of the transfer plus interest from that date would have been larger). The premise of § 8(c) is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor's recovery. Circumstances may require a departure from that measure of the recovery, however, as the

cases decided under the Uniform Fraudulent Conveyance Act and other laws derived from the Statute of 13 Elizabeth illustrate. Thus, if the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by improvements of the asset transferred or discharge of liens on the property, a good faith transferee should be reimbursed for the outlay for such a purpose to the extent the sale proceeds were increased thereby. See Bankruptcy Code § 550(d); Janson v. Schier, 375 A.2d 1159, 1160 (N.H. 1977); Anno., 8 A.L.R. 527 (1920). If the value of the asset has been diminished by severance and disposition of timber or minerals or fixtures, the transferee should be liable for the amount of the resulting reduction. See Damazo v. Wahby, 269 Md. 252, 257, 305 A.2d 138, 142 (1973). If the transferee has collected rents, harvested crops, or derived other income from the use or occupancy of the asset after the transfer, the liability of the transferee should be limited in any event to the net income after deduction of the expense incurred in earning the income. Anno., 60 A.L.R.2d 593 (1958). On the other hand, adjustment for the equities does not warrant an award to the creditor of consequential damages alleged to accrue from mismanagement of the asset after the transfer.

(4) Subsection (d) is an adaptation of § 548(c) of the Bankruptcy Code. An insider who receives property or an obligation from an insolvent debtor as security for or in satisfaction of an antecedent debt of the transferor or obligor is not a good faith transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or the obligation was incurred.

(5) Subsection (e)(1) rejects the rule adopted in Darby v. Atkinson (In re Farris), 415 F.Supp. 33, 39-41 (W.D.Okla. 1976), that termination of a lease on default in accordance with its terms and applicable law may constitute a fraudulent transfer. Subsection (e)(2) protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement of a secured creditor's rights pursuant to and in compliance with the provisions of Part 5 of Article 9 of the Uniform Commercial Code. Cf. Calaiaro v. Pittsburgh Nat'l Bank (In re Ewing), 33 B.R. 288, 9 C.B.C.2d 526, CCH B.L.R. 69,460 (Bk.W.D.Pa. 1983) (sale of pledged stock held subject to avoidance as fraudulent transfer in § 548 of the Bankruptcy Code), rev'd, 36 B.R. 476 (W.D.Pa. 1984) (transfer held not voidable because deemed to have occurred more than one year before bankruptcy petition filed). Although a secured creditor may enforce rights in collateral without a sale under § 9-502 or § 9-505 of the Code, the creditor must proceed in good faith (U.C.C. § 9-103) and in a "commercially reasonable" manner. The "commercially reasonable" constraint is explicit in U.C.C. § 9-502(2) and is implicit in § 9-505. See 2 G. Gilmore, Security Interests in Personal Property 1224-27 (1965).

(6) Subsection (f) provides additional defenses against the avoidance of a preferential transfer to an insider under § 5(b).

Paragraph (1) is adapted from § 547(c)(4) of the Bankruptcy Code, which permits a preferred creditor to set off the amount of new value subsequently advanced against the recovery of a voidable preference by a trustee in bankruptcy to the debtor without security. The new value may consist not only of money, goods, or services delivered on unsecured credit but also of the release of a valid lien. See, e.g., In re Ira Haupt & Co., 424 F.2d 722, 724 (2d Cir. 1970); Baranow v. Gibraltor Factors Corp. (In re Hygrade Envelope Co.), 393 F.2d 60, 65-67 (2d Cir.), cert. denied, 393 U.S. 837 (1968); In re John Morrow & Co., 134 F.686, 688 (S.D.Ohio 1901). It does not include an obligation substituted for a prior obligation. If the insider receiving the preference thereafter extends new credit to the debtor but also takes security from the debtor, the injury to the other creditors resulting from the preference remains undiminished by the new credit. On the other hand, if a lien taken to secure the new credit is itself voidable by a judicial lien creditor of the debtor, the new value received by the debtor may appropriately be treated as unsecured and applied to reduce the liability of the insider for the preferential transfer.

Paragraph (2) is derived from § 546(c)(2) of the Bankruptcy Code, which excepts certain payments made in the ordinary course of business or financial affairs from avoidance by the trustee in bankruptcy as preferential transfers. Whether a transfer was in the "ordinary course" requires a consideration of the pattern of payments or secured transactions engaged in by the debtor and the insider prior to the transfer challenged under § 5(b). See Tait & Williams, Bankruptcy Preference Laws: The Scope of Section 547(c)(2), 99 Banking L.J. 55, 63-66 (1982). The defense provided by paragraph (2) is available, irrespective of whether the debtor or the insider or both are engaged in business, but the prior conduct or practice of both the debtor and the insider-transferee is relevant.

Paragraph (3) is new and reflects a policy judgment that an insider who has previously extended credit to a debtor should not be deterred from extending further credit to the debtor in a good faith effort to save the debtor from a forced liquidation in bankruptcy or otherwise. A similar rationale has sustained the taking of security from an insolvent debtor for an advance to enable the debtor to stave off bankruptcy and extricate itself from financial stringency. Blackman v. Bechtel, 80 F.2d 505, 508-09 (8th Cir. 1935); Olive v. Tyler (In re

Chelan Land Co.), 257 F.497, 5 A.L.R. 561 (9th Cir. 1919); In re Robin Bros. Bakeries, Inc., 22 F.S. 662, 663-64 (N.D.Ill. 1937); see Dean v. Davis, 242 U.S. 438, 444 (1917). The amount of the present value given, the size of the antecedent debt secured, and the likelihood of success for the rehabilitative effort are relevant considerations in determining whether the transfer was in good faith.

NORTH CAROLINA COMMENT

Subsection (a) is consistent with former fraudulent conveyance law in North Carolina. *See, e.g.,* former N. C. Gen. Stat. § 39-19; *Aman v. Walker,* 165 N.C. 224, 81 S.E.2d 162 (1914) (principle four). A transferee has the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. Subsection (b) restricts a complaining creditor to relief equal to the lesser of the amount of his claim or the value of the property transferred, and in this respect is comparable to section 550(a) of the Bankruptcy Code, 11 U.S.C. § 550(a). Unlike former N.C. Gen. Stat. § 39-15, which provided only for avoidance of a conveyance in its entirety, subsection (b) establishes limits on a transferee's liability.

Subsection (c) is significant if the value of an asset has changed while in the hands of a transferee. As a matter of equity, when a transferee has enhanced the asset's value through improvements, the transferee should be entitled to retain the value of that increase despite avoidance of the transfer. Similarly, when a transferee has decreased the value (for example, by mining, harvesting timber or removing pre-existing improvements or fixtures), the transferee should be liable for the reduction. Subsection (c) allows a court, through application of equitable principles, to allocate post-transfer changes in value among the competing parties, which was not an issue specifically addressed under prior North Carolina statute or case law.

Subsection (d) provides that, when a transfer is avoided, a good faith transferee who gave less than reasonably equivalent value does not forfeit the value of the consideration given. It is an adaptation of section 548(c) of the Bankruptcy Code, 11 U.S.C. § 548(c), and preserves for a transferee specific rights in the property to the extent of actual value given. North Carolina's former fraudulent conveyance statutes did not provide similar protections for a good faith transferee, nor had the North Carolina courts addressed this issue.

Subsection (f) allows insiders certain additional defenses for transfers otherwise avoidable under N.C. Gen. Stat. § 39-23.5(b), which effectively balances that section's refusal to allow an insider's antecedent debt to qualify as reasonably equivalent value. Subsection (f) is derived from section 547(c) of the Bankruptcy Code, 11 U.S.C. § 547(c). The foundation of each of these defenses to "preferential" payment of insider debts — new value, ordinary course of business or financial affairs, and contemporaneous provision of value given in good faith to rehabilitate — is that encouraging normalized dealings with a financially distressed debtor may help that debtor avoid insolvency, receivership or bankruptcy, which is in the best interests of all creditors.

CASE NOTES

Cited in Quilling v. Cristell, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 8480 (W.D.N.C. Feb. 9, 2006).

§ 39-23.9. Extinguishment of cause of action.

A cause of action with respect to a fraudulent or voidable transfer or obligation under this Article is extinguished unless action is brought:

(1) Under G.S. 39-23.4(a)(1), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) Under G.S. 39-23.4(a)(2) or G.S. 39-23.5(a), within four years after the transfer was made or the obligation was incurred; or

(3) Under G.S. 39-23.5(b), within one year after the transfer was made or the obligation was incurred. (1997-291, s. 2.)

OFFICIAL COMMENT

(1) This section is new. Its purpose is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy. See Restatement of Conflict of Laws 2d § 143 Comments (b) and (c) (1971). The section rejects the rule applied in United States v. Gleneagles Inv. Co., 565 F.S. 556, 583 (M.D.Pa. 1983) (state statute of limitations held not to apply to action by United States based on Uniform Fraudulent Conveyance Act).

(2) Statutes of limitations applicable to the avoidance of fraudulent transfers and obligations vary widely from state to state and are frequently subject to uncertainties in their application. See Hesson, The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations, 32 Cornell L.Q. 222 (1946); Annos., 76 A.L.R. 864 (1932), 128 A.L.R. 1289 (1940), 133 A.L.R. 1311 (1941), 14 A.L.R.2d 598 (1950), and 100 A.L.R.2d 1094 (1965). Together with § 6, this section should mitigate the uncertainty and diversity that have characterized the decisions applying statutes of limitations to actions to fraudulent transfers and obligations. The periods prescribed apply, whether the action under this Act is brought by the creditor defrauded or by a purchaser at a sale on execution levied pursuant to § 7(b) and whether the action is brought against the original transferee or subsequent transferee. The prescription of statutory periods of limitation does not preclude the barring of an avoidance action for laches. See § 10 and the accompanying Comment infra.

NORTH CAROLINA COMMENT

The UFTA's limitations provisions make some change to the limitations period previously prescribed under North Carolina law. Under prior law, the limitations period applicable to fraudulent conveyances was three years and the limitations period began to run as of the time when the fraud was known or should have been discovered by the aggrieved party. *Cowart v. Whitley,* 39 N.C. App. 662, 664, 251 S.E.2d 627, 629 (1979).

The UFTA provides for three limitations periods. As to transfers made with actual intent to defraud, there is a four year statute that accrues upon the date of transfer, but with a proviso that an aggrieved party shall have a minimum limitations period of one year from the date the transfer was or reasonably could have been discovered. As to claims based on a transfer in which the debtor does not receive reasonably equivalent value, the limitations period is four years from the date of transfer. The limitations period for a transfer to an insider in payment of an antecedent debt is one year.

The introductory language of this section, which speaks in terms of a cause of action being "extinguished," is intended to indicate that lapse of the statutory period bars the right as well as the remedy. Thus, the discovery rule of N.C. Gen. Stat. § 1-52(9) would not apply to claims within subsections (b) or (c), even if such claims were made under circumstances such that N.C. Gen. Stat. § 1-52(9) would otherwise apply.

The defense of laches is available in appropriate cases. *See* N.C. Gen. Stat. § 39-23.10.

CASE NOTES

Cited in Strawbridge v. Sugar Mt. Resort, Inc., 243 F. Supp. 2d 472, 2003 U.S. Dist. LEXIS 1513 (W.D.N.C. 2003).

§ 39-23.10. Supplementary provisions.

Unless displaced by the provisions of this Article, the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions. (1997-291, s. 2.)

OFFICIAL COMMENT

This section is derived from § 11 of the Uniform Fraudulent Conveyance Act and § 1-103 of the Uniform Commercial Code. The section adds a reference to "laches" in recognition of the particular appropriateness of the application of this equitable doctrine to an untimely action to avoid a fraudulent transfer. See Louis Dreyfus Corp. v. Butler, 496 F.2d 806, 808 (6th Cir. 1974) (action to avoid transfers to debtor's wife when debtor was engaged in speculative business held to be barred by laches or applicable statutes of limitations); Cooch v. Grier, 30 Del.Ch. 255, 265-66, 59 A.2d 282, 287-88 (1948) (action under the Uniform Fraudulent Conveyance Act held barred by laches when the creditor was chargeable with inexcusable delay and the defendant was prejudiced by the delay).

NORTH CAROLINA COMMENT

This section is derived in part from section 1-103 of the Uniform Commercial Code. *See* N.C. Gen. Stat. § 25-1-103.

According to the Official Comment to this section, the defense of laches (which does not appear in UCC § 1-103) has been specifically added to the UFTA "in recognition of the particular appropriateness of the application of this equitable doctrine to an untimely action to avoid a fraudulent transfer."

§ 39-23.11. Uniformity of application and construction.

This act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Article among states enacting it. (1997-291, s. 2.)

NORTH CAROLINA COMMENT

A uniformity provision such as this appears in over two dozen uniform acts adopted in North Carolina. *See, e.g.,* N.C. Gen. Stat. § 25-1-102(2)(c) (Uniform Commercial Code). The North Carolina courts have occasionally cited such a provision in connection with their construction of a uniform act. *North Carolina Reinsurance Facility v. North Carolina Ins. Guaranty Ass'n.,* 67 N.C. App. 359, 372, 313 S.E.2d 253, 262 (1984) (applying N.C. Gen. Stat. § 58-155.17).

§ 39-23.12. Short title.

This Article may be cited as the Uniform Fraudulent Transfer Act. (1997-291, s. 2.)

Cross References. — As to arrest and bail in action for fraud on creditors, see G.S. 1-410, subdivision (5). As to attachment in action for fraud, see G.S. 1-440.1 et seq. As to preferences in deeds of trust or deeds of assignment for benefit of creditors, see G.S. 23-1 et seq. As to registration of conveyances, contracts to convey, and leases of land, see G.S. 47-18. As to registration, see the Connor Act, G.S. 47-17, 47-18, 47-19, and 47-20. As to statutes concerning married persons generally, see G.S. 52-1 et seq.

Legal Periodicals. — For discussion of the constructive trust as a remedy for the defrauded creditor, see 45 N.C.L. Rev. 424 (1967).

For analysis and comparison of the law of fraudulent conveyances in North Carolina with the Uniform Fraudulent Conveyances Act, see 50 N.C.L. Rev. 873 (1972).

For article on North Carolina's new Exemption Act, see 17 Wake Forest L. Rev. 865 (1981).

For note, "Branch Banking & Trust Co. v. Wright — Creditors' Rights to Entireties Property Awarded to Nondebtor Spouse Upon Divorce," see 64 N.C.L. Rev. 1471 (1986).

ARTICLE 4.

Voluntary Organizations and Associations.

§§ 39-24, 39-25: Repealed by Session Laws 2006-226, s. 2(a), effective January 1, 2007.

§ 39-26: Recodified as G.S. 59B-15(a) by Session Laws 2006-226, s. 2(b), effective January 1, 2007.

§ 39-27: Recodified as G.S. 59B-15(b) by Session Laws 2006-226, s. 2(b), effective January 1, 2007.

Article 5.

Sale of Building Lots in North Carolina.

§§ 39-28 through 39-32: Repealed by Session Laws 1981, c. 358.

Article 5A.

Control Corners in Real Estate Developments.

§ 39-32.1. Requirement of permanent markers as "control corners."

Whenever any person, firm or corporation shall hereafter divide any parcel of real estate into lots and lay off streets through such real estate development and sell or offer for sale any lot or lots in such real estate development, it shall be the duty of such person, firm or corporation to cause one or more corners of such development to be designated as "control corner" and shall cause two or more street center lines or offset lines within or on the street right-of-way lines to be permanently monumented at intersecting center lines or offset lines, points of curvature or such other control points, which monuments shall also be designated as control corners and to affix or place at such control corner or corners permanent markers which shall be of such material and affixed to the earth in such a manner as to insure as great a degree of permanence as is reasonably practical. (1947, c. 816, s. 1; 1959, c. 1159.)

Local Modification. — City of Charlotte: 2001-187, s. 1; Mecklenburg: 2001-187, s.2.

§ 39-32.2. Control corners fixed at time of recording plat or prior to sale.

Such control corner or corners, as described in G.S. 39-32.1, and such permanent marker or markers, as described in G.S. 39-32.1, must be designated and affixed at the time of recording the plat of said land or prior to the first sale of any lot or lots constituting a part of the real estate development which said person, firm or corporation has caused to be laid off in lots with designated streets. (1947, c. 816, s. 2.)

§ 39-32.3. Recordation of plat showing control corners.

Upon designating a control corner and affixing a permanent marker, said person, firm or corporation shall cause to be filed in the office of the register of deeds of the county in which the real estate development is located a map or plat showing the location of the control corner or corners and permanent marker or markers with adequate and sufficient description to enable a surveyor to locate such control corner or marker. No map or plat of a real estate subdivision or development made after July 1, 1947, shall be certified for recording pursuant to G.S 47-30.2 unless the location of control corners is shown thereon. (1947, c. 816, s. 3; 1997-309, s. 1.)

§ 39-32.4. Description of land by reference to control corner; use of control corner to fix distances and boundaries prima facie evidence of correct method.

Any lot or lots sold or otherwise transferred at the time of or subsequent to the establishment of a control corner may be described in any conveyance so as to include a reference to the location of said lot or lots which are being conveyed with respect to the control corner. Thereafter the use of the control corner in ascertaining distances so as to establish boundary lines of lots within or originally within such real estate development may be admissible as evidence in any court and shall be prima facie evidence of the correct method of determining the boundaries of any lot or lots within any such real estate development. (1947, c. 816, s. 4.)

Article 6.

Power of Appointment.

§ 39-33. Method of release or limitation of power.

A release or limitation of a power of appointment with respect to real or personal property exercisable by deed or will or otherwise may be effected, if such power may be released or limited under the laws of this State, by the execution by the holder of such power of an instrument in writing stating that the power is released or limited to the extent set forth therein, and the delivery of such instrument to any person who might be adversely affected if such power were exercised or to the fiduciary or one of the fiduciaries, if any, having possession or control of the property over which the power is exercisable. (1943, c. 665, s. 1.)

CASE NOTES

No Release or Estoppel Where Persons Adversely Affected Do Not Join in or Receive Deeds. — Where none of the deeds executed by the donee of a power is joined in by or executed to any person who would be adversely affected by the exercise of the power, there is no release or estoppel. Weston v. Hasty, 264 N.C. 432, 142 S.E.2d 23 (1965).

§ 39-34. Method prescribed in § 39-33 not exclusive.

The method of release prescribed in G.S. 39-33 is not exclusive, and this Article shall not invalidate or be construed to invalidate any instrument or contract of release or limitation of a power not executed and delivered in the manner provided in G.S. 39-33 or as invalidating any other act of release or limitation of a power, whether such instrument, contract or act has been heretofore or may be hereafter executed, delivered or done. (1943, c. 665, s. 2.)

CASE NOTES

Applied in Weston v. Hasty, 264 N.C. 432, 142 S.E.2d 23 (1965).

§ 39-35. Requisites of release or limitation as against creditors and purchasers for value.

No release or limitation of a power of appointment after March 8, 1943, which is made by the owner of the legal title to real property in this State shall be valid as against creditors and purchasers for a valuable consideration until an instrument in writing setting forth the release or limitation is executed and acknowledged in the manner required for a deed and recorded in the county where the real property is. (1943, c. 665, s. 3.)

ARTICLE 7.

Uniform Vendor and Purchaser Risk Act.

§ 39-36. Necessity for actual notice of release or limitation to bind fiduciary.

No fiduciary having possession or control of property over which a power of appointment is exercisable shall be bound or affected by any release or limitation of such power without actual notice thereof. (1943, c. 665, s. 4.)

CASE NOTES

Cited in Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§ 39-37. Short title.

This Article may be cited as the Uniform Vendor and Purchaser Risk Act. (1959, c. 514.)

Legal Periodicals. — For article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

§ 39-38. Uniformity of interpretation.

This Article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1959, c. 514.)

Legal Periodicals. — For article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Cited in Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§ 39-39. Risk of loss.

Any contract hereafter made in this State for the purchase and sale of realty shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise:

(1) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part thereof is destroyed without fault of the purchaser, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid;

(2) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid. (1959, c. 514.)

Legal Periodicals. — For article on options to purchase real property in North Carolina, see 44 N.C.L. Rev. 63 (1965).

For article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

Risk of Loss of Property Subject to Executory Contract. — The vendee in an executory contract for the sale of land holds an equitable interest therein. Absent inability of the vendor to convey, or express stipulation to the contrary, the risk of loss of property subject to such a contract falls on the vendee, who is treated as the equitable owner. In re Taylor, 60 N.C. App. 134, 298 S.E.2d 163 (1982).

Risk of Loss Not Shifted to High Bidder Prior to Closing. — Under this Act the making of the high bid in a foreclosure sale does not operate to extinguish the seller's interests and shift all risks to the purchaser. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Nothing in this section shifts the risk of loss prior to closing to the high bidder. In fact, the high bidder cannot compel relinquishment of the premises until the price has been paid in full, and the mortgagor remains subject to personal liability on the note until then. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

§§ 39-40 through 39-43: Reserved for future codification purposes.

ARTICLE 8.

Business Trusts.

§ 39-44. Definition.

The term "business trust" whenever used or referred to in this Article shall mean any unincorporated association, including but not limited to a Massachusetts business trust, engaged in any business or trade under a written instrument or declaration of trust under which the beneficial interest therein is divided into shares represented by certificates or shares of beneficial interest. (1977, c. 768, s. 1.)

Legal Periodicals. — For survey of 1977 law on business associations, see 56 N.C.L. Rev. 939 (1977).

§ 39-45. Authority to acquire and hold real estate.

Business trusts are hereby authorized and empowered to acquire real estate and interests therein and to hold the same in their trust names and may sue and be sued in their trust names. (1977, c. 768, s. 1.)

§ 39-46. Title vested; conveyance; probate.

Where real estate has been or may be hereafter conveyed to a business trust in its trust name or in the names of its trustees in their capacity as trustees of such business trust, the said title shall vest in said business trust, and the said real estate and interests therein may be conveyed, encumbered or otherwise disposed of by said business trust in its trust name by an instrument signed by at least one of its trustees, its president, a vice-president or other duly authorized officer, and attested or countersigned by its secretary, assistant secretary or such other officer as is the custodian of its common seal, not acting in dual capacity, with its official seal affixed, the said conveyance to be proven and probated in the same manner as provided by law for conveyances by corporations. Any conveyance, encumbrance or other disposition thus made by any such business trust shall convey good and sufficient title to said real estate and interests therein in accordance with the provisions of said conveyance; provided, however, that with respect to any such conveyance, encumbrance or other disposition effected after June 28, 1977, there must be recorded in the county where the land lies a memorandum of the written instrument or declaration of trust referred to in G.S. 39-44. As a minimum such memorandum shall set forth the name, date and place of filing, if any, of such written instrument or declaration of trust, and the place where the written instrument or declaration of trust, and all amendments thereto, is kept and may be examined upon reasonable notice, which place need not be a public office. (1977, c. 768, s. 1.)

§ 39-47. Prior deeds validated.

All deeds, leases, mortgages, deeds of trust or other conveyances heretofore executed in conformity with this Article and which are proper in all other respects are declared to be sufficient to pass title to real estate held by such business trusts in accordance with the provisions of such instruments. (1977, c. 768, s. 1.)

§§ 39-48, 39-49: Reserved for future codification purposes.

ARTICLE 9.

Disclosure.

§ 39-50. Death, illness, or conviction of certain crimes not a material fact.

In offering real property for sale it shall not be deemed a material fact that the real property was occupied previously by a person who died or had a serious illness while occupying the property or that a person convicted of any crime for which registration is required by Article 27A of Chapter 14 of the General Statutes occupies, occupied, or resides near the property; provided, however, that no seller may knowingly make a false statement regarding any such fact. (1989, c. 592, s. 1; 1998-212, s. 17.16A(a).)

§§ 39-51 through 39-59: Reserved for future codification purposes.

Article 10.

Real Property Tax Proration.

§ 39-60. Property tax proration on sale of real property.

Unless otherwise provided by contract, property taxes on the real property being sold shall be prorated between the seller and buyer of the real property on a calendar-year basis. (2006-106, s. 7.)

Editor's Note. — Session Laws 2006-106, s. 10, made this Article effective for contracts entered into on or after October 1, 2006.

Chapter 40.

Eminent Domain.

§§ 40-1 through 40-53: Repealed by Session Laws 1981, c. 919, s. 1.

Cross References. — For present provisions as to eminent domain, see Chapter 40A.

Editor's Note. — Section 40-7.1, relating to compensation for taking of water and sewer facilities by political subdivisions, was also repealed by Session Laws 1981, c. 627, effective upon ratification, June 19, 1981.

Chapter 40A.

Eminent Domain.

Article 1.

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40A-34. Defective title; how cured.
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Article 3.

Condemnation by Public Condemnors.

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40A-42. Vesting of title and right of possession; injunction not precluded.
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40A-54. Final judgments.
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40A-57 through 40A-61. [Reserved.]

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Just Compensation.

40A-62. Application.
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40A-65. Effect of condemnation procedure on value.
40A-66. Compensation to reflect project as planned.
40A-67. Entire tract.
40A-68. Acquisition of property subject to lien.
40A-69. Property subject to life tenancy.

Article 5.

Return of Condemned Property.

40A-70. Return of condemned property.

Article 1.

General.

§ 40A-1. Exclusive provisions.

(a) Notwithstanding the provisions of any local act, it is the intent of the General Assembly that, effective August 15, 2006, the uses set out in G.S. 40A-3 are the exclusive uses for which the authority to exercise the power of eminent domain is granted to private condemnors, local public condemnors, and other public condemnors. Effective August 15, 2006, a local act granting the authority to exercise the power of eminent domain to a private condemnor, local public condemnor, or other public condemnor for a use or purpose other than those granted to it in G.S. 40A-3(a), (b), (b1), or (c) is not effective for that use or purpose. Provided that, any eminent domain action commenced before August 15, 2006, for a use or purpose granted in a local act, may be lawfully completed pursuant to the provisions of that local act. The provisions of this subsection shall not repeal any provision of a local act limiting the purposes for which the authority to exercise the power of eminent domain may be used.

(b) It is the intent of the General Assembly that the procedures provided by this Chapter shall be the exclusive condemnation procedures to be used in this State by all private condemnors and all local public condemnors. All other provisions in laws, charters, or local acts authorizing the use of other procedures by municipal or county governments or agencies or political subdivisions thereof, or by corporations, associations or other persons are hereby repealed effective January 1, 1982. Provided, that any condemnation proceeding initiated prior to January 1, 1982, may be lawfully completed pursuant to the provisions previously existing.

(c) This Chapter shall not repeal any provision of a local act limiting the purposes for which property may be condemned. Notwithstanding the language of G.S. 40A-3(b), this Chapter also shall not repeal any provision of a local act creating any substantive or procedural requirement or limitation on the authority of a local public condemnor to exercise the power of eminent domain outside of its boundaries. (1981, c. 919, s. 1; 2006-224, s. 1; 2006-259, s. 47.)

Local Modification. — City of Charlotte: 2000-26, s. 1, as amended by 2000-89, s. 1, as amended by 2001-304, s. 1, as amended by 2007-255, s. 1; city of Conover: 1985, c. 422; city of Hickory: 1985, c. 422; city of Rocky Mount: 2003-327, s. 1; city of Wilmington: 1977, c. 495, as amended by 2007-57, s. 1; city of Wilson: 1989, c. 348, s. 1; city of Winston-Salem: 1985, c. 47; 1987, c. 95; town of Apex: 1987, c. 70; 2003-88, s. 1 (expires December 31, 2008); town of Holly Springs: 2005-57, s. 1; town of Maiden: 1985, c. 422.

Cross References. — As to the power given railroad companies to condemn land, see G.S. 62-220. As to condemning land for school buildings, see G.S. 115C-517. As to condemning land for hospitals, see G.S. 131E-10. As to condemnation by the Department of Transportation, see G.S. 136-19, 136-103 through 136-121.1. As to condemnation for drainage ditches, see G.S. 156-1 et seq.

Editor's Note. — Session Laws 1981, c. 919, s. 1 repealed former Chapter 40, relating to eminent domain, and enacted this Chapter. The historical citations for corresponding sections of the former chapter have been placed under sections of this Chapter. Annotations derived from cases decided under the former chapter or similar former provisions have been placed under sections of this Chapter.

Effect of Amendments. — Session Laws 2006-224, s. 1, effective August 15, 2006, added subsection (a); designated the previously existing paragraphs as subsections (b) and (c), respectively; in subsection (c), in the first sentence, deleted "enlarging or" following "local act" and made a minor stylistic change.

Session Laws 2006-259, s. 47, effective August 23, 2006, substituted "August 15, 2006" for "July 1, 2006" three times in subsection (a).

Legal Periodicals. — For article on eminent domain in North Carolina, see 35 N.C.L. Rev. 296 (1957).

For case law survey as to eminent domain, see 44 N.C.L. Rev. 941, 1003 (1966).

For article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

For note on expansion of definition of "taking" in eminent domain proceedings, see 47 N.C.L. Rev. 441 (1969).

For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970).

For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

For article, "Out of Focus: The Fuzzy Line Between Regulatory 'Takings' and Valid Zoning-Related 'Exactions' in North Carolina and Federal Jurisprudence," see 16 Campbell L. Rev. 333 (1994).

For an article on statutory easements by necessity or cartways, see 75 N.C.L. Rev. 1943 (1997).

For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

***Editor's Note.** — Many of the cases below were decided under similar former provisions.*

Power of Eminent Domain Is Attribute of Sovereignty. — The power of eminent domain is one of the attributes of a sovereign state. Redevelopment Comm'n v. Hagins, 258 N.C. 220, 128 S.E.2d 391 (1962).

Which Exists Independently of Constitutional Provisions. — The right to take private property for public use exists independently of constitutional provisions. In fact, such provisions are limitations on the State's power to exercise the right. Redevelopment Comm'n v. Hagins, 258 N.C. 220, 128 S.E.2d 391 (1962).

And Is Exclusively in Control of Legislature. — The method of taking land for a public use is within the exclusive control of the legislature, limited by organic law, and the courts cannot help the injured landowner, where the statute has been strictly followed, until the question of compensation is reached. Durham v. Rigsbee, 141 N.C. 128, 53 S.E. 531 (1906).

The right of eminent domain is possessed by the government, and may be exercised by the legislature or under its authority. It is peculiarly fit to be wielded by the legislature, as it is a power founded on necessity. Raleigh & G.R.R. v. Davis, 19 N.C. 451 (1837).

Unless Properly Delegated. — The right to exercise the power of eminent domain belongs to every independent government exercising sovereign power, as a necessary incident to its sovereignty, and this power, unless otherwise provided in the organic law, rests solely in the State unless by legislative action the power is delegated, the purposes for which it may be exercised enumerated, and the procedure for such exercise prescribed. Mount Olive v. Cowan, 235 N.C. 259, 69 S.E.2d 525 (1952).

Reason for Eminent Domain. — The right of eminent domain is granted because the public interest requires that private property shall be taken for public use under the circumstances and in the manner prescribed by law. Raleigh, C. & S.R.R. v. Mecklenburg Mfg. Co., 166 N.C. 168, 82 S.E. 5 (1914).

Public necessity alone justifies governmental taking of private property. State Hwy. Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

The power of eminent domain cannot be implied or inferred from vague or doubtful language. Commissioners of Beaufort County v. Bonner, 153 N.C. 66, 68 S.E. 970 (1910).

If the statute is silent on the subject it is to be presumed that the legislature intended that the necessary property should be obtained by contract. Commissioners of Beaufort County v. Bonner, 153 N.C. 66, 68 S.E. 970 (1910).

Statutes Giving Power Must Be Strictly Construed. — Statutes which authorize the exercise of the power of eminent domain must be strictly construed. Durham & N.R.R. v. Richmond & D.R.R., 106 N.C. 16, 10 S.E. 1041 (1890); Caroline & N.W.R.R. v. Pennearden Lumber & Mfg. Co., 132 N.C. 644, 44 S.E. 358 (1903); Board of Educ. v. Forrest, 193 N.C. 519, 137 S.E. 431 (1927).

Strict Construction of Authority to Condemn Land for Schools. — The statutory authority given the county board of education to condemn land for school purposes will be strictly construed as to the extent or limit of the power given. Board of Educ. v. Forrest, 193 N.C. 519, 137 S.E. 431 (1927).

Chapter Is Applicable to Private Landowners. — Even though private landowners are not specifically mentioned in G.S. 40A-3, they are bound by the provisions of this Chapter. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

The right of eminent domain can be exercised only in the mode pointed out in the statute conferring it. Allen v. Wilmington & W.R.R., 102 N.C. 381, 9 S.E. 4 (1889).

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — Section 40A-12, together with G.S. 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this Chapter. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Applicability of Rule 60, Rules of Civil Procedure. — Rule 60, of the Rules of Civil Procedure, applies to proceedings under Chapter 40A in order to provide relief from judgments or orders when necessary to promote the interests of justice. City of Durham v. Woo, 129 N.C. App. 183, 497 S.E.2d 457 (1998), cert. denied, 348 N.C. 496, 518 S.E.2d 380 (1998).

Conversion of Private Condemnation Proceedings into Quiet Title Action. — Trial court did not err by applying G.S. 1A-1, Rule 15(b) in such a way as to convert condemnation proceedings brought by private condemnors, with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

Necessity to Allege and Prove Compliance with Procedural Requirements. — When a city undertakes to exercise the power of eminent domain which has been granted to it by the legislature, it is necessary that it both allege and prove compliance with statutory procedural requirements. City of Charlotte v. McNeely, 8 N.C. App. 649, 175 S.E.2d 348 (1970).

The provisions of the general railroad act prevail over provisions in the charter of a railroad company, unless the charter specifically designates and repeals these provisions of the general act. Durham & N.R.R. v. Richmond & D.R.R., 106 N.C. 16, 10 S.E. 1041 (1890).

Municipal Annexation Proceedings Enjoined by Condemnor-County. — When a county initiates condemnation of property for a sanitary landfill, and the property is being considered for voluntary annexation into a municipality, the county may proceed with the condemnation action. The county is entitled to an injunction enjoining the annexation proceeding, and the property owners and the municipality may raise the proposed annexation in the answer to the condemnation complaint, for appropriate consideration by the court. Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216, cert. denied, 320 N.C. 798, 361 S.E.2d 91 (1987).

Applied in Bandy v. City of Charlotte, 72 N.C. App. 604, 325 S.E.2d 17 (1985); Nelson v. Town of Highlands, 159 N.C. App. 393, 583 S.E.2d 313, 2003 N.C. App. LEXIS 1516 (2003).

Cited in Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d 280 (1987); Town of Emerald Isle ex rel. Smith v. State, 320 N.C. 640, 360 S.E.2d 756 (1987); Dare County Bd. of Educ. v. Sakaria, 118 N.C. App. 609, 456 S.E.2d 842 (1995); Hancock v. Tenery, 131 N.C. App. 149, 505 S.E.2d 315 (1998).

§ 40A-2. Definitions.

As used in this Chapter the following words and phrases have the meanings indicated unless the context clearly requires another meaning:

(1) "Condemnation" means the procedure prescribed by law for exercising the power of eminent domain.

(2) "Condemnor" means those listed in G.S. 40A-3.

(3) "Eminent domain" means the power to divest right, title or interest from the owner of property and vest it in the possessor of the power against the will of the owner upon the payment of just compensation for the right, title or interest divested.

(4) "Judge" means a resident judge of the superior court in the district where the cause is pending, or special judge residing in said district, or a judge of the superior court assigned to hold the courts of said district or an emergency or special judge holding court in the county where the cause is pending.

(5) "Owner" includes the plural when appropriate and means any person having an interest or estate in the property.

(6) "Person" includes the plural when appropriate and means a natural person, and any legal entity capable of owning or having interest in property.

(7) "Property" means any right, title, or interest in land, including leases and options to buy or sell. "Property" also includes rights of access, rights-of-way, easements, water rights, air rights, and any other privilege or appurtenance in or to the possession, use, and enjoyment of land. (1981, c. 919, s. 1.)

Legal Periodicals. — For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

Editor's Note. — *Many of the cases below were decided under similar former provisions.*

Meaning of "Eminent Domain". — The words "eminent domain" mean the power of the sovereign or some agency authorized by it to take private property for public use. VEPCO v. King, 259 N.C. 219, 130 S.E.2d 318 (1963).

Eminent Domain Not Intended Absent Provision for Compensation. — Where a statute makes no provision for compensation, it is to be presumed that the legislature did not intend that the power of eminent domain should be exercised. Commissioners of Beaufort County v. Bonner, 153 N.C. 66, 68 S.E. 970 (1910).

Impairment of Property Rights Unconstitutional Unless Compensation Provided. — A statutory amendment to a former statute which destroyed and sensibly impaired vested property rights acquired under the former statute or which attempted to transfer them either to the public or any other, except under the principles of eminent domain and upon compensation duly made, was unconstitutional and invalid. Watts v. Lenoir & Blowing Rock Turnpike Co., 181 N.C. 129, 106 S.E. 497 (1921).

Definition of "property" is broad enough to include profits à prendre, requiring just compensation to the owner of that interest when the right to enter upon lands is lost through condemnation. In re Lee, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

Inclusion of Equipment Within Definition of Property. — It was not error for trial court to allow testimony about the value of the property to be taken which included various equipment present on the property, as the authority proposing to take the property never specifically excluded this equipment from its taking, and it could be included within the definition of property in G.S. 40A-2(7). Piedmont Triad Reg'l Water Auth. v. Lamb, 150 N.C. App. 594, 564 S.E.2d 71, 2002 N.C. App. LEXIS 584 (2002), cert. denied, 356 N.C. 166, 568 S.E.2d 608 (2002).

Diversion of Water as a "Taking". — Diversion of the natural flow and drainage of streams and surface waters incident to the construction of a highway, resulting in the periodic flooding of the lands of a proprietor, is a "taking" of property for which just compensation must be paid. Braswell v. State Hwy. & Pub. Works Comm'n, 250 N.C. 508, 108 S.E.2d 912 (1959).

The term "other persons" as used in the cartway statute, does include counties. Davis v. Forsyth County, 117 N.C. App. 725, 453 S.E.2d 231 (1995).

Month-to-Month Tenant as Owner. — A tenant having month-to-month tenancy based upon periodic rental payments without a written document is considered to be an "owner" as defined by this section, and has standing to challenge a condemnation proceeding itself as arbitrary, capricious, and an abuse of discretion. Transcontinental Gas Pipe Line Corp. v. Calco Enters., 132 N.C. App. 237, 511 S.E.2d 671 (1999).

Digging a ditch across private land to drain a public road amounts to a taking of private property for a public use. State v. New, 130 N.C. 731, 41 S.E. 1033 (1902).

Statute giving power to overseers of roads to cut poles on adjacent land was an instance of the exercise on the part of the sovereign of the right to take private property for the use of the public upon making compensation. Collins v. Creecy, 53 N.C. 333 (1861).

Where a landowner has granted a right-of-way over his land, he must look to his contract for compensation, as it cannot be awarded to him in condemnation proceedings, provided the contract is valid, and all its conditions have been complied with by the grantee. Feldman v. Transcontinental Gas Pipe Line Corp., 9 N.C. App. 162, 175 S.E.2d 713 (1970).

Cited in VEPCO v. Tillett, 316 N.C. App. 73, 343 S.E.2d 188 (1986); Dare County Bd. of Educ. v. Sakaria, 127 N.C. App. 585, 492 S.E.2d 369 (1997); City of Durham v. Woo, 129 N.C. App. 183, 497 S.E.2d 457 (1998), cert. denied, 348 N.C. 496, 518 S.E.2d 380 (1998).

§ 40A-3. By whom right may be exercised.

(a) Private Condemnors. — For the public use or benefit, the persons or organizations listed below shall have the power of eminent domain and may acquire by purchase or condemnation property for the stated purposes and other works which are authorized by law.

(1) Corporations, bodies politic or persons have the power of eminent domain for the construction of railroads, power generating facilities,

substations, switching stations, microwave towers, roads, alleys, access railroads, turnpikes, street railroads, plank roads, tramroads, canals, telegraphs, telephones, electric power lines, electric lights, public water supplies, public sewerage systems, flumes, bridges, and pipelines or mains originating in North Carolina for the transportation of petroleum products, coal, gas, limestone or minerals. Land condemned for any liquid pipelines shall:

a. Not be less than 50 feet nor more than 100 feet in width; and
b. Comply with the provisions of G.S. 62-190(b).

The width of land condemned for any natural gas pipelines shall not be more than 100 feet.

(2) School committees or boards of trustees or of directors of any corporation holding title to real estate upon which any private educational institution is situated, have the power of eminent domain in order to obtain a pure and adequate water supply for such institution.

(3) Franchised motor vehicle carriers or union bus station companies organized by authority of the Utilities Commission, have the power of eminent domain for the purpose of constructing and operating union bus stations: Provided, that this subdivision shall not apply to any city or town having a population of less than 60,000.

(4) Any railroad company has the power of eminent domain for the purposes of: constructing union depots; maintaining, operating, improving or straightening lines or of altering its location; constructing double tracks; constructing and maintaining new yards and terminal facilities or enlarging its yard or terminal facilities; connecting two of its lines already in operation not more than six miles apart; or constructing an industrial siding.

(5) A condemnation in fee simple by a State-owned railroad company for the purposes specified in subdivision (4) of this subsection and as provided under G.S. 124-12(2).

The width of land condemned for any single or double track railroad purpose shall be not less than 80 feet nor more than 100 feet, except where the road may run through a town, where it may be of less width, or where there may be deep cuts or high embankments, where it may be of greater width.

No rights granted or acquired under this subsection shall in any way destroy or abridge the rights of the State to regulate or control any railroad company or to regulate foreign corporations doing business in this State. Whenever it is necessary for any railroad company doing business in this State to cross the street or streets in a town or city in order to carry out the orders of the Utilities Commission, to construct an industrial siding, the power is hereby conferred upon such railroad company to occupy such street or streets of any such town or city within the State. Provided, license so to do be first obtained from the board of aldermen, board of commissioners, or other governing authorities of such town or city.

No such condemnor shall be allowed to have condemned to its use, without the consent of the owner, his burial ground, usual dwelling house and yard, kitchen and garden, unless condemnation of such property is expressly authorized by statute.

The power of eminent domain shall be exercised by private condemnors under the procedures of Article 2 of this Chapter.

(b) Local Public Condemnors — Standard Provision. — For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.

(1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to

the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.

(2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.

(3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.

(4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.

(5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.

(6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.

(7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.

(8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3B, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.

(9) Opening, widening, extending, or improving public wharves.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by Chapter 115C of the General Statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this Chapter.

(b1) Local Public Condemnors — Modified Provision for Certain Localities. — For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property or interest therein, either inside or outside its boundaries, for the following purposes.

(1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136. The provisions of this subdivision (1) shall not apply to counties.

(2) Establishing, extending, enlarging, or improving any of the public enterprises listed in G.S. 160A-311 for cities, or G.S. 153A-274 for counties.

(3) Establishing, enlarging, or improving parks, playgrounds, and other recreational facilities.

(4) Establishing, extending, enlarging, or improving storm sewer and drainage systems and works, or sewer and septic tank lines and systems.

(5) Establishing, enlarging, or improving hospital facilities, cemeteries, or library facilities.

(6) Constructing, enlarging, or improving city halls, fire stations, office buildings, courthouse jails and other buildings for use by any department, board, commission or agency.

(7) Establishing drainage programs and programs to prevent obstructions to the natural flow of streams, creeks and natural water channels or improving drainage facilities. The authority contained in this subdivision is in addition to any authority contained in Chapter 156.

(8) Acquiring designated historic properties, designated as such before October 1, 1989, or acquiring a designated landmark designated as such on or after October 1, 1989, for which an application has been made for a certificate of appropriateness for demolition, in pursuance of the purposes of G.S. 160A-399.3, Chapter 160A, Article 19, Part 3, effective until October 1, 1989, or G.S. 160A-400.14, whichever is appropriate.

(9) Opening, widening, extending, or improving public wharves.

(10) Engaging in or participating with other governmental entities in acquiring, constructing, reconstructing, extending, or otherwise building or improving beach erosion control or flood and hurricane protection works, including, but not limited to, the acquisition of any property that may be required as a source for beach renourishment.

(11) Establishing access for the public to public trust beaches and appurtenant parking areas.

The board of education of any municipality or county or a combined board may exercise the power of eminent domain under this Chapter for purposes authorized by Chapter 115C of the General Statutes.

The power of eminent domain shall be exercised by local public condemnors under the procedures of Article 3 of this chapter.

This subsection applies only to Carteret and Dare Counties, the Towns of Atlantic Beach, Carolina Beach, Caswell Beach, Emerald Isle, Holden Beach, Indian Beach, Kill Devil Hills, Kitty Hawk, Kure Beach, Nags Head, North Topsail Beach, Oak Island, Ocean Isle Beach, Pine Knoll Shores, Sunset Beach, Surf City, Topsail Beach, and Wrightsville Beach, and the Village of Bald Head Island.

(c) Other Public Condemnors. — For the public use or benefit, the following political entities shall possess the power of eminent domain and may acquire property by purchase, gift, or condemnation for the stated purposes.

(1) A sanitary district board established under the provisions of Part 2 of Article 2 of Chapter 130A for the purposes stated in that Part.

(2) The board of commissioners of a mosquito control district established under the provisions of Part 2 of Article 12 of Chapter 130A for the purposes stated in that Part.

(3) A hospital authority established under the provisions of Part B of Article 2 of Chapter 131E for the purposes stated in that Part, provided, however, that the provisions of G.S. 131E-24(c) shall continue to apply.

(4) A watershed improvement district established under the provisions of Article 2 of Chapter 139 for the purposes stated in that Article, provided, however, that the provisions of G.S. 139-38 shall continue to apply.

(5) A housing authority established under the provisions of Article 1 of Chapter 157 for the purposes of that Article, provided, however, that the provisions of G.S. 157-11 shall continue to apply.

(6) A corporation as defined in G.S. 157-50 for the purposes of Article 3 of Chapter 157, provided, however, the provisions of G.S. 157-50 shall continue to apply.

(7) A commission established under the provisions of Article 22 of Chapter 160A for the purposes of that Article.

(8) An authority created under the provisions of Article 1 of Chapter 162A for the purposes of that Article.

(9) A district established under the provisions of Article 4 of Chapter 162A for the purposes of that Article.
(10) A district established under the provisions of Article 5 of Chapter 162A for purposes of that Article.
(11) The board of trustees of a community college established under the provisions of Article 2 of Chapter 115D for the purposes of that Article.
(12) A district established under the provisions of Article 6 of Chapter 162A for the purposes of that Article.
(13) A regional public transportation authority established under Article 26 of Chapter 160A of the General Statutes for the purposes of that Article.

The power of eminent domain shall be exercised by a public condemnor listed in this subsection under the procedures of Article 3 of this Chapter. (1852, c. 92, s. 1; R.C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C.S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806; 1951, c. 1002, ss. 1, 2; 1953, c. 1211; 1957, c. 65, s. 11; c. 1045, s. 1; 1961, c. 247; 1973, c. 507, s. 5; c. 1262, s. 86; 1977, c. 771, s. 4; 1981, c. 919, s. 1; 1983, c. 378, s. 2; 1983 (Reg. Sess., 1984), c. 1084; 1985, c. 689, s. 10; c. 696, s. 2; 1987, c. 2, s. 1; c. 564, s. 13; c. 783, s. 6; 1989, c. 706, s. 3; c. 740, s. 1.1; 2000-146, s. 8; 2001-36, ss. 1, 3; 2001-478, s. 2; 2001-487, s. 58; 2002-172, s. 4.1; 2003-282, ss. 1, 2; 2004-203, s. 32(a), (b); 2006-224, s. 2; 2006-259, s. 47.)

Local Modification. — Guilford: 1987, c. 669, s. 3; Iredell: 1985, c. 570, s. 25; Stanly: 1985, c. 433, s. 2; 1989 (Reg. Sess., 1990), c. 839; Wake: 1985, c. 640, s. 1; 1993, c. 137, s. 2; city of Asheville: 1985, c. 556, s. 2; cities of Greensboro and High Point: 1987, c. 669, s. 3; city of Monroe: 1985, c. 177; 2000-35, s. 1; city of Morganton: 1987, c. 265, s. 1; city of Raleigh: 1985, c. 556, s. 2; city of Statesville: 1985, c. 570, s. 25; 1987, c. 265, s. 1; town of Carrboro: 1987, c. 476, s. 1; town of Cary: 1993, c. 137, s. 2; town of Wrightsville Beach: 1993, c. 187, s. 1; Grandfather Village: 1987, c. 419, s. 1; village of Pinehurst: 1985, c. 379, s. 2; Winston-Salem/Forsyth County Utility Commission: 1989 (Reg. Sess., 1990), c. 849.

Cross References. — As to the power given railroad companies to condemn land, see G.S. 62-220. As to condemnation of land for school buildings, etc., see G.S. 115C-517. As to the power of local governments and water companies to condemn land for public water systems, see G.S. 130A-319. As to condemning lands for roads, see G.S. 136-19. As to requirement for consent of board of commissioners in certain counties before land may be condemned or acquired by a unit of local government outside the county, see G.S. 153A-15. As to condemnation for drainage ditches, see G.S. 156-1 et seq.

Editor's Note. — Section 139-38, referred to in subdivision (c)(4), was repealed by Session Laws 1993, c. 391, s. 24, effective July 19, 1993.

Session Laws 2001-36, s. 1, amended subsection (b) by substituting "property or interest therein" for "property" in the introductory paragraph and adding subdivision (b)(10) and (b)(11). Section 3 of the act, as amended by Session Laws 2001-478, s. 2, made this amendment applicable only to Carolina Beach, Carteret County, Dare County, and the Towns of Atlantic Beach, Emerald Isle, Holden Beach, Indian Beach, Kill Devil Hills, Kitty Hawk, Kure Beach, Nags Head, North Topsail Beach, Pine Knoll Shores, Surf City, Topsail Beach, and Wrightsville Beach. The amended subdivision (b) was set out as new subsection (b1) at the direction of the Revisor of Statutes.

Session Laws 2003-282, s. 2, provides that Session Laws 2002-172 is reenacted.

Effect of Amendments. — Session Laws 2006-224, s. 2, effective August 15, 2006, in subsections (b) and (b1), substituted "Chapter 115C of the General Statutes" for "other statutes" in the second paragraph.

Session Laws 2006-259, s. 47, effective August 23, 2006, amended Session Laws 2006-224, s. 2, by changing the effective date from July 1, 2006, to August 15, 2006."

Legal Periodicals. — For comment on subdivision (8) of former G.S. 40-2 (substantially the same as subdivision (a)(3) of this section), see 19 N.C.L. Rev. 480 (1941).

For comment on possibility of this section imposing a limitation on G.S. 136-19, see 28 N.C.L. Rev. 403 (1950).

For note on public use in North Carolina, see 44 N.C.L. Rev. 1142 (1966).

For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970).

For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

I. General Consideration.
II. Public Use.
III. Private Condemnors.
  A. In General.
  B. Railroad Rights-of-Way.
IV. Public Condemnors.
V. Condemnation of Burial Grounds or Dwellings.
VI. Judicial Review.

I. GENERAL CONSIDERATION.

***Editor's Note.** — Many of the cases below were decided under similar former provisions.*

Chapter Is Applicable to Private Landowners. — Even though private landowners are not specifically mentioned in this section, they are bound by the provisions of this Chapter. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Subdivision ordinance as applied by defendant constituted an exaction requiring the court to determine whether the exaction amounted to an unconstitutional taking; therefore, summary judgment for defendant was inappropriate as to that issue. Franklin Rd. Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989).

Implied Promise to Pay for Property Taken. — Whenever the government in the exercise of its governmental rights takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Lloyd v. Venable, 168 N.C. 531, 84 S.E. 855 (1915).

Remedy for Abuse. — If, after acquiring land under condemnation for a public use, a company should devote it to private purposes, that is a remedy by quo warranto and otherwise. Wadsworth Land Co. v. Piedmont Traction Co., 162 N.C. 314, 78 S.E. 297 (1913).

Applied in City of Burlington v. Isley Place Condominium Ass'n, 105 N.C. App. 713, 414 S.E.2d 385 (1992).

Cited in Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989); Pinehurst v. Regional Invs., 97 N.C. App. 114, 387 S.E.2d 222 (1990); Board of Educ. v. Seagle, 120 N.C. App. 566, 463 S.E.2d 277 (1995), cert. denied, 343 N.C. 509, 471 S.E.2d 63 (1996); Stout v. City of Durham, 121 N.C. App. 716, 468 S.E.2d 254 (1996).

II. PUBLIC USE.

Taking of Private Property Must Be for Public Use. — In the exercise of the sovereign power of eminent domain, private property can be taken only for a public use and upon the payment of just compensation. State Hwy. Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

Meaning of "Public Use". — "Public use, as applied in the exercise of the power o eminent domain, is not capable of a precis definition applicable to all situations. The ter is elastic, and keeps pace with changing conditions, since the progressive demands of societ and changing concepts of governmental dutie and functions are constantly bringing new subjects forward as being for "public use." Stat Hwy. Comm'n v. Batts, 265 N.C. 346, 14 S.E.2d 126 (1965).

The statutory phrase "the public use or benefit" is incapable of a precise definition applicable to all situations. Rather, because of th progressive demands of an ever-changing society and the perpetually fluid concept of governmental duty and function, the phrase is elasti and keeps pace with the changing times. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 36 S.E.2d 399 (1988).

Test of Public Use or Benefit. — On judicial determination of whether a condemnor' intended use is an action for "the public use o benefit" under this section, courts in this an other states have employed essentially tw approaches to this problem. The first approac — the public use test — asks whether th public has a right to a definite use of th condemned property. The second approach — the public benefit test — asks whether som benefit accrues to the public as a result of th desired condemnation. Carolina Tel. & Tel. Co v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988)

Question of Law. — While the delegation o the power of eminent domain is for the legislature, the determination of whether a condemnor's intended use of the land is for "the publi use or benefit" is a question of law for th courts. Carolina Tel. & Tel. Co. v. McLeod, 32 N.C. 426, 364 S.E.2d 399 (1988).

A taking can be for public use or benefi even when there is also a substantial private use, so long as the private use in questio is incidental to the paramount public use. Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 36 S.E.2d 399 (1988).

The provision of telephone service, irrespective of the number of customers affected, i an action for "the public use or benefit." Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 36 S.E.2d 399 (1988).

Transport of Natural Gas is a Public Purpose. — Property taken for the transport of natural gas between states and for its distribution within this state is a public purpose. Transcontinental Gas Pipe Line Corp. v. Calco Enters., 132 N.C. App. 237, 511 S.E.2d 671 (1999).

City Authorized to Expand Sewer. — In a declaratory judgment action challenging a city's condemnation proceeding for expansion of the city's sewer system, a judgment for the city was proper because the intended use of the condemnation satisfied the public use and public benefit test as all city residents, including the landowners whose property was being condemned, would have the equal right to connect to the expanded sewer system, which was an essential service. Tucker v. City of Kannapolis, 159 N.C. App. 174, 582 S.E.2d 697, 2003 N.C. App. LEXIS 1442 (2003).

Term "public purposes" is employed in the same sense in the law of taxation and of eminent domain. Thus, if the General Assembly may authorize a State agency to expend public money for the purpose of aiding in the construction of a hospital facility to the leased to and ultimately conveyed to a private agency, it may also authorize the acquisition of a site for such facility by exercise of the power of eminent domain. Foster v. North Carolina Medical Care Comm'n, 283 N.C. 110, 195 S.E.2d 517 (1973).

The use which will justify the taking of private property under the exercise of the right of eminent domain is the use by or for the government, the general public, or some portion thereof as such, and not the use by or for particular individuals or for the benefit of particular estates. The use may be limited to the inhabitants of a small locality, but the benefit must be in common. State Hwy. Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

Scenic Value of Road May Be Considered. — The scenic value of a road and its necessity as a part of the system of scenic highways for the public may be considered in determining whether taking over the road is for a public or private purpose. State Hwy. Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

Use of the words "commercial railway" in a petition did not indicate that the land was to be used for private purposes, for the company was engaging in commerce when it carried articles of merchandise for the public. Wadsworth Land Co. v. Piedmont Traction Co., 162 N.C. 314, 78 S.E. 297 (1913).

Condemnation Not Prohibited. — Summary judgment was properly entered in a declaratory action regarding the applicability of G.S. 153A-15(b) because a condemnation action by a city in order to facilitate the construction of a water supply and distribution facility did not require any approval since the city and the land were located in the same county; moreover, the evidence showed that the real and substantial benefits of the condemnation accrued to the city in question, and not other parties in the case that were located in different counties. Caswell County v. Town of Yanceyville, 170 N.C. App. 124, 611 S.E.2d 451, 2005 N.C. App. LEXIS 898 (2005).

III. PRIVATE CONDEMNORS.

A. In General.

Right to Exercise Eminent Domain — Railroads. — Railroads are quasi-public corporations, created to serve primarily the public good and convenience, and as such they exercise public franchise rights, including that of eminent domain. Seaboard Air Line R.R. v. Atlantic Coast Line R.R., 240 N.C. 495, 82 S.E.2d 771 (1954).

Same — Public Service Corporations Generally. — A public service corporation has no power to condemn land by reason of its being a riparian proprietor, but only under authority given to it by a valid statute to do so. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N.C. 668, 96 S.E. 99 (1918), appeal dismissed, 252 U.S. 341, 40 S. Ct. 330, 64 L. Ed. 601 (1920).

Same — Public Service Corporations Generating Electricity. — Where a corporation is authorized by its charter to generate and sell electricity and to build dams and hydroelectric plants necessary to the generation of such hydroelectric power, and is therein given power of eminent domain to acquire the necessary rights-of-way and lands for its dams and the ponding of water, such corporation is a public service corporation and has the power of eminent domain, and it cannot be successfully contended that its taking of lands for ponding water necessary for one of its dams is a taking of private lands for a private use, nor does the fact that such public service corporation also engages in private enterprises not connected with its public service alter this result. Whiting Mfg. Co. v. Carolina Aluminum Co., 207 N.C. 52, 175 S.E. 698 (1934).

A corporation furnishing electricity for public use may condemn lands of a private owner necessary for its transmission lines, but it is unlawful for a power company to enter upon and take the lands of the owner for such purpose without complying with the statutory procedure. Crisp v. Nantahala Power & Light Co., 201 N.C. 46, 158 S.E. 845 (1931).

Condemnation Rights Not Impaired by Charter Rights of Private Nature. — The right of a corporation to condemn lands for a public use is not affected or impaired because in its charter it may be given rights of a more private nature to which the right of condemnation may not attach. Mountain Retreat Ass'n v.

Mount Mitchell Dev. Co., 183 N.C. 43, 110 S.E. 524 (1922).

Where a corporation is authorized to operate a street railway, it may exercise the right of eminent domain in respect to this business given to it by its charter and by law, notwithstanding it is also authorized to conduct business of a private nature. Wadsworth Land Co. v. Piedmont Traction Co., 162 N.C. 314, 78 S.E. 297 (1913).

Power Not Exhausted by Single Exercise. — The power of eminent domain conferred on electric public service corporations is not necessarily exhausted by a single exercise of the power, but, within the limits established by the general law or special charter, a subsequent or further exercise of the power may be permissible. Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

Purchase of Additional Rights as Needed to Serve Public. — If the property owned by a corporation having the right of eminent domain is inadequate for its corporate purposes, it may purchase such additional rights as it may need to serve the public. Such purchase may be with the consent of the owner or by condemnation, a purchase without the owner's consent being at the value of the property taken. VEPCO v. King, 259 N.C. 219, 130 S.E.2d 318 (1963).

The language "pipelines originating in North Carolina" in former G.S. 40-2 held not to impose a limitation on G.S. 62-190. Colonial Pipeline Co. v. Neill, 296 N.C. 503, 251 S.E.2d 457 (1979).

Condemnation by Railroad for Union Depot. — Former G.S. 40-4 conferred upon any railroad company the right to condemn land for the purpose of getting to a union depot required by the order of the Utilities Commission to be built. State ex rel. Corp. Comm'n v. Southern Ry., 185 N.C. 435, 117 S.E. 563 (1923).

Former G.S. 40-4 conferred on a railroad company the incidental right to make such changes in its line and route as are necessary to accomplish the purpose designed and to make the depot available and accessible to the traveling public as contemplated by statute. Dewey v. Atlantic Coast Line R.R., 142 N.C. 392, 55 S.E. 292 (1906).

Where the Utilities Commission, acting under former G.S. 40-4, selected a site after due inquiry, the railroads would not be enjoined, at the instance of citizens and property owners, from erecting the depot, either on the ground that the city was being sidetracked or that property would be damaged by the proposed change. Dewey v. Atlantic Coast Line R.R., 142 N.C. 392, 55 S.E. 292 (1906).

Installation of water and sewer lines solely for the benefit of one individual's manufacturing plant involved a private use, despite petitioner's argument that the plant would benefit the public by employing 30 people and thus contribute to the public welfare; and dismissal of petitioner's condemnation proceeding would be affirmed. City of Statesville v Roth, 77 N.C. App. 803, 336 S.E.2d 142 (1985)

The power of condemnation granted under former § 40-8, relating to taking materia from adjacent lands, is not confined to a right-of-way, delimited by surface boundaries, but may be extended to the cutting of trees or removing of obstructions outside of these boundaries when required for the reasonable preservation and protection of their lines and other property. Yadkin River Power Co. v Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

The legislature may by eminent domain authorize the consolidation of railroads and, in effect, condemn the shares of dissenting stockholders. Spencer v. Seaboard Air Line R.R., 137 N.C. 107, 49 S.E. 96 (1904).

B. Railroad Rights-of-Way.

Width of Right-of-Way. — If the charter prescribes no maximum or minimum width o the right-of-way, then subsection (a) of former G.S. 40-29 (substantially the same as the second unnumbered paragraph of subsection (a) o this section) applies, and the law presumes the width therein specified, subject to the right o the owner to recover compensation by compliance with G.S. 1-51. Griffith v. Southern Ry. 191 N.C. 84, 131 S.E. 413 (1926).

A right-of-way of specified width must be located and constructed in order to be exclusive. Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 126 N.C. 254, 35 S.E. 458 (1900).

A railroad company may occupy its right-of-way to its full extent whenever the proper management and business necessities o the road, in its own judgment, may require it though the owner of the land can use and occupy a part of the right-of-way not used by the railroad in a manner not inconsistent with its full enjoyment of the easement. Atlantic Coast Line R.R. v. Bunting, 168 N.C. 579, 84 S.E. 1009 (1915); Tighe v. Seaboard Air Line R.R., 176 N.C. 239, 97 S.E. 164 (1918).

A railroad company may use and occupy a right-of-way acquired by it under condemnation proceedings when, in its own judgment the proper management and business necessities of the road may require it. Virginia & C.S.R.R. v. McLean, 158 N.C. 498, 74 S.E. 461 (1912).

Easement Acquired over Portion Not Occupied. — A railroad corporation acquires by condemnation an easement over that portion of its right-of-way not actually occupied by its roadbed, tracks, drains and side ditches. Griffith v. Southern Ry., 191 N.C. 84, 131 S.E. 413 (1926).

Owner's Right to Use Land Covered by Right-of-Way. — To the extent that land covered by a right-of-way is not presently required for the purpose of the road, the owner may continue to occupy and use it in a manner not inconsistent with the full and proper enjoyment of the easement. Raleigh & Augusta Air Line R.R. v. Sturgeon, 120 N.C. 225, 26 S.E. 779 (1897); Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 126 N.C. 254, 35 S.E. 458 (1900); Seaboard Air Line R.R. v. Olive, 142 N.C. 257, 55 S.E. 263 (1906); Earnhardt v. Southern R.R., 157 N.C. 358, 72 S.E. 1062 (1911); Virginia & C.S.R.R. v. McLean, 158 N.C. 498, 74 S.E. 461 (1912); Coit v. Owenby-Wofford Co., 166 N.C. 136, 81 S.E. 1067 (1914).

To the extent that the right-of-way is not presently required for the purpose of the road, it may be occupied and used by the original owner in any manner not inconsistent with the easement acquired. Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 126 N.C. 254, 35 S.E. 458 (1900); Virginia & C.S.R.R. v. McLean, 158 N.C. 498, 74 S.E. 461 (1912).

The grant of a right-of-way of a specified width does not preclude the grantor from such use of his land himself or by others with his permission which is not in conflict therewith. Goldsboro Lumber Co. v. Hines Bros. Lumber Co., 126 N.C. 254, 35 S.E. 458 (1900).

Cultivation of Land by Owner. — While land included in the right-of-way of a railroad company, not necessary for the purposes of the company, may be cultivated by the servient owner, the crop must not be of such inflammable or combustible nature, when matured or maturing, as to endanger the safety of the company's passengers or cause injury to adjoining lands in case of ignition of such crops by sparks from the company's engines; in such a case, the company would have the right to enter and remove such crops. Raleigh & Augusta Air Line R.R. v. Sturgeon, 120 N.C. 225, 26 S.E. 779 (1897).

Unless the land is needed for some use, the occupation and cultivation by the owner of the servient tenement will be disturbed only when it becomes necessary for the company to enter in order to remove something which endangers the safety of its passengers, or which might, if undisturbed, subject the owner to liability for injury to adjacent lands or property. Ward v. Wilmington & W.R.R., 109 N.C. 358, 13 S.E. 926 (1891); Ward v. Wilmington & W.R.R., 113 N.C. 566, 18 S.E. 211 (1893); Blue v. Aberdeen & W.E.R.R., 117 N.C. 644, 23 S.E. 275 (1895).

Duty of Company to Clear Right-of-Way. —A railroad company is not negligent in failing to cut down bushes or weeds on the right-of-way beyond the portion over which it is exercising actual control for corporate purposes, but is required to keep the right-of-way clear of such growth to the outside of the side ditches on either side of the track. Ward v. Wilmington & W.R.R., 109 N.C. 358, 13 S.E. 926 (1891).

Where a railroad company permitted dry grass or leaves or other combustible rubbish to remain near its track and the same took fire from sparks emitted from one of its locomotives which had no spark arrester, and the fire was thereby communicated to the plaintiff's adjoining land, destroying timber, etc., it was held that the injury resulted from the negligence of the defendant company. Aycock v. Raleigh & Augusta Air Line R.R., 89 N.C. 321 (1883).

Only Easement Rights Held Acquired. — Only an easement in lands passes from the owner to a railroad company under condemnation proceedings divesting all the rights of owners who are parties to the proceedings in such easement during the corporate existence of the company, but allowing them to use and occupy the right-of-way in any manner not inconsistent with the easement acquired. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022, rev'd on other grounds on rehearing, 131 N.C. 225, 42 S.E. 587 (1902); Virginia & C.S.R.R. v. McLean, 158 N.C. 498, 74 S.E. 461 (1912).

IV. PUBLIC CONDEMNORS.

Public Recreational Facility Need Not Be Designed Before Land Is Acquired. — Neither subdivision (b)(3) of this section, which vests municipalities with the power of eminent domain to establish, enlarge or improve parks, playgrounds and other recreational facilities, nor G.S. 160A-353, of similar import, nor any other statute contains any requirement that the city design a public facility authorized by resolution before the land for the facility is acquired. City of Charlotte v. Rousso, 82 N.C. App. 588, 346 S.E.2d 693 (1986).

Local Zoning Laws. — While municipalities or counties may exercise the power of eminent domain for the construction, enlarging or improving of those buildings listed in subdivision (b)(6), the power of eminent domain does not include locating a particular building in violation of another jurisdiction's zoning laws, by virtue of the fact that through G.S. 153A-347 and 160A-392 the Legislature has made zoning regulations with regard to buildings specifically applicable to political subdivisions. The same zoning restrictions do not apply, however, to the construction, establishment, enlargement, improvement, maintenance, ownership or operation of a public enterprise unless the Legislature has clearly manifested a contrary intent. Davidson County v. City of High Point, 85 N.C. App. 26, 354 S.E.2d 280, modified and aff'd, 321 N.C. 252, 362 S.E.2d 553 (1987).

A municipal corporation can only exercise the right of eminent domain when authorized to do so by its charter or by general law, being a creature of the Legislature. Mount Olive v. Cowan, 235 N.C. 259, 69 S.E.2d 525 (1952).

Condemnation by Municipalities for Operation of Water and Sewer Systems. — The right of eminent domain has been conferred upon municipalities operating water and sewer systems. If such corporation is unable to agree with a landowner for the purchase of land it needs for such purpose, it may acquire the land, or an easement therein, by following the procedure set forth. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

The opening and closing of streets is a governmental function. Bessemer Imp. Co. v. City of Greensboro, 247 N.C. 549, 101 S.E.2d 336 (1958).

Exercise of Discretion in Widening Streets of Town. — Where it appeared that the governing authorities of a town took lands to widen a street intersecting with other streets so as to lessen the danger to traffic thereon, and that doing so was a reasonable exercise of discretion, finding that such course was unnecessary was not binding on the Supreme Court, the question being, primarily, whether the administrative authorities of the town so grossly and manifestly abused the exercise of their discretionary powers as to render their action ineffectual. Lee v. Town of Waynesville, 184 N.C. 565, 115 S.E. 51 (1922).

Acquisition of Storm Sewer Easement by Payment of Permanent Damages. — Where plaintiff landowners demanded permanent damages in their action against a municipality for trespass based upon the construction by the municipality of a storm sewer line over their lands, and defendant municipality prayed for an easement for the purpose of maintaining such drainage system, under the verdict and judgment awarding permanent damages the municipality, upon payment of the damages awarded, acquired a permanent easement to maintain its storm sewer line so long as it was kept in proper repair. McLean v. Town of Mooresville, 237 N.C. 498, 75 S.E.2d 327 (1953).

Municipal Airports. — The provisions of this Chapter now control cities' eminent domain actions with respect to airports. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Improvements Held No Bar to Condemnation. — The governing authorities of a town are not estopped to condemn land for the widening or improvement of its streets by reason of an owner having put extensive improvements on his land a long time prior to the time it was condemned for that purpose, the power of condemnation, in cases of such character, being a continuing one to be exercised when and to the extent that the public good may require it. Lee v. Town of Waynesville, 184 N.C. 565, 115 S.E 51 (1922).

Condemnation proceedings for a schoo site must be considered as instituted unde former G.S. 40-2 (similar to this section) pursuant to authority conferred by former G.S. 115 125 (see now G.S. 115C-517). Topping v. Stat Bd. of Educ., 249 N.C. 291, 106 S.E.2d 50 (1959).

It was not error to find that plaintiff wa authorized to acquire land for parks, recreational programs and facilities throug exercise of power of eminent domain. Town o Chapel Hill v. Burchette, 100 N.C. App. 157 394 S.E.2d 698 (1990).

V. CONDEMNATION OF BURIAL GROUNDS OR DWELLINGS.

To Whom Limitation Applicable. — Limitation in former G.S. 40-10 as to condemnatio of the owner's dwelling, burial grounds, etc. was only upon such corporations as were defined and named in the former article, whe exercising the power of eminent domai granted in such article in connection with th construction of the works or projects enumerated therein, and pursuant to the authorit granted thereby. Mount Olive v. Cowan, 23 N.C. 259, 69 S.E.2d 525 (1952).

Housing Project Not Covered. — Prohibition against condemnation of burial grounds dwelling houses, etc., without the consent of th owner is not applicable to proceeding to condemn lands for housing project. In re Housin Auth., 233 N.C. 649, 65 S.E.2d 761 (1951).

Nor Was Former Park Commission. — Former North Carolina National Park Commission created by Public Acts 1927, c. 48, was a agency of the State created by statute, veste with the power of eminent domain, and was no subject to the limitations provided for corporations by former G.S. 40-8 and 40-11. Yarbroug v. North Carolina Park Comm'n, 196 N.C. 284 145 S.E. 563 (1928).

Power of Municipality to Acquire Dwellings by Condemnation. — The governin body of a municipality, for the purpose of erecting an elevated water storage tank as an addition to its water system, has the power, in th exercise of a sound discretion, to acquire dwelling-house properties either within or outsid the city by condemnation. City of Raleigh v Edwards, 235 N.C. 671, 71 S.E.2d 396 (1952) commented on in, 31 N.C.L. Rev. 125 (1952) See also Mount Olive v. Cowan, 235 N.C. 259 69 S.E.2d 525 (1952).

Absent Charter Restrictions to the Contrary. — Where a city, under its charter, i given the same power to condemn lands o private owners for municipal purposes that i given to railroads and other public utilities, it i bound by the restrictions placed on them b this section. Selma v. Nobles, 183 N.C. 322, 111 S.E. 543 (1922).

This section does not apply to tenant houses, but only to the dwellings of the owner of the lands, which are preserved to him for sentimental reasons, and which could not exist where such owner is a corporation renting dwellings to its tenants. Raleigh, C. & S.R.R. v. Mecklenburg Mfg. Co., 166 N.C. 168, 82 S.E. 5 (1914).

Use by Owner Subsequent to Acquisition of Right-of-Way Not Protected. — When a provision in a charter of a railroad company or a deed granting it a right-of-way prohibited it from entering upon the yard, garden, burial ground, etc., of the defendants, but no portion of the right-of-way was so used at the date of its acquisition, the right of the company would not be interfered with by the fact that it has since been appropriated to such use. Dargan v. Carolina Cent. R.R., 131 N.C. 623, 42 S.E. 979 (1902); Seaboard Air Line R.R. v. Olive, 142 N.C. 257, 55 S.E. 263 (1906).

Maintenance of Nuisance as Violation of Prohibition. — The creation and maintenance of a nuisance which sensibly impairs the value of lands of private owners is a "taking" within the principle of eminent domain and condemnation proceedings thereunder, and falls within the exception as to dwellings. Selma v. Nobles, 183 N.C. 322, 111 S.E. 543 (1922).

House standing on the right-of-way does not become the property of the condemnor. Shields v. Norfolk & C.R.R., 129 N.C. 1, 39 S.E. 582 (1901); Raleigh, C. & S.R.R. v. Mecklenburg Mfg. Co., 166 N.C. 168, 82 S.E. 5 (1914).

No Discretion as to Statutory Exceptions. — The principle arising under the general power to condemn, leaving the matter largely within the discretion of the governing authorities seeking condemnation, does not apply to the statutory exceptions. Selma v. Nobles, 183 N.C. 322, 111 S.E. 543 (1922).

VI. JUDICIAL REVIEW.

What Is Public Use as Question for Court. — In any proceeding for condemnation under the sovereign power of eminent domain, what is a public use is a judicial question for ultimate decision by the court as a matter of law, reviewable upon appeal. State Hwy. Comm'n v. Batts, 265 N.C. 346, 144 S.E.2d 126 (1965).

To determine whether an exaction amounts to an unconstitutional taking, the court shall: (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; (3) determine whether the regulation substantially advances a legitimate state interest. If the regulation substantially advances a legitimate state interest, the court shall then determine (4) whether the condition imposed advances that interest; and (5) whether the condition imposed is proportionally related to the impact of the development. Franklin Rd. Properties v. City of Raleigh, 94 N.C. App. 731, 381 S.E.2d 487 (1989), citing Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989), rev'd on other grounds, 326 N.C. 1, 387 S.E.2d 655, cert. denied, 496 U.S. 931, 110 S. Ct. 2631, 110 L. Ed. 2d 651 (1990).

Discretion of Condemnors as to Extent and Limit of Rights to Be Acquired. — The extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only become an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912).

In determining what property is necessary for a public housing site, a broad discretion is vested by statute in housing authority commissioners, to whom the power of eminent domain is delegated. Housing Auth. v. Wooten, 257 N.C. 358, 126 S.E.2d 101 (1962); Philbrook v. Chapel Hill Housing Auth., 269 N.C. 598, 153 S.E.2d 153 (1967).

Condemnors' Discretion Not Subject to Review Absent Abuse. — Where the general power to condemn exists, the right of selection as to route, quantity, etc., is left largely to the discretion of the company or corporation, and does not become the subject of judicial inquiry except on allegations of fact tending to show bad faith on the part of the company or corporation or an oppressive and manifest abuse of the discretion conferred upon them by the law. Selma v. Nobles, 183 N.C. 322, 111 S.E. 543 (1922); Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Where an agency has the power of condemnation, the choice of route is primarily in its discretion and will not be reviewed on the ground that another route may have been more appropriately chosen, unless it appears that there has been an abuse of discretion. Duke Power Co. v. Ribet, 25 N.C. App. 87, 212 S.E.2d 182 (1975).

The exercise of discretion by the condemnor will not be interfered with on the ground that the condemnor acted unreasonably and without justification when there is neither allegation nor evidence that the condemnor acted either arbitrarily or capriciously or in a manner constituting an abuse of discretion in the selection of the route to condemn. Duke Power Co. v. Ribet, 25 N.C. App. 87, 212 S.E.2d 182 (1975).

Existence of Less Intrusive Means not Abuse of Discretion. — Gas pipeline company did not abuse its discretion by not using the less intrusive means of seeking variance from local zoning ordinances. Transcontinental Gas Pipe Line Corp. v. Calco Enters., 132 N.C App. 237, 511 S.E.2d 671 (1999).

§ 40A-4. No prior purchase offer necessary.

The power to acquire property by condemnation shall not depend on any prior effort to acquire the same property by gift or purchase, nor shall the power to negotiate for the gift or purchase of property be impaired by initiation of condemnation proceedings. A potential condemnor who seeks to acquire property by gift or purchase shall give the owner written notice of the provisions of G.S. 40A-6. (1981, c. 919, s. 1; 1997-270, s. 4.)

Legal Periodicals. — For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L Rev. 1989 (1997).

§ 40A-5. Condemnation of property owned by other condemnors.

(a) A condemnor listed in G.S. 40A-3(a), (b) or (c) shall not possess the power of eminent domain with respect to property owned by the State of North Carolina or a State-owned railroad as defined in G.S. 124-11 unless the State consents to the taking. The State's consent shall be given by the Council o State, or by the Secretary of Administration if the Council of State delegates this authority to the Secretary. In a condemnation proceeding against State property consented to by the State, the only issue shall be the compensation to be paid for the property.

(b) Unless otherwise provided by statute a condemnor listed in G.S. 40A-3(a), (b) or (c) may condemn the property of a private condemnor if such property is not in actual public use or not necessary to the operation of the business of the owner. Unless otherwise provided by statute a condemnor listed in G.S. 40A-3(b) or (c) may condemn the property of a condemnor listed in G.S. 40A-3(b) or (c) if the property proposed to be taken is not being used or held for future use for any governmental or proprietary purpose. (1981, c. 919 s. 1; 2000-146, s. 9.)

Local Modification. — Cabarrus: 1991 (Reg. Sess., 1992), c. 937, s. 1; 1993 (Reg. Sess., 1994), c. 700, s. 1.

CASE NOTES

Condemnation by Municipality of Land Owned by Railroad Company. — A municipal corporation had the power, under its charter and the general powers of eminent domain conferred upon it by statute, to condemn for necessary street purposes a strip of land owned by a railroad company, when such property was not being used by the railroad company and was neither necessary nor essential to the operation of its business. City of Goldsboro v. Atlantic Coast Line R.R., 246 N.C. 101, 97 S.E.2d 486 (1957), decided under prior law.

Acquisition of Land of One Railroad by Another. — Land acquired by one railroad company under a legislative grant of the right of eminent domain, and unnecessary for the exercise of its franchise or the discharge of its duties, is liable to be taken under the law of eminent domain for the use of another railroad company. North Carolina & R. & D.R.R. v Carolina Cent. Ry., 83 N.C. 489 (1880), decided under prior law.

§ 40A-6. Reimbursement of owner for taxes paid on condemned property.

(a) An owner whose property is totally taken in fee simple by a condemnor exercising the power of eminent domain, under this Chapter or any other statute, shall be entitled to reimbursement from the condemnor of the pro rata portion of real property taxes paid by the owner that are allocable to a period subsequent to vesting of title in the condemnor, or the effective date of possession of the real property, whichever is earlier.

(b) An owner who meets the following conditions is entitled to reimbursement from the condemnor for all deferred taxes paid by the owner pursuant to G.S. 105-277.4(c) as a result of the condemnation:

(1) The owner is a natural person whose property is taken in fee simple by a condemnor exercising the power of eminent domain under this Chapter or any other statute.

(2) The owner also owns agricultural land, horticultural land, or forestland that is contiguous to the condemned property and that is in active production.

The definitions in G.S. 105-277.2 apply in this subsection. (1975, c. 439, s. 1; 1981, c. 919, s. 1; 1997-270, s. 1.)

Cross References. — As to probation of the tax liability of the owner of condemned land, see also G.S. 136-121.1.

§ 40A-7. Acquisition of whole parcel or building.

(a) When the proposed project requires condemnation of only a portion of a parcel of land leaving a remainder of such shape, size or condition that it is of little value, a condemnor may acquire the entire parcel by purchase or condemnation. If the remainder is to be condemned the petition filed under the provisions of G.S. 40A-20 or the complaint filed under the provisions of G.S. 40A-41 shall include:

(1) A determination by the condemnor that a partial taking of the land would substantially destroy the economic value or utility of the remainder; or

(2) A determination by the condemnor that an economy in the expenditure of public funds will be promoted by taking the entire parcel; or

(3) A determination by the condemnor that the interest of the public will be best served by acquiring the entire parcel.

(b) Residues acquired under this section may be sold or disposed of in any manner provided for the disposition of property, or may be exchanged for other property needed by the condemnor.

(c) When the proposed project requires condemnation of a portion of a building or other structure, the condemnor may acquire the entire building or structure by purchase or condemnation, together with the right to enter upon the surrounding land for the purpose of removing the building or structure. If the entire building is to be condemned the petition filed under the provisions of G.S. 40A-20, or the complaint filed under the provisions of G.S. 40A-41 shall include a determination by the condemnor either:

(1) That an economy in the expenditure of public funds will be promoted by acquiring the entire building or structure; or

(2) That it is not feasible to cut off a portion of the building or structure without destroying the whole; or

(3) That the convenience, safety, or improvement of the project will be promoted by acquiring the entire building or structure. Nothing in this subsection shall be deemed to compel the condemnor to condemn the underlying fee of the portion of any building or structure that lies outside the project. (1981, c. 919, s. 1.)

CASE NOTES

Procedure for Condemning Excess Property. — The condemnor may condemn property in excess of that needed for an otherwise valid public purpose, as envisioned under this section, provided that it identifies the land to be condemned, demonstrates that the unneeded remainder of property is "of little value"; the condemnor has carried its burden of proof, the condemning authority must then affirmatively demonstrate the proposed condemnation is authorized by subsection (a)(1), (2), or (3). Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc., 353 N.C. 343, 543 S.E.2d 844, 2001 N.C. LEXIS 273 (2001).

Applicability of Section. — This section applies only to cases involving partial takings. Town of Hillsborough v. Crabtree, 143 N.C. App. 707, 547 S.E.2d 139, 2001 N.C. App. LEXIS 347 (2001), cert. denied, 354 N.C. 75, 553 S.E.2d 213 (2001).

"Little Value" Not Shown. — Condemnor's failure on appeal to contradict the court's finding regarding the value of land it sought t condemn in excess of that needed for an otherwise valid public purpose supported the tria court's conclusion of law that the 97-acre remainder was "not of such shape, size or condition as to render it of little value." Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc. 353 N.C. 343, 543 S.E.2d 844, 2001 N.C. LEXIS 273 (2001).

Appellate review is appropriate to protect the due process rights of landowners affected by a condemnor who seeks to condemn property in excess of what is needed for an otherwise valid public purpose; de novo review of whether the condemnor has satisfied the "of little value" requirement, as well as the condemnor's burden of proof under subsection (a)(1), (2), or (3) best ensures uniform and constitutional application of this section. Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc., 353 N.C. 343 543 S.E.2d 844, 2001 N.C. LEXIS 273 (2001).

§ 40A-8. Costs.

(a) In any action under the provisions of Article 2 or Article 3 of this Chapter the court in its discretion may award to the owner a sum to reimburse the owner for charges he has paid for appraisers, engineers and plats, provided such appraisers or engineers testify as witnesses, and such plats are received into evidence as exhibits by order of the court.

(b) If a condemnor institutes a proceeding to acquire by condemnation any property and (i) if the final judgment in a resulting action is that the condemnor is not authorized to condemn the property, or (ii) if the condemnor abandons the action, the court with jurisdiction over the action shall after making appropriate findings of fact award each owner of the property sought to be condemned a sum that, in the opinion of the court based upon its findings of fact, will reimburse the owner for: his reasonable costs; disbursements expenses (including reasonable attorney, appraisal, and engineering fees); and any loss suffered by the owner because he was unable to transfer title to the property from the date of the filing of the complaint under G.S. 40A-41.

(c) If an action is brought against a condemnor under the provisions of G.S 40A-20 or 40A-51 seeking compensation for the taking of any interest in property by the condemnor and judgment is for the owner the court shall award to the owner as a part of the judgment after appropriate finding of fact a sum that, in the opinion of the court based upon its finding of fact, will reimburse the owner as set out in subsection (b). (1981, c. 919, s. 1.)

Legal Periodicals. — For an article on statutory easements by necessity or cartways, see 75 N.C.L. Rev. 1943 (1997).

CASE NOTES

An award of counsel fees to the landowner is not authorized when judgment awards title to the condemnor and compensation to the landowner in a proceeding instituted by the condemnor. Housing Auth. v. Farabee 284 N.C. 242, 200 S.E.2d 12 (1973), decided under prior law.

Award of Attorneys' Fees in Inverse Con-

demnation Proceeding. — It is consistent with this section to award attorneys' fees when a landowner's counterclaim is the impetus behind the condemnor's concession that it took land not described in the complaint and declaration of taking, and when a verdict demonstrates that the jury awarded compensation for that taking. City of Raleigh v. Hollingsworth, 96 N.C. App. 260, 385 S.E.2d 513 (1989), cert. denied, 326 N.C. 363, 389 S.E.2d 816 (1990).

Inference as to Award of Attorney's Fees Improper. — Provision by the legislature for the payment of reasonable attorneys' fees when the power of eminent domain was exercised by urban redevelopment commissions under G.S. 160A-500 et seq. could not be used by the courts to infer a similar intention in condemnation proceedings instituted by housing authorities under other statutes containing no language definitely indicating such legislative intent. Housing Auth. v. Farabee, 284 N.C. 242, 200 S.E.2d 12 (1973), decided under prior law.

Plaintiff Could Not Proceed in One Action with Petition for Certiorari and Complaint for Costs, Damages, etc. — Plaintiff's petition for writ of certiorari to review town's decision denying plaintiff's subdivision permit application was improperly joined with her complaint against the town in which she alleged constitutional violations and sought damages, costs, and attorneys' fees pursuant to this section. Batch v. Town of Chapel Hill, 326 N.C. 1, 387 S.E.2d 655, cert. denied, 496 U.S. 931, 110 S. Ct. 2631, 110 L. Ed. 2d 651 (1990).

Failure to Make Findings of Fact. — Case remanded for failure of trial court to make findings of fact as required by this section in support of an award of attorney's fees. Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999).

Assessment of Costs Upheld. — Where although city filed a Declaration of Taking, it did not include property held to have been inversely condemned, the court's assessment of costs under this section was proper. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Cited in Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986); Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989).

§ 40A-9. Removal of structures on condemned land; lien.

At the request of the owner the condemnor shall allow the owner of property acquired by condemnation to remove any timber, building, permanent improvement, or fixture wholly or partially located on or affixed to the property unless such removal would be inconsistent with the purpose for which condemnation is made, and shall specify a reasonable time within which it may be removed. If the report of the commissioners deducted the value of any such property to be removed from the award of compensation and allowed the cost of removal as an element of damages and the owner fails to remove it within the time allowed, the condemnor may remove it and the cost of the removal and storage of the property shall be chargeable against the owner and a lien upon any remainder of the property not acquired by the condemnor to be recovered or foreclosed in the manner provided by law for recovery of debt or foreclosure of mortgages. (1981, c. 919, s. 1.)

CASE NOTES

Applied in Scotland County v. Johnson, 131 N.C. App. 765, 509 S.E.2d 213 (1998).

§ 40A-10. Sale or other disposition of land condemned.

When any property condemned by the condemnor is no longer needed for the purpose for which it was condemned, it may be used for any other public purpose or may be sold or disposed of in the manner prescribed by law for the sale and disposition of surplus property. (1981, c. 919, s. 1.)

Local Modification. — Cabarrus: 1991, c. 685, s. 8; Cabarrus County and any incorporated municipality partly or wholly in Cabarrus County: 1985, c. 269.

Legal Periodicals. — For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

Recognition that situations may change. — Situations may change and condemned property may not always be used for the purpose that gave rise to the original condemnation proceeding. When a town in good faith initiates condemnation proceedings for a public use and in accord with legal requirements, the fact that some obstacle may potentially derail the intended use will not defeat that purpose. Town of Highlands v. Hendricks, 164 N.C. App. 474, 596 S.E.2d 440, 2004 N.C. App. LEXIS 1009 (2004), cert. denied, — N.C. —, 605 S.E.2d 149 (2004).

§ 40A-11. Right of entry prior to condemnation.

Any condemnor without having filed a petition or complaint, depositing any sum or taking any other action provided for in this Chapter, is authorized to enter upon any lands, but not structures, to make surveys, borings, examinations, and appraisals as may be necessary or expedient in carrying out and performing its rights or duties under this Chapter. The condemnor shall give 30 days' notice in writing to the owner at his last known address and the party in possession of the land of the intended entry authorized by this section.

Entry under this section shall not be deemed a trespass or taking within the meaning of this Chapter, however, the condemnor shall make reimbursement for any damage resulting from such activities, and the owner is entitled to bring an action to recover for the damage. If the owner recovers damages of twenty-five percent (25%) over the amount offered by the condemnor for reimbursement for its activities the court, in its discretion, may award reasonable attorney fees to the owner. (1981, c. 919, s. 1.)

CASE NOTES

Editor's Note. — *The cases below were decided under similar former provisions.*

Constitutionality. — Statutes authorizing bodies having the power of eminent domain to enter onto land for purposes of conducting preliminary surveys and the like, containing no provision for compensation to the landowner for such use of the land, are not violative of constitutional provisions against the taking of private property for public purposes without prior payment of just compensation. Duke Power Co. v. Herndon, 26 N.C. App. 724, 217 S.E.2d 82 (1975).

Nature of Right of Entry. — The right of entry granted a railroad company under this section is only for the purpose of marking out the route and designating the building sites desired, to the end that the parties may come to an intelligent agreement as to the price, and without the consent of the owner the company cannot enter by virtue of this section for the purpose of building its road. State v. Wells, 142 N.C. 590, 55 S.E. 210 (1906).

Entry Prior to Condemnation Not a "Taking." — An entry for the purpose of laying out the proposed route for an easement does not constitute a "taking." Duke Power Co. v. Herndon, 26 N.C. App. 724, 217 S.E.2d 82 (1975).

The mere threat to take a right-of-way under the power of eminent domain and an isolated act in going upon the land to make a preliminary survey are insufficient to constitute a "taking." Penn v. Carolina Va. Coastal Corp., 231 N.C. 481, 57 S.E.2d 817 (1950).

Railroad Company Not a Trespasser. — A railroad company having the right of eminent domain, entering upon and occupying lands for building its tracks, is not a trespasser. Abernathy v. South & W.R.R., 150 N.C. 97, 63 S.E. 180 (1908).

OPINIONS OF ATTORNEY GENERAL

As to former § **40-3,** see opinion of Attorney General to Mr. James R. Taylor, Executive Director, Statesville Housing Authority, 40 N.C.A.G. 314 (1969).

§ 40A-12. Additional rules.

Where the procedure for conducting an action under this Chapter is not expressly provided for in this Chapter or by the statutes governing civil procedure, or where the civil procedure statutes are inapplicable, the judge before whom such proceeding may be pending shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter. The practice in each case shall conform as near as may be to the practice in other civil actions. (1981, c. 919, s. 1.)

CASE NOTES

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — This section, together with G.S. 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure, G.S. 1A-1, in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this Chapter. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Applicability of Rule 60, Rules of Civil Procedure. — Rule 60, of the Rules of Civil Procedure, applies to proceedings under Chapter 40A in order to provide relief from judgments or orders when necessary to promote the interests of justice. City of Durham v. Woo, 129 N.C. App. 183, 497 S.E.2d 457 (1998), cert. denied, 348 N.C. 496, 518 S.E.2d 380 (1998).

Conversion of Private Condemnation Proceeding into Quiet Title Action. — Trial court did not err by applying G.S. 1A-1, Rule 15(b) in such a way as to convert condemnation proceeding brought by private condemnors, with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Power of Court to Make Rules of Procedure. — The legislature, recognizing the difficulty of doing more than outlining the mode of practice so as to safeguard the rights of the parties, has conferred upon the court the power to make rules of procedure when they are not expressly provided by statute. Abernathy v. South & W.R.R., 150 N.C. 97, 63 S.E. 180 (1908), decided under prior law.

§ 40A-13. Costs and appeal.

In addition to any reimbursement provided for in G.S. 40A-8 the condemnor shall pay all court costs taxed by the court. Either party shall have a right of appeal to the appellate division for errors of law committed in any proceedings provided for in this Chapter in the same manner as in any other civil actions and it shall not be necessary that an appeal bond be posted. (1981, c. 919, s. 1.)

Cross References. — As to provision that petitioner pay costs in certain condemnation proceedings, see G.S. 6-22(3).

CASE NOTES

Taxing of Costs Where Owner Not Entitled to Recovery. — In an action to recover damages for the taking of land for use as a sidewalk by defendant municipality, where the jury found plaintiff was entitled to recover nothing, the court could properly tax the costs against the defendant. Jervis v. Mars Hill, 214 N.C. 323, 199 S.E. 96 (1938), decided under prior law.

Under former law, when it was decided by the superior court that defendant owner's benefit equalled the damages, the plaintiff corporation would pay the costs; however, if the defendant appealed and the decision of the lower court was affirmed, then the cost of the appeal would fall upon the defendant. Madison County R.R. v. Gahagan, 161 N.C. 190, 76 S.E. 696 (1912), decided under prior law.

§§ 40A-14 through 40A-18: Reserved for future codification purposes.

Article 2.

Condemnation Proceedings by Private Condemnors.

§ 40A-19. Proceedings by private condemnors.

Any private condemnor enumerated in G.S. 40A-3(a), possessing by law the right of eminent domain in this State shall have the right to acquire property required for the purposes of its incorporation or for the purposes specified in this Chapter in the manner and by the special proceedings herein prescribed. (1871-2, c. 138, s. 13; Code, ss. 1943, 2009; 1885, c. 168; 1893, c. 63; 1899, c. 64; 1901, cc. 6, 41, s. 2; 1903, c. 159, s. 16; c. 562; Rev., s. 2579; C.S., s. 1715; 1951, c. 59, s. 1; 1981, c. 919, s. 1.)

Legal Periodicals. — For article urging revision and recodification of North Carolina's eminent domain laws, see 45 N.C.L. Rev. 587 (1967).

For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

Editor's Note. — *Many of the cases below were decided under similar former provisions.*

Statutes prescribing the procedure to condemn lands should be strictly construed. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839 (1970), rev'd on other grounds, 277 N.C. 634, 178 S.E.2d 345 (1971).

One cannot condemn that which he owns. VEPCO v. King, 259 N.C. 219, 130 S.E.2d 318 (1963).

Condemnation under the power of eminent domain is a proceeding in rem against the property. Redevelopment Comm'n v. Hagins, 258 N.C. 220, 128 S.E.2d 391 (1962).

Only when the parties cannot agree may condemnation proceedings be instituted. Weyerhaeuser Co. v. Carolina Power & Light Co., 257 N.C. 717, 127 S.E.2d 539 (1962).

Statutory method of condemning a right-of-way can be exercised when the parties are unable to agree upon the terms of acquisition. Allen v. Wilmington & W.R.R., 102 N.C. 381, 9 S.E. 4 (1889).

Before the right of eminent domain accrues to the condemnor, there must exist an inability to agree for the purchase price. This has been held to be a preliminary jurisdictional fact. State Hwy. Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

And Condemnor Must First Make a Bona Fide Effort to Purchase. — Before the agency seeking to acquire can ask the court to condemn, it must make a bona fide effort to purchase by private negotiation. VEPCO v. King, 259 N.C. 219, 130 S.E.2d 318 (1963).

Unless Minors Are Interested in Land Sought to Be Acquired. — It is not required of a quasi public service corporation authorized to condemn land that it first endeavor to agree with the owners when it is made to appear that infants have an interest therein, and otherwise that a title to the lands could not be acquired in such way. Western Carolina Power Co. v. Moses, 191 N.C. 744, 133 S.E. 5 (1926).

Procedure Applicable Only to Acquisition of Right, etc., to Specific Land. — Provisions for commissioners, appraisal, viewing the premises, etc., are applicable only to instances where the condemnor acquires title and right to possession of specific land. Eller v. Board of Educ., 242 N.C. 584, 89 S.E.2d 144 (1955).

Procedure Not Applicable to Trespasses. — Provisions with regard to procedure by private condemnors only apply to the mode of acquiring title to real estate and getting a right-of-way, and have no application to trespasses committed outside of the right-of-way in building the road; for such trespasses, the corporations are liable in a civil action. Bridgers v. Dill, 97 N.C. 222, 1 S.E. 767 (1887).

Applicability of Procedure to Railroads. — The method of proceeding prescribed for the condemnation of land by railroad corporations is applicable to all railroads, whether formed under the general law or special act of incorporation. Allen v. Wilmington & W.R.R., 102 N.C. 381, 9 S.E. 4 (1889).

Condemnation by Department of Transportation. — The procedure prescribed by former G.S. 40-11, et seq. was applicable to condemnation proceedings instituted by the Board (now Department) of Transportation prior to July 1, 1960, while the procedure presently applicable to condemnation proceedings by the Board (now Department) of Transportation is prescribed by G.S. 136-103 et seq. City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973). As to condemnation by the former State Highway Commission and former Board (now Department) of Transportation, see also Yancey v. North Carolina State Hwy. & Pub. Works Comm'n, 222 N.C. 106, 22 S.E.2d 256 (1942); State v. Alston, 272 N.C. 278, 158 S.E.2d 52 (1967); State v. Pritchard, 227 N.C. 168, 41 S.E.2d 287 (1947); State v. Lashley, 21 N.C. App. 83, 203 S.E.2d 71 (1974), cert. denied, Cox v. Cox, 92 N.C. App. 702, 376 S.E.2d 13 (1989); Hamlin v. Hamlin, 302 N.C. 478, 276 S.E.2d 381 (1981).

As to procedure for condemnation by county board of education, see Board of Educ. v. Forrest, 193 N.C. 519, 137 S.E. 431 (1927).

As to acquisition of property by redevelopment commission, see Redevelopment Comm'n v. Abeyounis, 1 N.C. App. 270, 161 S.E.2d 191 (1968); Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

Applicability of Rules Governing Civil Actions. — As a proceeding to condemn land under statutory power is a special proceeding, the requirement of G.S. 1-393 that "except as otherwise provided" special proceedings shall be governed by the same rules laid down for civil actions is applicable thereto. Nantahala Power & Light Co. v. Whiting Mfg. Co., 209 N.C. 560, 184 S.E. 48 (1936).

Applicability of Rules of Civil Procedure to Private Condemnation Proceedings. — This section, together with G.S. 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure, G.S. 1A-1, in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by this Chapter. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Conversion of Private Condemnation Proceeding into Quiet Title Action. — Trial court did not err by applying G.S. 1A-1, Rule 15(b) in such a way as to convert condemnation proceeding brought by private condemnors with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

Payment Prerequisite to Right of Entry. — If the parties cannot agree, the company may proceed to condemn the land; it does not acquire the right to enter for the purpose of constructing the road until the amount of the appraisement has been paid into court. State v. Wells, 142 N.C. 590, 55 S.E. 210 (1906).

A condemnor acquires no right to possession in a condemnation proceeding until it pays into court the value of the subject property, as determined by appraisers. City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

And to Acquisition of Title. — A condemnor acquires no title to the property until it obtains a final judgment and pays to the landowner the amount of compensation fixed by such judgment. City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

Use of Property by Owner Until Payment. — Absent unusual circumstances, the landowner may continue to use his property from the commencement of a condemnation proceeding until the payment into court by the condemnor of the value of the property as determined by commissioners, to the same extent and in the same manner as he had been using it prior to commencement of the condemnation proceeding. City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

Each owner is entitled to defend upon the ground that his property does not qualify for the purpose intended, or that its selection was the result of arbitrary or capricious conduct on the part of the taking agency. Redevelopment Comm'n v. Hagins, 258 N.C. 220, 128 S.E.2d 391 (1962).

A landowner may not maintain a proceeding unless there has been a taking under the power of eminent domain. Hughes v. North Carolina State Hwy. Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

Statutory remedy held the only one open to one whose land was appropriated as a right-of-way. McIntire v. Western N.C.R.R., 67 N.C. 278 (1872); Allen v. Wilmington & W.R.R., 102 N.C. 381, 9 S.E. 4 (1889).

Election to Sue for Damages. — Where a railroad or other public service corporation has made the entry, appropriated the right-of-way, constructed its road and is operating the same, and neither party has seen fit to resort to the statutory method, the owner of the land has the right at his election to sue for permanent damages, and on payment of the same the easement will pass to the defendant. Mason v. Durham County, 175 N.C. 638, 96 S.E. 110 (1918).

Cited in VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); Carolina Tel. & Tel. Co. v. McLeod, 321 N.C. 426, 364 S.E.2d 399 (1988).

§ 40A-20. Petition filed; contents.

For the purpose of acquiring property a condemnor listed in G.S. 40A-3(a), or the owner of the property sought to be condemned, may present a petition to the clerk of the superior court of any county in which the real estate described in the petition is situated, praying for the appointment of commissioners of appraisal. The petition shall be signed and verified. If filed by the condemnor, it must contain a description of the property which the condemnor seeks to acquire; and it must state that the condemnor is duly incorporated, and that it is its intention in good faith to conduct and carry on the public business authorized by its charter, stating in detail the nature of its public business, and the specific use of the property; and that the property described in the petition is required for the purpose of conducting the proposed business. The petition, if filed by the condemnor, must also contain a statement as to whether the owner will be permitted to remove all or a specified portion of any buildings, structures, permanent improvements, or fixtures situated on or affixed to the land. The petition, whether filed by the condemnor or the owner, must also state the names and places of residence of all other owners, so far as the same can by reasonable diligence be ascertained, or those who claim to be owners of the property. If any such persons are infants, their ages, as near as may be known, must be stated; and if any such persons are incompetents, inebriates or are unknown, that fact must be stated, together with any other allegations and statements of liens or encumbrances on the property which the condemnor or the owner may see fit to make.

Nothing in this section shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property. (1871-2, c. 138, s. 14; Code, s. 1944; 1893, c. 396; Rev., s. 2580; 1907, c. 783, s. 3; C.S., s. 1716; 1981, c. 919, s. 1.)

Cross References. — As to condemnation by the Department of Transportation, see G.S. 136-103 et seq.

Legal Periodicals. — For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970).

CASE NOTES

I. In General.
II. Contents of Petition.

I. IN GENERAL.

Editor's Note. — *Many of the cases below were decided under similar former provisions.*

Perfunctory Proceeding Not Intended. — A perfunctory proceeding leading automatically to the granting of the petition is not contemplated by the law; the landowner may deny any of the allegations in the petition, and is entitled to a hearing before commissioners are appointed to appraise the damages he will sustain if his property is taken. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

"Taking" Prerequisite to Proceeding by Owner. — The owner's right to have the land appraised must necessarily be predicated upon a taking of the property by the corporation possessing the right of eminent domain. And "taking" under the power of eminent domain may be defined as entering upon private property for more than a momentary period, and, under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof. Penn v. Carolina Va. Coastal Corp., 231 N.C. 481, 57 S.E.2d 817 (1950).

Owner may not maintain a proceeding for the assessment of damages until there has been a taking of his property under the power of eminent domain; hence, demurrer to a petition was properly sustained when its allegations amounted to no more than that respondent had threatened to take an easement and had made preliminary surveys incidental thereto, since in such instance the petition failed to allege a taking of the property. Penn v. Carolina Va. Coastal Corp., 231 N.C. 481, 57 S.E.2d 817 (1950).

Recovery of Compensation Where Taking Not for Private Purpose. — Where there was no evidence upon the record showing that the taking over of a road was for a private purpose sufficient to raise an issue of fact, the plaintiff was remitted to his rights for the recovery of just compensation. Reed v. State Hwy. & Pub. Works Comm'n, 209 N.C. 648, 184 S.E. 513 (1936).

Recovery of Consideration Agreed On. — Where the State Highway Commission (now Department of Transportation) failed to pay consideration for a right-of-way easement executed by landowners in accordance with an agreement, the landowners could bring an action at law in the superior court to recover such consideration; a special condemnation proceeding was not proper. Sale v. State Hwy. & Pub. Works Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955).

Setting Aside of Fraudulent Deed. — Where a deed for a right-of-way was obtained from a landowner by fraud on the part of a railroad company, the superior court had jurisdiction to set aside the conveyance, but could not go further in the same action and ascertain and enforce payment of damages suffered by the grantor by reason of the appropriation of his land as a right-of-way by the company, although such appropriation was made by the company under the deed in question. Allen v. Wilmington & W.R.R., 102 N.C. 381, 9 S.E. 4 (1889).

Fact that cotenant granted a right-of-way to railroad would not prevent another owner from instituting proceedings for the assessment of damages sustained by him, nor would such facts prevent the cotenant who had made such grant from becoming a party to the proceedings and having his rights adjusted thereunder, upon a claim that the company had forfeited its right under the grant by failure to comply with the conditions thereof, even though such forfeiture did not occur until after the petition was filed by the cotenant. Hill v. Glendon & Gulf Mining & Mfg. Co., 113 N.C. 259, 18 S.E. 171 (1893).

Proceedings Involving Telegraph Companies. — Inasmuch as former G.S. 56-7 set forth all the necessary statements for the petition of the telegraph company, and former G.S. 56-8 provided for its service, only so much of the railroad law as directed proceedings after the petition was before the court was made applicable to telegraph companies. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022, rev'd on other grounds on rehearing, 131 N.C. 225, 42 S.E. 587 (1902).

Joinder — Of Interested Parties Generally. — The petition, whether filed by an owner or by the company, should state the names of all persons interested, and all of them should be in court before the commissioners are appointed. Hill v. Glendon & Gulf Mining & Mfg. Co., 113 N.C. 259, 18 S.E. 171 (1893).

In an action by the owner of an interest in lands against the State Highway Commission (now Department of Transportation) to recover compensation for the taking of a portion of the land, the joinder, as a respondent, of the owner of the other interest in the land did not result in a misjoinder of parties and causes, since the action was to enforce a single right to recover compensation, and the joinder of all parties having an interest in the land was required. Tyson v. State Hwy. Comm'n, 249 N.C. 732, 107 S.E.2d 630 (1959).

Same — Of Owners of Several Tracts. — Where it is sought to condemn several tracts of land belonging to different owners, all the owners may be joined in one proceeding in the absence of any statutory provision to the contrary. Such a course is convenient, and can injure no one if damages are separately assessed to each owner. Redevelopment Comm'n v. Hagins, 258 N.C. 220, 128 S.E.2d 391 (1962).

Trial of Intervenor's Claim Not Required Prior to Intervention. — The court is not required to try and determine the validity of a claim of ownership advanced by an omitted claimant before it permits him to intervene in the proceeding for the purpose of asserting his claim. City of Raleigh v. Edwards, 234 N.C. 528, 67 S.E.2d 669 (1951).

Clerk Held to Have Jurisdiction. — Where the charter of a railroad company provided that it might condemn land by a proceeding commenced before a court of record having common-law jurisdiction, it was held that the clerk of a superior court had jurisdiction of such proceeding. Durham & N.R.R. v. Richmond & D.R.R., 106 N.C. 16, 10 S.E. 1041 (1890).

Waiver of Right to Require Proceeding before Clerk. — Where a city was sued for damages for running its water-supply pipe on the plaintiff's lands, and it was made to appear that the pipeline was upon the State's highway over the plaintiff's land, the plaintiff, as the servient owner, could maintain his action; the denial of his title or right by the defendant was a waiver of its right that the plaintiff should have proceeded before the clerk under this section, so that the plaintiff could maintain his action of trespass in the superior court. Rouse v. Kinston, 188 N.C. 1, 123 S.E. 482 (1924).

Waiver of Preliminary Hearing. — Where it was stipulated by the parties in condemnation proceedings that a hearing before commissioners appointed by the clerk should be waived, and judgment was rendered determining the amount of damages, and on appeal the Supreme Court affirmed the judgment as to the compensation allowed and remanded the cause for error in the exclusion of another element of compensation to which defendants were entitled, on the subsequent trial to determine the amount recoverable on such other element of compensation the parties were bound by the stipulation waiving a preliminary hearing by commissioners, and plaintiff's exception to the trial of the issue without such preliminary hearing would not be sustained. State ex rel. Myers v. Wilmington-Wrightsville Beach Causeway Co., 205 N.C. 508, 171 S.E. 859 (1933).

Clerk's Findings of Facts Not Final. — The finding of the facts of the clerk upon preliminary allegations in condemnation proceedings are not final and may be appealed from. Johnson City S.R.R. v. South & W.R.R., 148 N.C. 59, 61 S.E. 683 (1908).

Necessity of Taking Is Legislative Question. — As a general rule, once the public purpose is established, the necessity or expediency of the taking is a legislative, and not a judicial question. Greensboro-High Point Airport Auth. v. Irvin, 36 N.C. App. 662, 245 S.E.2d 390, appeal dismissed, 295 N.C. 548, 248 S.E.2d 726 (1978), cert. denied, 440 U.S. 912, 99 S. Ct. 1224, 59 L. Ed. 2d 460 (1979).

Judicial Inquiry into Allegations of Bad Faith. — Upon specific allegations tending to show bad faith, malice, wantonness, or oppressive and manifest abuse of discretion by the condemnor, the issue raised becomes the subject of judicial inquiry as a question of fact to be determined by the judge. Greensboro-High Point Airport Auth. v. Irvin, 36 N.C. App. 662, 245 S.E.2d 390, appeal dismissed, 295 N.C. 548, 248 S.E.2d 726 (1978), cert. denied, 440 U.S. 912, 99 S. Ct. 1224, 59 L. Ed. 2d 460 (1979).

II. CONTENTS OF PETITION.

Section stating the requisites of the petition must be strictly complied with, especially by a private corporation as distinguished from a public one or municipality. Johnson City S.R.R. v. South & W.R.R., 148 N.C. 59, 61 S.E. 683 (1908). See Durham & N.R.R. v. Richmond & D.R.R., 106 N.C. 16, 10 S.E. 1041 (1890).

Affirmative Showing of Compliance with Statute. — In order for a redevelopment commission to establish a right to acquire property by condemnation, the petition must affirmatively show that the statutory provisions have been complied with. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839, rev'd on other grounds, 277 N.C. 634, 178 S.E.2d 345 (1970).

Sufficiency of Petition. — A petition to condemn land for urban renewal is sufficient under the Rules of Civil Procedure to state a claim for relief where it gives notice of the nature and basis of the petitioners' claim and the type of case brought, and alleges generally the occurrence or performance of the conditions precedent. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1970).

Energy company's petition for condemnation in order to condemn an easement across the property owner's property as part of a plan to build a power line across the forum county was sufficient to describe the easement, as the petition included a legal description of the property and the easement area, described the intended use of the easement, and further described the nature of the right, title, and interest sought to be condemned. Progress Energy Carolinas, Inc. v. Strickland, — N.C. App. —, 640 S.E.2d 856, 2007 N.C. App. LEXIS 404 (2007).

The petition must state in detail the nature of the public business and the specific use to which the land will be put. These allegations are jurisdictional in character. Redevelopment Comm'n v. Abeyounis, 1 N.C. App. 270, 161 S.E.2d 191 (1968); State Hwy. Comm'n v. Matthis, 2 N.C. App. 233, 163 S.E.2d 35 (1968).

Controversy as to what land condemnor is seeking to condemn has no place in condemnation proceedings. Carolina Power & Light Co. v. Creasman, 262 N.C. 390, 137 S.E.2d 497 (1964).

Petition to Contain Accurate Description of Property Sought. — Ordinarily, condemnation proceedings are instituted by the condemnor by petition containing an accurate description of the property which it seeks to condemn, thereby placing the landowner on the defendant's side of the indexes and cross-indexes of the public records and furnishing accessible means by which the property may be identified. Hughes v. North Carolina State Hwy. Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

And Not Merely a Description of the Entire Tract. — A description of the property sought to be acquired, and not merely a description of the entire tract over which the right-of-way, privilege, or easement is to run, is necessary. City of Gastonia v. Glenn, 218 N.C. 510, 11 S.E.2d 459 (1940).

When the condemnor seeks to follow the procedure permitted by statute, his petition must contain a description of the property actually in litigation, and not merely a description of the entire tract. The property must "first be located." Hughes v. North Carolina State Hwy. Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

With Reference to Uncontroverted Monuments. — It is for the condemnor to determine what land it seeks to condemn and to describe it in its petition by reference to uncontroverted monuments. Carolina Power & Light Co. v. Creasman, 262 N.C. 390, 137 S.E.2d 497 (1964); Duke Power Co. v. Herndon, 26 N.C. App. 724, 217 S.E.2d 82 (1975).

The condemnor must "first locate the property." Carolina Power & Light Co. v. Creasman, 262 N.C. 390, 137 S.E.2d 497 (1964).

So That Owner Knows Exact Limits. — The statutory procedure for the award of just compensation to the owner of private property appropriated to public use presupposes that the owner shall know with certainty the exact limits of the appropriation made. Cannon v. City of Wilmington, 242 N.C. 711, 89 S.E.2d 595 (1955), cert. denied, 352 U.S. 842, 77 S. Ct. 66, 1 L. Ed. 2d 58 (1956).

Filing of Map and Profile Required. — The filing of a proper profile is a condition precedent before an order of condemnation shall be granted to a railroad. Kinston & C.R.R. v. Stroud, 132 N.C. 413, 43 S.E. 913 (1903).

It is deemed necessary, so that the landowner may know what land is intended to be appropriated and can have his grievances adjusted, to require the filing of maps, profiles, etc. Durham & N.R.R. v. Richmond & D.R.R., 106 N.C. 16, 10 S.E. 1041 (1890).

Failure to file a map and profile may be cured by amendment. Holly Shelter R.R. v. Newton, 133 N.C. 132, 133 N.C. 136, 45 S.E. 549, 45 S.E. 549 (1903); State v. Wells, 142 N.C. 590, 55 S.E. 210 (1906).

Only Property Described May Be Acquired. — Ordinarily, absent an amendment, the only property a condemnor may acquire is that described in the petition. Carolina Power & Light Co. v. Creasman, 262 N.C. 390, 137 S.E.2d 497 (1964).

Remedy for Failure of Agency to Define Extent of Claim. — Where the State Highway Commission (now Department of Transportation) claimed a right-of-way over land, the landowner was entitled as a matter of right to require that the Commission (now Department) define with particularity the location and extent of its claim and if it refused or failed to do so, the landowner could invoke the remedy of mandamus. Cannon v. City of Wilmington, 242 N.C. 711, 89 S.E.2d 595 (1955).

Allegation of Damages. — In a special proceeding to assess compensation for land taken from an educational institution for highway purposes, it was not required that petitioners allege with particularity the various respects in which the property was adversely affected by the new highway, and since evidence in support of all elements of damage recoverable is competent under the general allegation of damage, petitioners were not prejudiced by an order striking from the petition allegations relating thereto. Gallimore v. State Hwy. & Pub. Works Comm'n, 241 N.C. 350, 85 S.E.2d 392 (1955).

As to statement of inability to acquire title required by former § 40-12, see Hill v. Glendon & Gulf Mining & Mfg. Co., 113 N.C. 259, 18 S.E. 171 (1893); Durham v. Rigsbee, 141 N.C. 128, 53 S.E. 531 (1906); Johnson City S.R.R. v. South & W.R.R., 148 N.C. 59, 61 S.E. 683 (1908); Western Carolina Power Co. v. Moses, 191 N.C. 744, 133 S.E. 5 (1926); Red Springs City Bd. of Educ. v. McMillan, 250 N.C. 485, 108 S.E.2d 895 (1959); VEPCO v. King, 259 N.C. 219, 130 S.E.2d 318 (1963); State Hwy. Comm'n v. Phillips, 267 N.C. 369, 148 S.E.2d 282 (1966).

§ 40A-21. Notice of proceedings.

Notice of all proceedings brought hereunder shall be filed with the clerk of superior court of each county in which any part of the land is located in the form and manner provided by G.S. 1-116, and the clerk shall index and cross-index this notice as required by G.S. 1-117. In the record of lis pendens and in the judgment docket required by G.S. 7A-109 the clerk shall always index the name of the condemnor as the plaintiff and the name of the property owner as the defendant irrespective of whether the condemning party is the plaintiff or defendant. The filing of such notice shall be constructive notice of the proceeding to any person who subsequently acquires any interest in or lien upon said property, and the condemnor shall take all property condemned under this Article free of the claims of any such person. (1969, c. 864; 1981, c. 919, s. 1.)

§ 40A-22. Service.

A summons as in other cases of special proceedings, together with a copy of the petition, must be served on all persons whose estates or interests are to be affected by the proceedings, at least 10 days prior to the hearing of the same by the court. (1871-2, c. 138, s. 14; Code, s. 1944; Rev., s. 2581; C.S., s. 1717; 1981, c. 919, s. 1.)

Cross References. — As to summons in special proceedings, see G.S. 1-394, 1-395.

CASE NOTES

Issuance of Summons. — A condemnation proceeding is a special proceeding and a summons should issue as in all other cases. Carolina & N.W.R.R. v. Pennearden Lumber & Mfg. Co., 132 N.C. 644, 44 S.E. 358 (1903), decided under prior law.

Applied in VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985).

§ 40A-23. Service where parties unknown.

If the person on whom service of summons and petition is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then service may be made by publishing a notice, stating the time and place within which such person must appear and plead, the object thereof, with a description of the land to be affected by the proceedings, in accordance with the provisions of G.S. 1A-1, Rule 4(j)(9)c. In such cases the State Treasurer shall be served as custodian of the Escheat Fund and may become a party to the action. (Code, s. 1944, subsec. 5; Rev., s. 2582; C.S., s. 1718; 1971, c. 1093, s. 18; 1981, c. 919, s. 1.)

Editor's Note. — The reference in this section to G.S. 1A-1, Rule 4(j)(9)c was made prior to extensive rewording of the material formerly located in G.S. 1A-1, Rule 4(j)(9). As to service by publication on a party that cannot otherwise be served, see now G.S. 1A-1, Rule 4(j1). As to manner of service to exercise jurisdiction in rem or quasi-in-rem, see now G.S. 1A-1, Rule 4(k).

CASE NOTES

When service by publication inadequate. — Service by publication is not an adequate substitute for actual notice, when giving actual notice to identified parties is neither impossible, impractical, nor unreasonable. United States v. Chatham, 323 F.2d 95 (4th Cir. 1963), decided under prior law.

When condemnation plaintiffs take the easy course, they should not be heard to say that the proceedings had upon published notice addressed to unknown persons foreclosed the rights of interested parties who were readily identifiable and easily served, particularly when the condemnation plaintiff knew, or should have known, that the unidentified persons had a substantial interest in the litigation. United States v. Chatham, 323 F.2d 95 (4th Cir. 1963), decided under prior law.

§ 40A-24. Orders served as in special proceedings in absence of other provisions.

In all cases not herein otherwise provided for, service of orders, notices, and other papers in the special proceedings authorized by this Chapter may be made as in other special proceedings. (Code, s. 1944, subsec. 7; Rev., s. 2583; C.S., s. 1719; 1981, c. 919, s. 1.)

Cross References. — As to special proceedings generally, see G.S. 1-393 et seq.

§ 40A-25. Answer to petition; hearing; commissioners appointed.

On presenting such petition to the clerk of superior court, with proof of service of a copy thereof, and of the summons, all or any of the persons whose estates or interests are to be affected by the proceedings may answer such petition and show cause against granting the prayer of the same. The clerk shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, shall make an order for the appointment of three commissioners and shall fix the time and place for the first meeting of the commissioners. Each commissioner shall be a resident of the county wherein the property being condemned lies who has no right, title, or interest in or to the property condemned, is not related within the third degree to the owner or to the spouse of the owner, is not an officer, employee or agent of the condemnor, and is disinterested in the rights of the parties in every way. (1871-2, c. 138, s. 15; Code, s. 1945; Rev., s. 2584; C.S., s. 1720; 1981, c. 919, s. 1.)

CASE NOTES

Editor's Note. — *Most of the cases below were decided under similar former provisions.*

Strict Construction. — Statutes prescribing the procedure to condemn lands should be strictly construed. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839, rev'd on other grounds, 277 N.C. 634, 178 S.E.2d 345 (1970).

Legislative Intent with Regard to Parties. — Tenant having month-to-month tenancy based upon periodic rental payments without a written document is a person having an estate or interest affected by condemnation proceedings; if the legislature had intended to give a diminished status to month-to-month tenancies, it could have expressly done so. Transcontinental Gas Pipe Line Corp. v. Calco Enters., 132 N.C. App. 237, 511 S.E.2d 671 (1999).

The clerk is to hold the hearing on the challenge only after notice to the parties. Collins v. North Carolina State Hwy. & Pub. Works Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953); City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

The statutory procedure is designed to provide to the landowner a fair determination of his damages; it would be converted into a farce if it were construed to permit the clerk to appoint commissioners, the commissioners to meet and determine the damages and report the same to the clerk, and the clerk 20 days later to enter a final judgment, all with no notice whatever to the landowner, other than the original summons in the proceedings, and all before the time for filing his answer, as extended by the clerk, expired. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Burden on Respondent. — Trial court's finding that the energy company's condemnation of part of the property owner's property to condemn an easement across the property would not affect the property owner's reasonable-size garden was supported by the evidence, and thus the order granting condemnation would not be overturned; the property owner, as the respondent, had the burden of proof to show that condemnation in the private condemnation proceeding initiated by the energy company would not be proper and the property owner did not meet that burden. Progress Energy Carolinas, Inc. v. Strickland, — N.C. App. —, 640 S.E.2d 856, 2007 N.C. App. LEXIS 404 (2007).

Effect of Notice of Hearing. — If the landowner is given notice of the hearing before the clerk, this would, no doubt, be sufficient to charge him with notice of an order entered by the clerk, at such hearing, appointed commissioners and fixing the time and place for their first meeting. In turn, this would charge him with notice of actions of the commissioners at such first meeting, including the adjournment of such meeting to another time and place. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Notice of Motions. — All motions made before the clerk, other than those grantable as a matter of course or those specifically provided for by law, require notice to the parties affected thereby. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Advisability of Street Widening Project in Discretion of Aldermen. — The advisability of widening a street is a matter committed by law to the sound discretion of the aldermen, with which neither the defendants nor the courts can interfere; it is a political and administrative measure of which the defendants are not even entitled to notice or to be heard. Durham v. Rigsbee, 141 N.C. 128, 53 S.E. 531 (1906).

Railroad as Judge of Necessity of Land for Right-of-Way. — A railroad company is entitled to so much of the right-of-way as may be necessary for the purpose of the company; hence, the denial by a person in the possession of a portion of the right-of-way that the portion in controversy was necessary for the purposes of the company did not raise an issue of fact to be determined by a jury, as the company was the judge of the necessity and extent of such use. Seaboard Air Line R.R. v. Olive, 142 N.C. 257, 55 S.E. 263 (1906).

When Extent of Rights to Be Acquired Are an Issuable Question. — The extent and limit of the rights to be acquired are primarily and very largely referred to the companies or grantees of the power, and only becomes an issuable question, usually determinable by the court, on allegation of fact tending to show bad faith on the part of the companies or an oppressive or manifest abuse of their discretion. Yadkin River Power Co. v. Wissler, 160 N.C. 269, 76 S.E. 267 (1912), distinguishing, Carolina Cent. R.R. v. Love, 81 N.C. 434 (1879).

Clerk Without Authority to Appoint Commissioners Until Determination of Controverted Facts. — In a special proceeding to condemn land for urban renewal, the clerk of superior court does not have authority to issue an order appointing commissioners of appraisal where respondents deny the allegations of the petition; the record must show that after a proper hearing the controverted facts had been determined in favor of petitioner, the clerk's finding that commissioners should be appointed not being a sufficient finding of the controverted facts. Redevelopment Comm'n v.

Grimes, 8 N.C. App. 376, 174 S.E.2d 839 (1970), rev'd on other grounds, 277 N.C. 634, 178 S.E.2d 345 (1971).

Procedure Where Issuable Matters Are Raised Before Clerk. — Where issuable matters are raised before the clerk he should pass upon these matters presented in the record, and have the land assessed through commissioners, as the statute directs, allowing the parties, by exceptions, to raise any question of law or fact issuable or otherwise to be considered on appeal to the superior court from his award of damages, as provided by law. Selma v. Nobles, 183 N.C. 322, 111 S.E. 543 (1922).

When respondents in a special proceeding to condemn land for urban renewal deny the allegations of the petition, the clerk of superior court has the duty, after notice, to hear the parties and pass upon the disputed matters presented on the record; if the allegations of the petition are found to be true, the clerk must then appoint commissioners to appraise the property and assess damages for the taking. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839 (1970), rev'd on other grounds, 277 N.C. 634, 178 S.E.2d 345 (1971).

Procedure Where Only Issue of Just Compensation Is Raised. — Where the answer does not deny the right of the city to acquire the desired easements by condemnation and raises no issue save that of just compensation, the only matter to be determined by the clerk at the initial hearing is the selection and appointment of the commissioners and the fixing of the time and place for their first meeting. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

As to protection of rights of parties by interlocutory injunction, see Selma v. Nobles, 183 N.C. 322, 111 S.E. 543 (1922).

Pretrial Conference. — In a condemnation proceeding, the trial court should conduct a pretrial conference where the record shows that the parties have different concepts of what phase of the matter they are going to try. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839 (1970), rev'd on other grounds, 277 N.C. 634, 178 S.E.2d 345 (1971).

If corporate charter is on its face inoperative and void, a court will so declare it in any proceedings to condemn lands by virtue of the right of eminent domain claimed thereunder. Kinston & C.R.R. v. Stroud, 132 N.C. 413, 43 S.E. 913 (1903); Holly Shelter R.R. v. Newton, 133 N.C. 132, 133 N.C. 136, 45 S.E. 549, 45 S.E. 549 (1903).

Collateral Attack by Landowner Not Upheld. — The court would not sustain a collateral attack and deny the right of condemnation upon a suggestion that the petitioner might exceed its chartered right in the use of the property acquired by condemnation. Wadsworth Land Co. v. Piedmont Traction Co., 162 N.C. 314, 78 S.E. 297 (1913).

Order appointing commissioners to assess damages is interlocutory, and no appeal will be entertained until after final judgment upon the report of the commissioners. American Union Tel. Co. v. Wilmington, C. & A.R.R., 83 N.C. 420 (1880); Commissioners of Davie County v. Cook, 86 N.C. 18 (1882); Norfolk & S.R.R. v. Warren, 92 N.C. 620 (1885); Hendrick v. Carolina Cent. R.R., 98 N.C. 431, 4 S.E. 184 (1887), distinguishing Click v. Western N.C.R.R., 98 N.C. 390, 4 S.E. 183 (1887).

Appeal from Ruling of Clerk. — It is only after the clerk of superior court confirms or fails to confirm the report of the commissioners that either party aggrieved by the ruling of the clerk may appeal; such appeal carries the entire record up for review by the trial judge upon the questions of fact. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1970).

Finding of Facts by Court Conclusive. — In condemnation proceedings, when it is proper for the lower court to find the facts, its findings upon competent supporting evidence are conclusive. Johnson City S.R.R. v. South & W.R.R., 148 N.C. 59, 61 S.E. 683 (1908).

Cited in Hancock v. Tenery, 131 N.C. App. 149, 505 S.E.2d 315 (1998).

§ 40A-26. Powers and duties of commissioners.

The commissioners, before entering upon the discharge of their duties, shall take and subscribe an oath that they will fairly and impartially appraise the property in the petition. Any one of them may issue subpoenas, administer oaths to witnesses, and any two of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet, except by the appointment of the clerk or pursuant to adjournment, they shall cause 10 days' notice of such meeting to be given to the parties who are affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing. After the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of the commissioners being present and acting, shall ascertain and determine the compensation which ought justly to be made by the condemnor to the owners of the property appraised by them. The commissioners shall determine the compensation to be awarded in accordance with the principles established by Article 4 of this Chapter. They shall report the same to the clerk within 10 days. (1871-2, c. 138, ss. 16-18; Code, s. 1946; 1891, c. 160; Rev., s. 2585; C.S., s. 1721; 1981, c. 919, s. 1.)

CASE NOTES

I. General Consideration.
II. Compensation.

I. GENERAL CONSIDERATION.

Editor's Note. — *The cases below were decided under similar former provisions.*

Determination of Commissioners Not an Interference with Right to Jury Trial. — It seems to have been settled in Raleigh & G.R.R. v. Davis, 19 N.C. 451 (1837), that the Constitution guarantees the right to trial by jury in controversies respecting property only in cases where, under the common law, the demand that the facts should be so found could not have been refused, and that in fixing the quantum of compensation to the landowner for a right-of-way condemned to the use of a railroad, commissioners do not invade the province that, under the ancient law, belonged peculiarly and exclusively to the jury. Chowan & S.R.R. v. Parker, 105 N.C. 246, 11 S.E. 328 (1890). As to provision for jury trial on appeal, see § 40A-29.

Availability of Method to Landowner. — The method prescribed for arriving at compensation for condemnation of land is open to the landowner as well. Hughes v. North Carolina State Hwy. Comm'n, 275 N.C. 121, 165 S.E.2d 321 (1969).

Allegation of Compliance with Statutory Requirements. — In order to invoke the power of eminent domain, a redevelopment commission must affirmatively allege compliance with the statutory requirements. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1970).

The law contemplates notice to the landowner of the meeting of the commissioners at which they are to "hear" his proofs and allegations. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

The commissioners are required to give the parties or their attorneys notice of the meeting at which the report is adopted and ordered filed. Collins v. North Carolina State Hwy. & Pub. Works Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953).

The statutory procedure is designed to provide to the landowner a fair determination of his damages. It would be converted into a farce if it were construed to permit the clerk to appoint commissioners, the commissioners to meet and determine the damages and report the same to the clerk, and the clerk 20 days later to enter a final judgment, all with no notice whatever to the landowner, other than the original summons in the proceedings, and all before the time for filing his answer, as extended by the clerk, expired. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

If the landowner is given notice of the hearing before the clerk, this would, no doubt, be sufficient to charge him with notice of an order entered by the clerk, at such hearing, appointing commissioners and fixing the time and place for their first meeting. In turn, this would charge him with notice of actions of the commissioners at such first meeting, including the adjournment of such meeting to another time and place. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Statutory procedure for condemnation does not contemplate that commissioners pass upon issues of fact prerequisite to an adjudication as to whether a landowner is entitled to recover for an alleged appropriation by use of an easement of flight. City of Charlotte v. Spratt, 263 N.C. 656, 140 S.E.2d 341 (1965).

Report Held to Fail to Show Hearing. — A commissioners' report that simply stated that the commissioners met on a certain day in the office of the clerk and subsequently visited the premises of the defendant, and after taking into full consideration the quality and quantity of the land involved, and all inconveniences likely to result to defendant from the condemnation of the rights-of-way, asserted the damages at zero, did not purport to show any hearing by the commissioners of the proofs and allegations of the parties, as required both by law and by the order of the clerk. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Appeal from Ruling of Clerk. — It is only after the clerk of superior court confirms or fails to confirm the report of the commissioners that either party aggrieved by the ruling of the clerk may appeal; such appeal carries the entire record up for review by the trial judge upon the questions of fact. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1970).

Passing of Cause for Flooding with Conveyance of Property. — The right to flood lands in derogation of plaintiff's easement of access does not arise merely upon the erection of the structure causing the flooding, but upon the institution of proceedings looking to the award of due compensation; and until such proceedings are instituted by one side or the other, the flooding constitutes a mere invasion of rights which pass with a conveyance of the property to which they are attached. Empie v. United States, 131 F.2d 481 (4th Cir. 1942).

Damages caused by diversion of water were not covered by statute providing for equipment of a right-of-way by railroad companies. Ward v. Albemarle & Raleigh R.R., 112 N.C. 168, 16 S.E. 921 (1893).

Cited in Hancock v. Tenery, 131 N.C. App. 149, 505 S.E.2d 315 (1998).

II. COMPENSATION.

Meaning of "Compensation which Ought Justly To Be Made". — It seems to be the general rule in this jurisdiction that "the compensation which ought justly to be made" is such compensation after special benefits peculiar to the land are set off against damages. Stamey v. Burnsville, 189 N.C. 39, 126 S.E. 103 (1925).

Compensation to Be Paid to Individual Who Owns Property at Time of Taking. — Compensation for property taken in the exercise of the power of eminent domain is due to the owner at the time of the taking, and not to the owner at an earlier or later date. Empie v. United States, 131 F.2d 481 (4th Cir. 1942).

Nonowner Not Entitled to Compensation. — If plaintiff does not own the land upon which the defendant has constructed its road and imposed a burden, he has nothing to be "taken," and therefore nothing for which he is entitled to compensation. Abernathy v. South & W.R.R., 150 N.C. 97, 63 S.E. 180 (1908).

The owner is entitled to compensation for actual and direct damages which he may sustain by being deprived of his property. Raleigh, C. & S.R.R. v. Mecklenburg Mfg. Co., 166 N.C. 168, 82 S.E. 5 (1914), dismissed, 169 N.C. 156, 85 S.E. 390 (1915).

Only Actual and Direct Damage Considered. — In estimating damages of any kind to lands taken by a railroad company, it is only proper to consider actual damages, not those remote or speculative or dependent upon a future possible use of the property. Madison County R. R. v. Gahagan, 161 N.C. 190, 76 S.E. 696 (1912).

Damage to Adjoining Lands Included. — The landowner will be entitled to have included in his assessment damages for injuries to lands adjoining those upon which the railroad is constructed. Hendrick v. Carolina Cent. R.R., 101 N.C. 617, 8 S.E. 236 (1888).

Damages are limited to those which embrace the actual value of the property taken and the direct physical injuries to the remaining property. Raleigh, C. & S.R.R. v. Mecklenburg Mfg. Co., 166 N.C. 168, 82 S.E. 5 (1914), dismissed, 169 N.C. 156, 85 S.E. 390 (1915).

The owner of land, a part of which is taken under the right of eminent domain, may recover as compensation not only the value of the land taken, but also the damages thereby caused, if any, to the remaining land. Western Carolina Power Co. v. Hayes, 193 N.C. 104, 136 S.E. 353 (1927).

Measure of Damages. — In condemnation proceedings the measure of damages is not the difference between the value of the owner's property before and after the taking, but the fair value of the land taken reduced by any special benefits received. Stamey v. Burnsville, 189 N.C. 39, 126 S.E. 103 (1925).

Basis of Damage Calculation. — Damages are not assessed upon the idea of a proposed actual dominion, occupation and perception of the profits of the whole right-of-way by the corporation; rather, the calculation is based on the principle that possession and exclusive control will be asserted only over so much of the condemned territory as may be necessary for corporate purposes, such as additional tracks, ditches and houses to be used for stations and section hands. Blue v. Aberdeen & W.E.R.R., 117 N.C. 644, 23 S.E. 275 (1895).

There are two elements of damages legally cognizable in condemnation actions: (1) compensation for the value of property taken, and (2) compensation for any delay in paying for the property once it is taken. Greensboro-High Point Airport Auth. v. Irvin, 306 N.C. 263, 293 S.E.2d 149 (1982), decided under former § 40-17.

Inclusion of Market Value in Damage Estimate. — In awarding damages to the owner of lands for an easement therein acquired for railroad purposes, there should, as a general rule, be included the market value of the land actually covered by the right-of-way, subject to modification under special circumstances, as where there is a mineral deposit with the use of which the easement does not interfere. Virginia & C.S.R.R. v. McLean, 158 N.C. 498, 74 S.E. 461 (1912).

Criteria in Estimating Fair Market Value. — In estimating the fair market value of property acquired by eminent domain, all of the capabilities of the property and all of the uses to which it may be applied or for which it is adapted which affect its value in the market are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner. City of Statesville v. Bowles, 6 N.C. App. 124, 169 S.E.2d 467 (1969), aff'd, 278 N.C. 497, 180 S.E.2d 111 (1971).

Matters such as the accessibility of the property, its slope and elevation, and the costs that will be involved for necessary grading and filling are often important factors to be considered in arriving at an opinion as to its value. City of Statesville v. Bowles, 6 N.C. App. 124, 169 S.E.2d 467 (1969), aff'd, 278 N.C. 497, 180 S.E.2d 111 (1971).

The use of property in combination with other property may be considered as a basis for awarding damages if the possibility of combination is so reasonably sufficient and the use so reasonably probable as to affect the market value. City of Statesville v. Bowles, 6 N.C. App. 124, 169 S.E.2d 467 (1969), aff'd, 278 N.C. 497, 180 S.E.2d 111 (1971).

Compensation for Additional Burdens. — When a railroad company puts additional burdens upon a right-of-way which it has acquired by condemnation, not properly embraced in the general purpose for which it was obtained, the owner is entitled to compensation for them. Virginia & C.S.R.R. v. McLean, 158 N.C. 498, 74 S.E. 461 (1912).

Such as a Telegraph Line. — Telegraph line along a railroad and on the right-of-way of the railroad is an additional burden upon the land, for which the landowner is entitled to just compensation. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022, 89 Am. St. R. 868, rev'd on other grounds on rehearing, 131 N.C. 225, 42 S.E. 587 (1902); Hodges v. Western Union Tel. Co., 133 N.C. 225, 45 S.E. 572 (1903); Query v. Postal Tel. Cable Co., 178 N.C. 639, 101 S.E. 390, 8 A.L.R. 1290 (1919).

Or electric wires placed along street. See Brown v. Asheville Elec. Light Co., 138 N.C. 533, 51 S.E. 62, 60 L.R.A. 631, 107 Am. St. R. 554 (1905).

Or Sewer and Water Lines. — Where a city proposes to lay sewer and water lines in the right-of-way of a State highway, the owner of the fee in this land is entitled to just compensation for an additional burden beyond that of the original easement for the highway. The laying of a water main or sewer line in the right-of-way of a highway is an additional burden upon the owner of the fee. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

But Not Street Railway. — The use of streets for a street railway is one of the ordinary purposes for which streets and highways may be used, and does not impose an additional burden or servitude so as to entitle the abutting property owner to further compensation. Hester v. Durham Traction Co., 138 N.C. 288, 50 S.E. 711, 1 L.R.A. (n.s.) 981 (1905).

Value Determined as of Date of Taking. — For the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain, the value of the land taken should be ascertained as of the date of the taking. The land is taken within the meaning of this principle when the proceeding is begun. Western Carolina Power Co. v. Hayes, 193 N.C. 104, 136 S.E. 353 (1927); Greensboro-High Point Airport Auth. v. Irvin, 306 N.C. 263, 293 S.E.2d 149 (1982), decided under former § 41-17.

Later Changes in Value Are Not Considered. — No change in the value of the land after the date of commencement of the proceeding, whether caused by the use for which it is to be condemned or not, can be considered in determining the amount which the owners shall receive and the petitioner shall pay as just compensation. Greensboro-High Point Airport Auth. v. Irvin, 306 N.C. 263, 293 S.E.2d 149 (1982), decided under former § 40-17.

Legislature has the power to allow municipal corporations to have general benefits assessed as offsets against damages in an action to acquire land for a public purpose, but the power or authority must be given either by special charter or general state act. Stamey v. Burnsville, 189 N.C. 39, 126 S.E. 103 (1925).

General benefits are those which arise from fulfillment of the public object which justified the taking. State Hwy. Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

Special benefits are those which arise from the peculiar relation of the land in question to the public improvement. State Hwy. Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

In determining the compensation to be paid, account must be taking of benefits to the owner's property from the construction of the proposed improvement. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

What Pecuniary Advantages Deducted from Damages. — The owner of lands through which a railroad has acquired a right-of-way by condemnation is entitled to recover therefor the damages done to the remainder of the tract or portions of the land used by him as one tract, deducting from the estimate the pecuniary benefits or advantages which are special and peculiar to the tract in question, but not those which are shared by him in common with other owners of lands of like kind in the same vicinity. Virginia & C.S.R.R. v. McLean, 158 N.C. 498, 74 S.E. 461 (1912). See also, Freedle v. North Carolina R.R., 49 N.C. 89 (1856); Southport, W. & D.R.R. v. Owners of Platt Land, 133 N.C. 266, 45 S.E. 589 (1903).

As to Compensation for Land Containing Stone or Mineral Deposits, see State Hwy. Comm'n v. Mode, 2 N.C. App. 464, 163 S.E.2d 429 (1968).

Admissibility of Evidence Showing Value. — In a proceeding to condemn land for a right-of-way, evidence to show the value of the land by its location and surroundings is admissible, but a tax list is not admissible for that purpose. Suffolk & C. Ry. v. West End Land & Imp. Co., 137 N.C. 330, 49 S.E. 350 (1904).

Expert Appraisers To Give Reasons for Opinion of Value. — It is proper and in fact desirable that expert real estate appraisers give the reasons upon which they base their opinion as to the fair market value of property immediately before and immediately after a taking for a sanitary sewer line easement. City of Statesville v. Bowles, 6 N.C. App. 124, 169 S.E.2d 467 (1969), aff'd, 278 N.C. 497, 180 S.E.2d 111 (1971).

Finding of commissioners that land taken for railroad purposes received no special benefit is conclusive. Southport, W. & D.R.R. v. Owners of Platt Land, 133 N.C. 266, 45 S.E. 589 (1903).

§ 40A-27. Form of commissioners' report.

When the commissioners shall have assessed the compensation, they shall forthwith make and subscribe a written report of their proceedings, in substance as follows:

To the Clerk of the Superior Court of ____________:

We, ____________, commissioners appointed by the court to assess the damages that have been and will be sustained by ________, the owner of certain property lying in the county of __________, which _______ the condemnor proposes to condemn for its use, do hereby certify that we met on _______ (or the day to which we were regularly adjourned), and, having first been duly sworn, we visited the premises of the owner, and after taking into full consideration the quality and quantity of the property aforesaid, and all other inconveniences likely to result to the owner, we have estimated and do assess the compensation aforesaid at the sum of $ ________.

Given under our hands, the _______ day of ___________, A.D. ________.

(R.C., c. 61, s. 17; 1874-5, c. 83; Code, s. 1700; Rev., s. 2586; C.S., s. 1722; 1981, c. 919, s. 1; 1999-456, s. 59.)

CASE NOTES

Editor's Note. *— The cases below were decided under similar former provisions.*

Report of the commissioners is not invalid because it does not contain a description of the land, as that can be ascertained by reference to the location of the roadbed and right-of-way. Hanes v. North Carolina R.R., 109 N.C. 490, 13 S.E. 896 (1891).

But the easement should be described in the report of the commissioners as fully and correctly as it would be in a grant, as the easement is conveyed to the petitioner by the report when confirmed. Suffolk & C.Ry. v. West End Land & Imp. Co., 137 N.C. 330, 49 S.E. 350 (1904).

Seal Not Required. — While it was formerly provided that the report of the commissioners should be under seal, this provision was not mandatory, but directory only, and omission of the seal was not a fatal defect. Hanes v. North Carolina R.R., 109 N.C. 490, 13 S.E. 896 (1891).

Report Not Set Aside for Failure to State Particulars of Benefits. — The report of the commissioners would not be set aside for failure to show in what the benefits assessed consist, where no objection was made when the report was submitted. Wilmington & W.R.R. v. Smith, 99 N.C. 131, 5 S.E. 237 (1888).

§ 40A-28. Exceptions to report; hearing; when title vests; appeal; restitution.

(a) Upon the filing of the report, the clerk shall forthwith mail copies to the parties. Within 20 days after the filing of the report any party to the proceedings may file exceptions thereto. The clerk, after notice to the parties, shall hear any exceptions so filed and may thereafter direct a new appraisal, modify or confirm the report, or make such other orders as the clerk may deem right and proper.

(b) If no exceptions are filed to the report, and if the clerk's final judgment rendered upon the petition and proceedings shall be in favor of the condemnor, and upon the deposit by the condemnor of the sum adjudged, together with all costs allowed, into the office of the clerk of superior court, then, in that event, all owners who have been made parties to the proceedings shall be divested of the property or interest therein to the extent set forth in the proceedings. A copy of the judgment, certified under the seal of the court, shall be registered in the county or counties where the land is situated, and the original judgment, or a certified copy thereof, or a certified copy of the registered judgment, may be given in evidence in all actions and proceedings as deeds for property are now allowed in evidence.

(c) Any party to the proceedings may file exceptions to the clerk's final determination on any exceptions to the report and may appeal to the judge of superior court having jurisdiction. Notice of appeal shall be filed within 10 days of the clerk's final determination. Upon appeal the clerk shall transfer the proceedings to the civil issue docket of the superior court. A judge in session shall hear and determine all matters in controversy and, subject to G.S. 40A-29 regarding trial by jury, shall determine any issues of compensation to be awarded in accordance with the provisions of Article 4 of this Chapter.

(d) Notwithstanding the filing of exceptions by any party to any orders or final determination of the clerk or the filing of a notice of appeal to the superior court, the condemnor may, at the time of the filing of the report of commissioners, deposit with the clerk of superior court in the proceedings the sum appraised by the commissioners and, in that event, the condemnor may enter, take possession of, and hold said property in the manner and to the extent sought to be acquired by the proceedings until final judgment is rendered on any appeal.

(e) If, on appeal, the judge shall refuse to condemn the property, then the money deposited with the clerk of court in the proceedings, or so much thereof as shall be adjudged, shall be refunded to the condemnor and the condemnor shall have no right to the property and shall surrender possession of the same, on demand, to the owner. The judge shall have full power and authority to make such orders, judgments and decrees as may be necessary to carry into effect the final judgment rendered in such proceedings, including compensation in accordance with the provisions of G.S. 40A-8.

(f) If the amount adjudged to be paid the owner of any property condemned under this Article shall not be paid within 60 days after final judgment in the proceedings, the right under the judgment to take the property shall ipso facto cease and determine, but the claimant under the judgment shall still remain liable for all amounts adjudged against said claimant except the compensation awarded for the taking of the property.

(g) The provisions of this section shall not preclude any injunctive relief otherwise available to the owner or the condemnor. (Code, s. 1946; 1893, c. 148; Rev., s. 2587; 1915, c. 207; C.S., s. 1723; 1951, c. 59, s. 2; 1955, c. 29, s. 1; 1969, c. 44, s. 47; 1971, c. 528, s. 37; 1981, c. 919, s. 1.)

CASE NOTES

I. In General.
II. Exceptions and Appeals.

I. IN GENERAL.

Editor's Note. — *Many of the cases below were decided under similar former provisions.*

Strict Construction. — The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. Greensboro-High Point Airport Auth. v. Irvin, 2 N.C. App. 341, 163 S.E.2d 118 (1968).

Power of Acquiring Fee Not Restricted. — The legislature did not intend, by referring to the procedure to be used in acquiring by condemnation, to restrict the power of acquiring in fee when necessary; the reference was merely for procedural purposes. Town of

Morganton v. Hutton & Bourbonnais Co., 251 N.C. 531, 112 S.E.2d 111 (1960).

Estoppel to Contest Right to Condemn. — All questions, except the question of just compensation, were rendered moot by a stipulation which agreed that a city's payment; should be treated as if it were the amount of damages assessed by commissioners and paid into the office of the clerk of the superior court, and in the face of the stipulation that upon payment of the stipulated sum the city would acquire title, defendants were estopped to contest the city's right to condemn. City of Kings Mountain v. Cline, 281 N.C. 269, 188 S.E.2d 284 (1972).

Temporary and Permanent Possession by Condemnor Distinguished. — Temporary possession, pendente lite, subject to removal by final adverse judgment, is quite different from a final judicial determination that the condemnor is entitled as a matter of right to permanent possession. Greensboro-High Point Airport Auth. v. Irvin, 2 N.C. App. 341, 163 S.E.2d 118 (1968).

Grant by Charter of Power to Enter before Condemnation. — The legislature may by charter empower a railroad company to enter land and construct a road before instituting condemnation proceedings. Compensation must be provided to warrant the taking, but it need not precede the taking, and the owner is confined to the special remedy given him by the statute under which his property is seized. State v. Lyle, 100 N.C. 497, 6 S.E. 379 (1888); Watauga & Y.R.R. v. Ferguson, 169 N.C. 70, 85 S.E. 156 (1915); State v. Jones, 170 N.C. 753, 87 S.E. 235 (1915).

When the legislature intended to confer the right to enter before the assessment is made or the damage paid, it has so declared in express terms in the charter. State v. Jones, 139 N.C. 613, 52 S.E. 240 (1905).

Requirement of Payment before Entry. — Formerly the landowner had no right to a jury trial in fixing compensation upon condemnation of the right-of-way, nor was the compensation required to be paid before entry; now the company is required to pay into court the sum assessed before entry. Holly Shelter R.R. v. Newton, 133 N.C. 132, 133 N.C. 136, 45 S.E. 549, 45 S.E. 549 (1903); State v. Jones, 139 N.C. 613, 52 S.E. 240 (1905).

Provisions Granting Temporary Possession and Use Not Applicable to Cartway Proceedings. — Provision giving the court authority to give possession and use of land to the condemnor pending appeal is not applicable to proceedings to establish a Cartway brought under G.S. 136-68 et seq. Lowe v. Rhodes, 9 N.C. App. 111, 175 S.E.2d 721 (1970).

Payment of Damages into Court Pendente Lite Does Not Vest Title in Condemnor. — In proceedings to condemn land for a school site, the payment into court by the county board of education of the amount of damages assessed by the commissioners and the taking of possession by it under order of the clerk, while the cause remained pending for trial on exceptions directed both to petitioner's right to condemn and to the adequacy of the damages awarded by the commissioners, did not vest title in the board. Topping v. State Bd. of Educ., 249 N.C. 291, 106 S.E.2d 502 (1959).

The title of the landowner is not divested until final confirmation and payment in full of the amount appraised. Nantahala Power & Light Co. v. Whiting Mfg. Co., 209 N.C. 560, 184 S.E. 48 (1936).

While the value of lands taken in condemnation proceedings is fixed as of the date the petition is filed, title to the land does not pass until the award, as assessed by the commissioners, is paid into court after confirmation of the commissioners' report. Bemis Hardwood Lumber Co. v. Graham County, 214 N.C. 167, 198 S.E. 843 (1938).

The title of the landowner is not divested unless and until the condemnor obtains a final judgment in his favor and pays to the landowner the amount of the damages fixed by such final judgment. Topping v. State Bd. of Educ., 249 N.C. 291, 106 S.E.2d 502 (1959); North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964); Greensboro-High Point Airport Auth. v. Irvin, 2 N.C. App. 341, 163 S.E.2d 118 (1968); City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

Injunction to Restrain Entry Refused. — Where a railroad company seeking to condemn land for its right-of-way gave ample bond to cover any damages resulting from its wrongful entry upon the land, an injunction would not issue to restrain such company from entering upon the land before the appraisal of damages and the payment thereof into court. Wellington & P.R.R. v. Cashie & C.R.R. & Lumber Co., 116 N.C. 924, 20 S.E. 964 (1895); Holly Shelter R.R. v. Newton, 133 N.C. 132, 133 N.C. 136, 45 S.E. 549, 45 S.E. 549 (1903).

Date of Valuation Not Dependent on Whether Deposit Made. — The only thing which turns on the making of the deposit is the right of possession. The date for valuing the condemned property is not dependent on whether the condemnor makes the deposit. Greensboro-High Point Airport Auth. v. Irvin, 306 N.C. 263, 293 S.E.2d 149 (1982), decided under former § 40-19.

Deposit of the amount of the award by the condemnor is discretionary. The condemnor has a right or election to pay the award; it does not require it to do so. Greensboro-High Point Airport Auth. v. Irvin, 306 N.C. 263, 293 S.E.2d 149 (1982), decided under former § 40-19.

Judge has the discretionary power to allow withdrawal of a deposit in a condemnation proceeding without prejudice to the withdrawing party to continue further litigation. It is incumbent upon petitioner, if aggrieved by this order, to object and except thereto. Public Serv. Co. v. Lovin, 9 N.C. App. 709, 177 S.E.2d 448 (1970).

Condemnor May Not Take Voluntary Nonsuit after Obtaining Temporary Possession. — A condemnor may not, as a matter of right, take a voluntary nonsuit, over the landowner's objection, after obtaining temporary possession by payment of the amount of damages assessed by the commissioners, because the landowner may, if he elects to do so, assert his claim for damages on account of the condemnor's possession pendente lite. Topping v. State Bd. of Educ., 249 N.C. 291, 106 S.E.2d 502 (1959).

Nor After a Decree Has Been Made. — In proceedings by one railroad company to condemn a right-of-way upon which another has lawfully constructed its roadbed, the plaintiff may not, as a matter of right, submit to a judgment of nonsuit after a decree has been made, for rights which the defendant is entitled to have settled by the action have attached. Johnson City S.R.R. v. South & W.R.R., 148 N.C. 59, 61 S.E. 683 (1908).

Former Provision as to Registration Superseded. — Provision that a copy of the judgment in eminent domain proceedings be registered in the county where the land lies was superseded by G.S. 47-27. Carolina Power & Light Co. v. Bowman, 228 N.C. 319, 45 S.E.2d 531 (1947).

Pretrial Conference. — In a condemnation proceeding, the trial court should conduct a pretrial conference where the record shows that the parties have different concepts of what phase of the matter they were going to try. Redevelopment Comm'n v. Grimes, 8 N.C. App. 376, 174 S.E.2d 839 (1970), rev'd on other grounds, 177 N.C. 634, 178 S.E.2d 345 (1971).

Judgment Should Fix Boundaries. — In an action for damages for the location of a railroad, the judgment should definitely fix the land over which the road is located and the width of the right-of-way. Beal v. Durham & C.R.R., 136 N.C. 298, 48 S.E. 674 (1904).

Property Involved in Voluntary Sale as Guide to Value. — Whether property involved in a voluntary sale is sufficiently similar in nature, location, and condition to the property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property is a question to be determined by the trial judge, in the exercise of his sound discretion. Redevelopment Comm'n v. Denny Roll & Panel Co., 273 N.C. 368, 159 S.E.2d 861 (1968).

Accrual of Interest. — Damages given in condemnation proceedings fall directly under G.S. 24-5, giving interest only from the rendition of the judgment; hence, a judgment allowing interest from the date of condemnation would be erroneous. Durham v. Davis, 171 N.C. 305, 88 S.E. 433 (1916).

The judgment in an action must correspond with the verdict, and where, in condemnation proceedings tried in the superior court on appeal, the jury have in their verdict ascertained the damages to the owner of the land, the verdict will be presumed to include the element of interest, nothing else appearing; hence, it was reversible error for the trial judge to allow interest from the time the damages were determined upon by the appraisers and render judgment accordingly. Red Springs City Bd. of Educ. v. McMillan, 250 N.C. 485, 108 S.E.2d 895 (1959).

Respondents, in an action to take land under eminent domain, are entitled to interest from the date the petitioner acquires the right to possession and not from the date the proceedings were instituted. Carolina Power & Light Co. v. Briggs, 268 N.C. 158, 150 S.E.2d 16 (1966).

Extent of Right Acquired with Railroad Easement. — A railroad company, by condemnation proceedings, acquires an easement upon the land condemned, with the right to actual possession of, so much only thereof as is necessary for the operation of its road and to protect it against contingent damages. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022 (1902).

A house situated on the right-of-way of a railroad at the time of condemnation proceedings does not become the absolute property of the company. Shields v. Norfolk & C.R.R., 129 N.C. 1, 39 S.E. 582 (1901).

Liability for Costs Where Proceedings Not Carried Through. — In the event, for any reason, that condemnation proceedings are not carried through, all the costs of the proceeding, except the appraised value of the land, shall be paid by the petitioners. Nantahala Power & Light Co. v. Whiting Mfg. Co., 209 N.C. 560, 184 S.E. 48 (1936).

Cessation of Right to Property Where Appraised Value Not Timely Paid. — After final judgment fixing petitioner's right to condemn, if the appraised value of the land is not paid within one year (now 60 days) the petitioner's right to take the property shall end, and the petitioner or claimant shall not be liable for the consideration, i.e., the value of the land. Nantahala Power & Light Co. v. Whiting Mfg. Co., 209 N.C. 560, 184 S.E. 48 (1936).

For construction of reference to counsel fees under former § 40-19, see North Carolina R.R. v. Goodwin, 110 N.C. 175, 14 S.E. 687 (1892); Durham v. Davis, 171 N.C. 305, 88 S.E. 433 (1916); Carolina Power & Light Co. v.

Creasman, 262 N.C. 390, 137 S.E.2d 497 (1964); City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972).

II. EXCEPTIONS AND APPEALS.

General Exceptions to Order Appointing Commissioners. — Upon proper denial of the matters alleged in the petition, exceptions to the clerk's order appointing commissioners in condemnation proceedings may be of general character, and, upon appeal, will present any question appearing upon the record. Johnson City S.R.R. v. South & W.R.R., 148 N.C. 59, 61 S.E. 683 (1908).

Filing Exceptions to Commissioner's Report as Prerequisite to Filing of Appeal. — The respondents failed to make any exceptions to the Commissioner's report. They also failed to file exceptions to the clerk's final judgment. Therefore, respondents' appeal was properly dismissed. Carolina Power & Light Co. v. Crowder, 89 N.C. App. 578, 366 S.E.2d 499 (1988).

Filing exceptions to a commissioner's report that establishes a statutory cartway and determines the compensation to be paid to the affected property owners is a prerequisite to appeal. Hancock v. Tenery, 131 N.C. App. 149, 505 S.E.2d 315 (1998).

Existence of Case or Controversy. — A case or controversy existed with respect to challenges by a nonprofit corporation and its political action committee to statutes that criminalize certain election activities, despite the State's claim that it did not interpret the statutes to reach the corporation's or committee's activities, since the statutes applied by their terms, thereby presenting a credible threat of prosecution and chilling the corporation's exercise of its free speech rights. North Carolina Right to Life, Inc. v. Bartlett, 168 F.3d 705, 1999 U.S. Dist. LEXIS 2350 (4th Cir. 1999), cert. denied, 528 U.S. 1153, 120 S. Ct. 1156, 145 L. Ed. 2d 1069 (2000).

The landowner has the right to file exceptions to the report of the commissioners within 20 days after the report is filed. He is entitled to be heard upon his exceptions. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Filing of Exceptions Nunc Pro Tunc. — The judge has the discretionary power to allow exceptions to be filed nunc pro tunc. Gatling v. State Hwy. & Pub. Works Comm'n, 245 N.C. 66, 95 S.E.2d 131 (1956).

Requirement of Timely Exceptions to Preserve Right to Appeal. — Absent insufficient notice of proceedings before the clerk, an appealing party must file timely exceptions to the commissioners' report to preserve their right to appeal. City of Raleigh v. Martin, 59 N.C. App. 627, 297 S.E.2d 916 (1982), decided under former § 40-19.

Former G.S. 40-20 (now G.S. 40A-29), which guaranteed the right to have a jury determine the amount of damages, did not override the requirement of former G.S. 40-19 (now this section), that exceptions be filed within 20 days of the commissioners' report. City of Raleigh v. Martin, 59 N.C. App. 627, 297 S.E.2d 916 (1982), decided under former § 40-19.

Exceptions Held Timely. — In the absence of notice of the meeting of commissioners, the filing of exceptions by the landowner on the twenty-first day after the filing of the report was held timely. Gatling v. State Hwy. & Pub. Works Comm'n, 245 N.C. 66, 95 S.E.2d 131 (1956).

Clerk to Make Determination on Exceptions Only after Notice. — The clerk is to make his determination on the exceptions only after notice and an opportunity to be heard thereon is given the parties. Collins v. North Carolina State Hwy. & Pub. Works Comm'n, 237 N.C. 277, 74 S.E.2d 709 (1953).

Appeal from Ruling of Clerk. — It is only after the clerk of superior court confirms or fails to confirm the report of the commissioners that either party aggrieved by the ruling of the clerk may appeal; such appeal carries the entire record up for review by the trial judge upon the questions of fact. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1970).

No appeal lies to the judge at chamber. Cape Fear & N.R.R. v. Stewart, 132 N.C. 248, 43 S.E. 638 (1903).

Power of Court on Erroneous Transfer from Clerk. — Where a proceeding to condemn property for urban renewal was erroneously transferred from the clerk to the superior court before the clerk acted on the exceptions to the commissioners' report, the judge of superior court had full power to consider and determine all matters in controversy as if the cause was originally before him. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1970).

De Novo Trial on Appeal to Court. — On appeal to the superior court by both parties in proceedings to condemn land, the trial is de novo; and where the defendant has substantially recovered damages for the taking of his land, the costs are taxable against the plaintiff, though the recovery is in a smaller sum than the amount theretofore awarded by the appraisers or viewers. Durham v. Davis, 171 N.C. 305, 88 S.E. 433 (1916).

The issue as to amount of compensation is for determination de novo by jury trial in the superior court. Redevelopment Comm'n v. Smith, 272 N.C. 250, 158 S.E.2d 65 (1967); Redevelopment Comm'n v. Denny Roll & Panel Co., 273 N.C. 368, 159 S.E.2d 861 (1968).

Scope of Review on Appeal. — The appeal from a judgment by the clerk of the superior court in condemnation proceedings takes the entire record up for review upon questions of fact to be tried by the court. Johnson City S.R.R. v. South & W.R.R., 148 N.C. 59, 61 S.E. 683 (1908).

Stay of Entry Pending Appeal within Discretion of Trial Court. — Trial court in an eminent domain proceeding did not err in refusing to stay petitioner's entry upon the land pending appeal, where petitioner had deposited with the clerk the full amount of compensation awarded by the commissioners; though the trial court was empowered to stay petitioner's entry upon the land, it was not required to do so; it lies in the sound discretion of the trial court to determine whether a temporary restraining order should be granted. Carolina Power & Light Co. v. Merritt, 41 N.C. App. 438, 255 S.E.2d 225 (1979), decided under former § 40-19.

The judge has authority to set aside the report and direct a new appraisement by the same commissioners or others appointed in their stead, on the ground that the damage assessed was excessive. Hanes v. North Carolina R.R., 109 N.C. 490, 13 S.E. 896 (1891).

Interlocutory Nature of Order Remanding Proceedings to Clerk. — An order of the superior court in condemnation proceedings remanding the cause to the clerk, that he may hear the same, is interlocutory, and no appeal lies therefrom. Cape Fear & Y.V. Ry. v. King, 125 N.C. 454, 34 S.E. 541 (1899); Holly Shelter R.R. v. Newton, 133 N.C. 132, 133 N.C. 136, 45 S.E. 549, 45 S.E. 549 (1903).

Denial of Vacation of Confirmation May Not Be Affirmed on Ground Additional Appraisals Will Not Give Recovery. — The court may not affirm the clerk's denial of a motion to vacate the judgment of confirmation on the ground that there is no reasonable probability that any additional appraisals, hearings, or trials would result in any recovery on the part of the defendant. Under the statutes, that is not for the court below or for the Supreme Court to determine, but can be determined only by commissioners who are appointed after notice and hearing contemplated. City of Randleman v. Hinshaw, 267 N.C. 136, 147 S.E.2d 902 (1966).

Recordari Held Properly Denied. — The landowner must file exceptions to the final report of the commissioners within 20 days after the report is filed, with right to appeal to the superior court; hence, when landowner filed no exceptions and did not appeal from the order of confirmation by the clerk, recordari to the superior court was properly denied when the application therefor merely alleged merit without specifying facts supporting this conclusion and failed to negate laches, and the application was not made to the next succeeding term of the superior court. Redevelopment Comm'n v. Capehart, 268 N.C. 114, 150 S.E.2d 62 (1966).

§ 40A-29. Provision for jury trial on appeal.

In any proceedings under this Article by a condemnor to acquire property, any party to the proceedings shall be entitled on appeal to superior court to have the amount of compensation determined by a jury unless trial by jury has been waived by all parties. A jury shall determine the compensation to be awarded in accordance with the provisions of Article 4 of this Chapter. (1893, c. 148; Rev., s. 2588; C.S., s. 1724; 1957, c. 582; 1971, c. 528, s. 38; 1981, c. 919, s. 1.)

CASE NOTES

Editor's Note. — *The cases below were decided under similar former provisions.*

Strict Construction. — The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. Redevelopment Comm'n v. Abeyounis, 1 N.C. App. 270, 161 S.E.2d 191 (1968).

A landowner is not entitled at the hearing before the clerk to a jury trial. Holly Shelter R.R. v. Newton, 133 N.C. 132, 133 N.C. 136, 45 S.E. 549, 45 S.E. 549 (1903); Kaperonis v. North Carolina State Hwy. Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

Entitlement to Jury Trial on Appeal. — While prior to 1893, if the parties did not demand trial by jury before the appointment of the commissioners they were deemed to have waived it, and it would not be thereafter granted, now the right of trial by jury upon an appeal from the report of the commissioners is specifically granted. Chowan & S.R.R. v. Parker, 105 N.C. 246, 11 S.E. 328 (1890); Holly Shelter R.R. v. Newton, 133 N.C. 132, 133 N.C. 136, 45 S.E. 549, 45 S.E. 549 (1903); Durham v. Rigsbee, 141 N.C. 128, 53 S.E. 531 (1906).

Right of Owner to Jury Trial in Proceedings Instituted by Town. — In condemnation proceedings instituted by a town for the taking of lands for a public municipal purpose, the owner is entitled to a trial by jury in the superior court to determine his damages when he has duly preserved such right by his exceptions and proper procedure, and when the trial judge has exercised his discretion in setting aside the amount theretofore awarded by the viewers, the cause continues in the court for the jury trial given him by statute; and an order directing the appointment of other commissioners by the clerk to go upon the land and assess the damages is erroneous. Ayden v. Lancaster, 195 N.C. 297, 142 S.E. 18 (1928).

Requirement of Timely Exceptions to Preserve Right to Appeal. — Former G.S. 40-20 (now this section), which guaranteed the right to have a jury determine the amount of damages, did not override the requirement of former G.S. 40-19 (now G.S. 40A-28), that exceptions be filed within 20 days of the commissioners' report. City of Raleigh v. Martin, 59 N.C. App. 627, 297 S.E.2d 916 (1982), decided under former § 40-20.

Appeal Preserved Despite Absence of Specific Municipal Charter Provision Therefor. — Where a municipal charter provided for condemning lands of private owners for cemetery purposes in the manner prescribed for condemnation thereof for street or other purposes, without specific provisions for appeal, former G.S. 40-20 (now this section) nevertheless preserved the right of appeal, and the charter provisions would not be declared unconstitutional for failure to specially provide therefor. Long v. Rockingham, 187 N.C. 199, 121 S.E. 461 (1924).

Right to Jury Trial Limited. — There is a limitation on the right to demand trial by jury, and the idea that any such right is given in respect to the questions of the fact to be decided preliminary to the question of damages is clearly excluded. Madison County R.R. v. Gahagan, 161 N.C. 190, 76 S.E. 696 (1912).

The only question for determination by the jury is the issue of just compensation. Redevelopment Comm'n v. Abeyounis, 1 N.C. App. 270, 161 S.E.2d 191 (1968).

The amount of compensation is for determination de novo by jury trial in the superior court. Redevelopment Comm'n v. Smith, 272 N.C. 250, 158 S.E.2d 65 (1967); Redevelopment Comm'n v. Denny Roll & Panel Co., 273 N.C. 368, 159 S.E.2d 861 (1968).

When either party to a condemnation proceeding appeals to the superior court in term and demands that the damage be determined by a jury, the trial must proceed in the superior court, insofar as the question of damages is concerned, as though no commissioners of appraisal had ever been appointed. In re Proceedings by City of Greensboro, 21 N.C. App. 124, 203 S.E.2d 325 (1974).

And Judgment Is Entered Upon the Jury's Verdict. — Upon appeal from the award of the appraisers in condemnation proceedings, the trial in the superior court is de novo, and must proceed, insofar as the question of damages is concerned, as though no commissioners of appraisal had ever been appointed; hence, the court properly enters judgment upon the verdict of the jury, regardless of whether it is greater or smaller than the award of the commissioners and regardless of which party took the appeal. Proctor v. State Hwy. & Pub. Works Comm'n, 230 N.C. 687, 55 S.E.2d 479 (1949).

The superior court at term is vested with authority to enter judgment for the landowner for the amount of damages fixed by the verdict of the jury, regardless of whether the same be greater or smaller than the sum originally awarded by the commissioners of appraisal, and regardless of whether the landowner or the condemnor took the appeal. In re Proceedings by City of Greensboro, 21 N.C. App. 124, 203 S.E.2d 325 (1974).

Property Involved in Voluntary Sale as Guide to Value. — Whether property involved in a voluntary sale is sufficiently similar in nature, location, and condition to the property appropriated by condemnation to admit evidence of its sale and the price paid therefor as a guide to the value of the condemned property is a question to be determined by the trial judge in the exercise of his sound discretion. Redevelopment Comm'n v. Denny Roll & Panel Co., 273 N.C. 368, 159 S.E.2d 861 (1968).

§ 40A-30. Title of infants, incompetents, inebriates, and trustees without power of sale, acquired.

In case any property required by a condemnor shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, incompetent, or inebriate, the superior court shall have power, by a special proceeding, on petition, to authorize and empower such trustee or the general guardian or committee of such infant, incompetent or inebriate, to sell and convey the same to such condemnor, on such terms as may be just. In case any infant, incompetent or inebriate has no general guardian or committee, the court may appoint a special guardian or committee for the purpose of making a sale, release or conveyance, and may require security from the general or special guardian or committee as the court may deem proper. Before any conveyance or release authorized by this section shall be executed, the terms on which it is to be executed shall be reported to the court on oath. If the court is satisfied that the terms are just to the owner of the property, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of the property having legal power to sell and convey the same. (1871-2, c. 138, s. 28; Code, s. 1956; Rev., s. 2590; C.S., s. 1726; 1981, c. 919, s. 1.)

Cross References. — As to requirement that judge approve special proceeding where petitioner is infant, see G.S. 1-402. As to sales of ward's estate by guardian, see G.S. 35A-1301 et seq. As to sale of land required for public use on cotenant's petition, see G.S. 46-27.

§ 40A-31. Rights of claimants of fund determined.

If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the property taken, the clerk or the judge on appeal may direct the money to be paid into the court by the condemnor, and may determine who is entitled to the same and direct to whom the same shall be paid, and may order a reference to ascertain the facts on which such determination and order are to be made. (1871-2, c. 138, s. 19; Code, s. 1947; Rev., s. 2591; C.S., s. 1727; 1981, c. 919, s. 1.)

CASE NOTES

Editor's Note. — *Many of the cases below were decided under similar former provisions.*

Purpose of Section. — Purpose of former G.S. 40-23 (similar to this section) is to prevent a corporation, having the right of eminent domain, from being indefinitely postponed in acquiring title and going on with its work or from being subjected to a succession of suits for compensation, and under its provisions, the company acquires the right-of-way and the court distributes the compensation. See Abernathy v. South & W.R.R., 150 N.C. 97, 63 S.E. 180 (1908).

The phrase "adverse and conflicting claimants" does not include the condemnor. VEPCO v. King, 259 N.C. 219, 130 S.E.2d 318 (1963).

Who May Be "Adverse and Conflicting Claimants". — The phrase "adverse and conflicting claimants" is limited to those who assert adverse titles to the property and hence a conflict in interest as to the party entitled to the sum awarded, or those who are in agreement as to their respective titles but are in disagreement as to the value of their respective estates and hence the proportion of the award to which each is entitled. VEPCO v. King, 259 N.C. 219, 130 S.E.2d 318 (1963).

No Mandatory Provision as to Manner of Determining Interests. — Former G.S. 40-23 (similar to this section) contained no mandatory provision as to when or in what manner the respective interests were to be determined. Barnes v. North Carolina State Hwy. Comm'n, 257 N.C. 507, 126 S.E.2d 732 (1962).

Separation of Trial of Collateral Issues. — Ordinarily, the trial of collateral issues, involving a determination of what the respective claimants own, should be separate from the trial to determine the gross amount required to be paid. Barnes v. North Carolina State Hwy. Comm'n, 257 N.C. 507, 126 S.E.2d 732 (1962).

Preservation of Right to Except to Order of Compulsory Reference. — The provision of former G.S. 40-23 (similar to this section) that the court "may in its discretion order a reference to ascertain the facts on which such determination and order are to be made" did not deprive any claimant of his right to except to an order of compulsory reference and preserve his right to a jury trial as to controverted issues of fact. Barnes v. North Carolina State Hwy. Comm'n, 257 N.C. 507, 126 S.E.2d 732 (1962).

And of Right to Jury Trial on Controverted Issues of Fact. — The provision of former G.S. 40-23 (similar to this section) that the court "may determine who is entitled to the same and direct to whom the same shall be paid" contemplated a situation where such determination may be made as a matter of law, and it did not deprive any claimant of his right to a jury trial as to controverted issues of fact. Barnes v. North Carolina State Hwy. Comm'n, 257 N.C. 507, 126 S.E.2d 732 (1962).

Cited in VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985).

§ 40A-32. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed.

(a) The clerk or the judge on appeal shall appoint some competent attorney to appear for and protect the rights of any party in interest who is unknown or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent, and shall make an allowance to said attorney for his services which shall be taxed in the bill of costs. In such cases the State Treasurer as custodian of the Escheat Fund shall be notified of the appointment of such an attorney.

(b) The clerk or the judge on appeal shall have power at any time to amend any defect or informality in any of the special proceedings authorized by this Chapter as may be necessary, or to cause new parties to be added, and to direct such further notices to be given to any party in interest as it deems proper; and also to appoint other commissioners in place of any who shall die, refuse or neglect to serve or be incapable of serving. (1871-2, c. 138, s. 20; Code, s. 1948; Rev., s. 2592; C.S., s. 1728; 1981, c. 919, s. 1.)

CASE NOTES

As to provision in former § 40-19 for counsel fees for attorneys appointed for unknown parties, see North Carolina R.R. v. Goodwin, 110 N.C. 175, 14 S.E. 687 (1892); Durham v. Davis, 171 N.C. 305, 88 S.E. 433 (1916); Carolina Power & Light Co. v. Creasman, 262 N.C. 390, 137 S.E.2d 497 (1964); City of Charlotte v. McNeely, 281 N.C. 684, 190 S.E.2d 179 (1972), decided under similar former provisions.

§ 40A-33. Change of ownership pending proceedings.

When any proceedings under this Article shall have been commenced, no change of ownership by voluntary conveyance or transfer of the property shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made. (1871-2, c. 138, s. 22; Code, s. 1950; Rev., s. 2594; C.S., s. 1730; 1981, c. 919, s. 1.)

CASE NOTES

Editor's Note. — *The cases below were decided under similar former provisions.*

Condemnation proceedings are considered a lis pendens. Hughes v. North Carolina State Hwy. Comm'n, 2 N.C. App. 1, 162 S.E.2d 661 (1968), rev'd on other grounds, 275 N.C. 121, 165 S.E.2d 321 (1969).

The right to convey land is not affected by the mere filing of condemnation proceedings, nor by appraisement without confirmation and payment, as all rights would pass to the grantee. Nantahala Power & Light Co. v. Whiting Mfg. Co., 209 N.C. 560, 184 S.E. 48 (1936), citing Liverman v. Roanoke & T.R.R., 109 N.C. 52, 13 S.E. 734 (1891) and Beal v. Durham & C.R.R., 136 N.C. 298, 48 S.E. 674 (1904).

As Title Is Not Divested Until Payment. — Since the title of the person who owned the land immediately prior to the commencement of the proceedings is not divested until compensation is paid, he can sell. North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

The person who owns when the award is confirmed is the person to be compensated. North Carolina State Hwy. Comm'n v. York Indus. Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964); City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

Subsequent Purchaser Not Barred From Recovery. — An owner of land who acquired title subsequent to the location by a railroad company was not barred of his remedy for compensation where the road was not finished more than two years before he began his action. Hendrick v. Carolina Cent. R.R., 101 N.C. 617, 8 S.E. 236 (1888); Beattie v. Carolina Cent. R.R., 108 N.C. 425, 12 S.E. 913 (1891).

The purchaser of land subsequent to the location thereon of a railroad may recover permanent damages for the easement taken. Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022, rev'd on other grounds on rehearing, 131 N.C. 225, 42 S.E. 587 (1902); Beal v. Durham & C.R.R., 136 N.C. 298, 48 S.E. 674 (1904).

Right to Compensation for Damages Passes with Conveyance. — Until a purchase or condemnation, the corporation's occupation is without title, and the conveyance of the land will pass to the vendee the right to compensation for damages. Liverman v. Roanoke & T.R.R., 109 N.C. 52, 13 S.E. 734 (1891).

But Action for Unlawful Entry Is Personal. — The damages incident to the act of an unlawful entry upon land by a railway corporation are personal to the owner of the land, and do not pass by his subsequent conveyance of the premises. Liverman v. Roanoke & T.R.R., 109 N.C. 52, 13 S.E. 734 (1891).

The purchaser at the mortgage sale, while not entitled to the damages incident to the act of entry, might recover compensation for the land appropriated to the use of the company. Liverman v. Roanoke & T.R.R., 109 N.C. 52, 13 S.E. 734 (1891).

§ 40A-34. Defective title; how cured.

If at any time after an attempt to acquire title under this Article has commenced it shall be found that the title thereby attempted to be acquired is defective, the condemnor may commence new proceedings to acquire or perfect such title in the same manner as if no previous attempt had been commenced. At any stage in the new proceedings the court may authorize the condemnor, if in possession, to continue in possession, and if not in possession, to take possession and use the property during the pendency and until the final conclusion of the new proceedings. If the condemnor pays into court a sum determined by the court to be adequate compensation for the property, the court, in its discretion, may stay all actions or proceedings against the condemnor for its possession. In every such case the party interested in the property may conduct the proceedings to a conclusion if the condemnor delays or omits to prosecute the same. (1871-2, c. 138, s. 23; Code, s. 1951; Rev., s. 2595; C.S., s. 1731; 1981, c. 919, s. 1.)

§§ 40A-35 through 40A-39: Reserved for future codification purposes.

ARTICLE 3.

Condemnation by Public Condemnors.

§ 40A-40. Notice of action.

(a) Not less than 30 days prior to the filing of a complaint under the provisions of G.S. 40A-41, a public condemnor listed in G.S. 40A-3(b) or (c) shall provide notice to each owner (whose name and address can be ascertained by reasonable diligence) of its intent to institute an action to condemn property. (The notice shall be sent to each owner by certified mail, return receipt requested. The providing of notice shall be complete upon deposit of the notice enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. Notice by publication is not required. Notice to an owner whose name and/or address cannot be ascertained by reasonable diligence is not required in any manner.)

The notice shall contain a general description of the property to be taken and of the amount estimated by the condemnor to be just compensation for the property to be condemned. The notice shall also state the purpose for which the property is being condemned and the date condemnor intends to file the complaint.

(b) In the case of a condemnation action to be commenced pursuant to G.S. 40A-42(a), the notice required by subsection (a) of this section shall substantially comply with the following requirements:

(1) The notice shall be printed in at least 12 point bold legible type.
(2) The words "Notice of condemnation" or similar words shall conspicuously appear on the notice.
(3) The notice shall include the information required by subsection (a) of this section.
(4) The notice shall contain a plain language summary of the owner's rights, including:
  a. The right to commence an action for injunctive relief.
  b. The right to answer the complaint after it has been filed.
(5) The notice shall include a statement advising the owner to consult with an attorney regarding the owner's rights.

An owner is entitled to no relief because of any defect or inaccuracy in the notice unless the owner was actually prejudiced by the defect or inaccuracy, and the owner is otherwise entitled to relief under Rules 55(d) or 60(b) of the North Carolina Rules of Civil Procedure or other applicable law. (1981, c. 919, s. 1; 1981 (Reg. Sess., 1982), c. 1243, s. 3; 1999-410, s. 1.)

Local Modification. — City of Durham: 1993, c. 476, s. 1.

Cross References. — As to requirement for consent of the board of commissioners in certain counties before land may be condemned or acquired by a unit of local government outside the county, see G.S. 153A-15.

CASE NOTES

Long as Original Purpose Remains, No Fatal Inconsistency with Regard to Additional Uses. — Presuit notice of condemnation was sufficiently specific, where it stated the purpose of expanding and improving an existing landfill, even though the county's subsequent complaint stated additional uses, since the original purpose remained valid, and the county was not required to state with specificity the "uses" for which the property was taken. Scotland County v. Johnson, 131 N.C. App. 765, 509 S.E.2d 213 (1998).

Applied in Nelson v. Town of Highlands, 159 N.C. App. 393, 583 S.E.2d 313, 2003 N.C. App. LEXIS 1516 (2003).

Cited in Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216 (1987).

§ 40A-41. Institution of action and deposit.

A public condemnor listed in G.S. 40A-3(b) or (c) shall institute a civil action to condemn property by filing in the superior court of any county in which the land is located a complaint containing a declaration of taking declaring that property therein is thereby taken for the use of the condemnor.

The complaint shall contain or have attached thereto the following:

(1) A statement of the authority under which and the public use for which the property is taken;
(2) A description of the entire tract or tracts of land affected by the taking sufficient for the identification thereof;
(3) A statement of the property taken and a description of the area taken sufficient for the identification thereof;
(4) The names and addresses of those persons who the condemnor is informed and believes may be or, claim to be, owners of the property so far as the same can by reasonable diligence be ascertained, and if any such persons are infants, incompetents, inebriates or under any other disability, or their whereabouts or names unknown, it must be so stated;
(5) A statement of the sum of money estimated by the condemnor to be just compensation for the taking; and

(6) A statement as to whether the owner will be permitted to remove all or a specified portion of any timber, buildings, structures, permanent improvements, or fixtures situated on or affixed to the property.

(7) A statement as to such liens or other encumbrances as the condemnor is informed and believes are encumbrances upon the property and can by reasonable diligence be ascertained.

(8) A prayer that there be a determination of just compensation in accordance with the provisions of this Article.

The filing of the complaint shall be accompanied by the deposit to the use of the owner of the sum of money estimated by the condemnor to be just compensation for the taking. Upon the filing of the complaint and the deposit of said sum, summons shall be issued to each owner of the property. The summons, together with a copy of the complaint and notice of the deposit shall be served upon the person named therein in the manner provided for the service of process under the provisions of G.S. 1A-1, Rule 4. The condemnor may amend the complaint and may increase the amount of its deposit with the court at any time while the proceeding is pending, and the owner shall have the same rights of withdrawal of this additional amount as set forth in G.S. 40A-44 of this Chapter. (1935, c. 470, ss. 4, 5; 1947, c. 781; 1971, c. 382, s. 1; 1981, c. 919, s. 1.)

Local Modification. — Cabarrus: 1985, c. 194, s. 2; Union: 1983, c. 150.

CASE NOTES

Land Affected by Taking. — As property owners' answers denied that a city had accurately described the lands it sought to condemn by taking, and pursuant to G.S. 40A-41(2) the city's complaint had to sufficiently describe any "land affected by the taking," the owners' pleadings raised this issue and they were thus entitled to an evidentiary hearing under G.S. 40A-47. City of Winston-Salem v. Slate, — N.C. App. —, 647 S.E.2d 643, 2007 N.C. App. LEXIS 1705 (2007).

Cited in Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216 (1987); Dare County Bd. of Educ. v. Sakaria, 118 N.C. App. 609, 456 S.E.2d 842 (1995); City of Greensboro v. Pearce, 121 N.C. App. 582, 468 S.E.2d 416 (1996); Dare County Bd. of Educ. v. Sakaria, 127 N.C. App. 585, 492 S.E.2d 369 (1997); State v. Coastland Corp., 134 N.C. App. 269, 517 S.E.2d 655, 1999 N.C. App. LEXIS 749 (1999), cert. denied, 351 N.C. 111, 540 S.E.2d 371 (1999); Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999); Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc., 136 N.C. App. 425, 524 S.E.2d 375, 2000 N.C. App. LEXIS 7 (2000).

§ 40A-42. Vesting of title and right of possession; injunction not precluded.

(a)(1) Standard Provision. — When a local public condemnor is acquiring property by condemnation for a purpose set out in G.S. 40A-3(b)(1), (4) or (7), or when a city is acquiring property for a purpose set out in G.S. 160A-311(1), (2), (3), (4), (6), or (7), or when a county is acquiring property for a purpose set out in G.S. 153A-274(1), (2) or (3), or when a local board of education or any combination of local boards of education is acquiring property for any purpose set forth in G.S. 115C-517, or when a condemnor is acquiring property by condemnation as authorized by G.S. 40A-3(c)(8), (9), (10), (12), or (13) title to the property and the right to immediate possession shall vest pursuant to this subsection. Unless an action for injunctive relief has been initiated, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor upon the filing of the complaint and the making of the deposit in accordance with G.S. 40A-41.

(2) Modified Provision for Certain Localities. — When a local public condemnor is acquiring property by condemnation for a purpose set out in G.S. 40A-3(b1)(1), (4), (7), (10), or (11), or when a city is acquiring property for a purpose set out in G.S. 160A-311(1), (2), (3), (4), (6), or (7), or when a county is acquiring property for a purpose set out in G.S. 153A-274(1), (2) or (3), or when a local board of education or any combination of local boards of education is acquiring property for any purpose set forth in G.S. 115C-517, or when a condemnor is acquiring property by condemnation as authorized by G.S. 40A-3(c)(8), (9), (10), (12), or (13) title to the property and the right to immediate possession shall vest pursuant to this subsection. Unless an action for injunctive relief has been initiated, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor upon the filing of the complaint and the making of the deposit in accordance with G.S. 40A-41.

This subdivision applies only to Carteret and Dare Counties, the Towns of Atlantic Beach, Carolina Beach, Caswell Beach, Emerald Isle, Holden Beach, Indian Beach, Kill Devil Hills, Kitty Hawk, Kure Beach, Nags Head, North Topsail Beach, Oak Island, Ocean Isle Beach, Pine Knoll Shores, Sunset Beach, Surf City, Topsail Beach, and Wrightsville Beach, and the Village of Bald Head Island.

(b) When a local public condemnor is acquiring property by condemnation for purposes other than for the purposes listed in subsection (a) above, title to the property taken and the right to possession shall vest in the condemnor pursuant to this subsection. Unless an action for injunctive relief has been initiated, title to the property specified in the complaint, together with the right to immediate possession thereof, shall vest in the condemnor:

(1) Upon the filing of an answer by the owner who requests only that there be a determination of just compensation and who does not challenge the authority of the condemnor to condemn the property; or

(2) Upon the failure of the owner to file an answer within the 120-day time period established by G.S. 40A-46; or

(3) Upon the disbursement of the deposit in accordance with the provisions of G.S. 40A-44.

(c) If the property is owned by a private condemnor, the vesting of title in the condemnor and the right to immediate possession of the property shall not become effective until the superior court has rendered final judgment (after any appeals) that the property is not in actual public use or is not necessary to the operation of the business of the owner, as set forth in G.S. 40A-5(b).

(d) If the answer raises any issues other than the issue of compensation, the issues so raised shall be determined under the provisions of G.S. 40A-47.

(e) The judge shall enter such orders in the cause as may be required to place the condemnor in possession.

(f) The provisions of this section shall not preclude or otherwise affect any remedy of injunction available to the owner or the condemnor. (1981, c. 919, s. 1; 1989 (Reg. Sess., 1990), c. 871, s. 1; 1998-212, s. 9.10; 2001-36, ss. 2, 3; 2001-239, s. 1; 2001-478, s. 2; 2003-282, s. 2; 2004-203, s. 33.)

Local Modification. — Cabarrus: 1991 (Reg. Sess., 1992), c. 937, s. 2; 1993 (Reg. Sess., 1994), c. 700, s. 1; Duplin: 1993 (Reg. Sess., 1994), c. 608, s. 1; Franklin: 1989, c. 432, s. 1; Guilford: 1987, c. 669, s. 4; Person: 1983, 829; Wake: 1985, c. 640, s. 2; cities of Greensboro and High Point: 1987, c. 669, s. 4; town of Holly Springs: 1985 (Reg. Sess., 1986), c. 941; town of Troy: 2003-328, s. 1 (effective until July 1, 2008); town of Wrightsville Beach: 1993, c. 187, s. 2.

Editor's Note. — Session Law 2001-36, s. 2, amended subsection (a) by substituting "(4), (7), (10), or (11)" for "(4) or (7)" in the first sentence. Section 3 of the act, as amended by Session Laws 2001-478, s. 2, made this amendment applicable only to Carolina Beach, Carteret County, Dare County, and the Towns of Atlantic Beach, Emerald Isle, Holden Beach, Indian Beach, Kill Devil Hills, Kitty Hawk, Kure Beach, Nags Head, North Topsail Beach, Pine Knoll Shores, Surf City, Topsail Beach, and Wrightsville Beach. The amended subsection (a) was set out as new subdivision (a)(2) at the direction of the Revisor of Statutes.

CASE NOTES

Subsection (a) does not grant landowner a statutory right to bring an action for injunctive relief to bar condemnation proceeding and to prevent the title and the right to immediate possession of the property from vesting in defendant when under G.S. 40A-45 landowner has an adequate remedy of law. Tradewinds Campground, Inc. v. Town of Atlantic Beach, 90 N.C. App. 601, 369 S.E.2d 365, cert. denied, 323 N.C. 180, 373 S.E.2d 126 (1988).

Title of Defendants Holding Property as Tenants by Entirety Need Not Be Divested Simultaneously in Condemnation Proceeding. — Where plaintiff acquired title to defendants' interest in certain property owned by them as tenants by the entirety, and even though plaintiff argued such title on separate dates, this Chapter contains no requirement that title to condemned property be divested simultaneously. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

Effect of Answer Which Did Not Contest Plaintiff's Power to Condemn. — Where, in condemnation proceeding original answer of defendant property owner contested only amount of compensation due and did not contest power of plaintiff to condemn property, title to defendant's interest vested in plaintiff at that time, and plaintiff's filing of amended complaint did not void defendant's original answer. Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

Effect of Failure to File Action for Injunctive Relief. — Title to condemned property vested and the county had the right to take immediate possession when they filed the complaint and deposited the estimated just compensation, since the landowners did not file an action for injunctive relief before the condemnation complaint was filed. Scotland County v. Johnson, 131 N.C. App. 765, 509 S.E.2d 213 (1998).

Effect of Landowner's Failure to Request Injunctive Relief at the Condemnation Hearing. — Since the landowners had the opportunity to present all affirmative defenses argued in their action for a permanent injunction during the condemnation proceedings, judicial economy counseled against litigating the same issues again. Nelson v. Town of Highlands, 159 N.C. App. 393, 583 S.E.2d 313, 2003 N.C. App. LEXIS 1516 (2003).

"Reasonable Diligence". — In an inverse condemnation suit where plaintiff's advertisement sign was torn down by defendant city, plaintiff's allegation in the complaint that defendant city failed to exercise reasonable diligence to discover plaintiff's interest and that plaintiff's sign was prominently constructed upon the property creates an issue of fact as to whether defendant city exercised reasonable diligence. Schloss Outdoor Adv. Co. v. City of Charlotte, 50 N.C. App. 150, 272 S.E.2d 920 (1980), decided under prior law.

Cited in UNCC Properties, Inc. v. Greene, 111 N.C. App. 391, 432 S.E.2d 699 (1993); Dare County Bd. of Educ. v. Sakaria, 127 N.C. App. 585, 492 S.E.2d 369 (1997); Piedmont Triad Reg'l Water Auth. v. Lamb, 150 N.C. App. 594, 564 S.E.2d 71, 2002 N.C. App. LEXIS 584 (2002), cert. denied, 356 N.C. 166, 568 S.E.2d 608 (2002).

§ 40A-43. Memorandum of action.

The condemnor, at the time of the filing of the complaint containing the declaration of taking and deposit of estimated compensation, shall record a memorandum of action with the register of deeds in all counties in which the land involved is located and said memorandum shall be recorded among the land records of said county. Upon the amending of any complaint affecting the property taken, the condemnor shall record a supplemental memorandum of action. The memorandum of action shall contain:

(1) The names of those persons who the condemnor is informed and believes to be or claim to be owners of the property and who are parties to said action;

(2) A description of the entire tract or tracts affected by said taking sufficient for the identification thereof;
(3) A statement of the property taken for public use;
(4) The date of institution of said action, the county in which said action is pending, and such other reference thereto as may be necessary for the identification of said action. (1981, c. 919, s. 1.)

CASE NOTES

Cited in Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc., 136 N.C. App. 425, 524 S.E.2d 375, 2000 N.C. App. LEXIS 7 (2000).

§ 40A-44. Disbursement of deposit.

Where there is no dispute as to title the person named in the complaint may apply to the court for disbursement of the money deposited in the court, or any part thereof, as full compensation, or as a credit against just compensation without prejudice to further proceedings in the cause to determine just compensation. Upon such application, the judge shall order that the money deposited be paid forthwith to the person entitled thereto in accordance with the application. Subject to the provisions of G.S. 40A-68 the judge shall have power to make such orders with respect to encumbrances, liens, rents, taxes, assessments, insurance and other charges, if any, as shall be just and equitable.

No notice to the condemnor of the hearing upon the application for disbursement of deposit shall be necessary. (1981, c. 919, s. 1.)

§ 40A-45. Answer, reply and plat.

(a) Any person whose property has been taken by the condemnor by the filing of a complaint containing a declaration of taking, may within the time set forth in G.S. 40A-46 file an answer to the complaint. No answer shall be filed to the declaration of taking and notice of deposit. Said answer shall contain the following:

(1) Such admissions or denials of the allegations of the complaint as are appropriate;
(2) The names and addresses of the persons filing said answer, together with a statement as to their interest in the property taken;
(3) Such affirmative defenses or matters as are pertinent to the action; and
(4) A request that there be a determination of just compensation.

(b) A copy of the answer shall be served on the condemnor provided that failure to serve the answer shall not deprive the answer of its validity. The affirmative allegations of said answer shall be deemed denied. The condemnor may, however, file a reply within 30 days from receipt of a copy of this answer.

(c) The condemnor, within 90 days from the receipt of the answer shall file in the cause a plat of the property taken and such additional area as may be necessary to properly determine the compensation, and a copy thereof shall be mailed to the parties or their attorney; provided, however, the condemnor shall not be required to file a map or plat in less than six months from the date of the filing of the complaint. (1981, c. 919, s. 1.)

CASE NOTES

Section 40A-42(a) does not grant landowner a statutory right to bring an action for injunctive relief to bar condemnation proceeding and to prevent the title and the right to immediate possession of the property from vesting in defendant when under this section landowner has an adequate remedy of law. Tradewinds Campground, Inc. v. Town of Atlantic Beach, 90 N.C. App. 601, 369 S.E.2d 365, cert. denied, 323 N.C. 180, 373 S.E.2d 126 (1988).

Property Owners Not Entitled to Injunctive Relief. — As subdivision (a)(3) of this section gave owners an opportunity to raise in court the issue of pending voluntary annexation proceeding, they had an adequate remedy at law and were not entitled to injunctive relief granted by the trial court, enjoining county from proceeding with condemnation proceeding. Yandle v. Mecklenburg County, 85 N.C. App. 382, 355 S.E.2d 216, cert. denied, 320 N.C. 798, 361 S.E.2d 91 (1987).

Property Owners Not Entitled to Evidentiary Hearing. — Pursuant to G.S. 40A-45, in eminent domain proceedings, plats are not to be filed until after the pleadings are closed and, in any event, no earlier than six months after the initiation of an eminent domain action; therefore, property owners who disputed the plats were not entitled to an evidentiary hearing on this issue under G.S. 40A-47. City of Winston-Salem v. Slate, — N.C. App. —, 647 S.E.2d 643, 2007 N.C. App. LEXIS 1705 (2007).

Landowner's Failure to Seek Injunction at Condemnation Hearing. — Since the landowners had the opportunity to present all affirmative defenses argued in their action for a permanent injunction during the condemnation proceedings, judicial economy counseled against litigating the same issues again. Nelson v. Town of Highlands, 159 N.C. App. 393, 583 S.E.2d 313, 2003 N.C. App. LEXIS 1516 (2003).

§ 40A-46. Time for filing answer; failure to answer.

Any person named in and served with a complaint containing a declaration of taking shall have 120 days from the date of service thereof to file answer. Failure to answer within said time shall constitute an admission that the amount deposited is just compensation and shall be a waiver of any further proceeding to determine just compensation; in such event the judge shall enter final judgment in the amount deposited and order disbursement of the money deposited to the owner. Provided, however, at any time prior to the entry of the final judgment the judge may, for good cause shown and after notice to the condemnor extend the time for filing answer for 30 days. (1981, c. 919, s. 1.)

CASE NOTES

Applied in Town of Chapel Hill v. Burchette, 100 N.C. App. 157, 394 S.E.2d 698 (1990).

Cited in Dare County Bd. of Educ. v. Sakaria, 127 N.C. App. 585, 492 S.E.2d 369 (1997).

§ 40A-47. Determination of issues other than damages.

The judge, upon motion and 10 days' notice by either the condemnor or the owner, shall, either in or out of session, hear and determine any and all issues raised by the pleadings other than the issue of compensation, including, but not limited to, the condemnor's authority to take, questions of necessary and proper parties, title to the land, interest taken, and area taken. (1981, c. 919, s. 1.)

CASE NOTES

A municipality is solely liable for the damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor, and contract provisions which require that work be accomplished upon public property or upon private property for which the city holds an easement do not alter the city's liability for such damages. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Evidentiary Hearing Improper for Eminent Domain Proceedings. — Pursuant to G.S. 40A-45, in eminent domain proceedings, plats are not to be filed until after the pleadings are closed and, in any event, no earlier than six months after the initiation of an eminent domain action; therefore, property owners who disputed the plats were not entitled to an evidentiary hearing on this issue under G.S. 40A-47. City of Winston-Salem v. Slate, — N.C. App. —, 647 S.E.2d 643, 2007 N.C. App. LEXIS 1705 (2007).

As property owners' answers denied that a city had accurately described the lands it sought to condemn by taking, and pursuant to G.S. 40A-41(2) the city's complaint had to sufficiently describe any "land affected by the taking," the owners' pleadings raised this issue and they were thus entitled to an evidentiary hearing under G.S. 40A-47. City of Winston-Salem v. Slate, — N.C. App. —, 647 S.E.2d 643, 2007 N.C. App. LEXIS 1705 (2007).

Property Owners Entitled to Evidentiary Hearing. — Property owners were harmed by the trial court's error in refusing to grant them an evidentiary hearing under G.S. 40A-47 as to the proper description of land a city sought to condemn, because their offer of proof indicated that they would have offered evidence that they used their property "as a single economic unit" in conjunction with one another; such evidence might have been sufficient to establish "unity of use" affecting the valuation of the property under G.S. 40A-67. City of Winston-Salem v. Slate, — N.C. App. —, 647 S.E.2d 643, 2007 N.C. App. LEXIS 1705 (2007).

Damages to land outside city's easements which inevitably or necessarily flow from the construction of the outfall result in an appropriation of land for public use. Such damages are embraced within the just compensation to which defendant landowners are entitled. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Review of Condemnation Decision. — This section authorized the trial court to conduct a de novo review of the condemnation decision of a city redevelopment commission. Redevelopment Comm'n v. Agapion, 129 N.C. App. 346, 499 S.E.2d 474 (1998).

Denial of Jury Trial on Issue of Ownership Upheld. — In special proceedings for condemnation of land for an airport, trial judge did not err in denying motion for a jury trial on the issue of ownership of the property, as the issue of ownership was not triable by a jury of right, and moreover, appellant did not demand a trial by jury in writing within the prescribed time. Raleigh-Durham Airport Auth. v. Howard, 88 N.C. App. 207, 363 S.E.2d 184 (1987), cert. denied, 322 N.C. 113, 367 S.E.2d 916 (1988).

Applied in Scotland County v. Johnson, 131 N.C. App. 765, 509 S.E.2d 213 (1998); Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999); Piedmont Triad Reg'l Water Auth. v. Unger, 154 N.C. App. 589, 572 S.E.2d 832, 2002 N.C. App. LEXIS 1529 (2002), cert. denied, 357 N.C. 165, 580 S.E.2d 695 (2003).

Cited in City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986); Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986); Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc., 136 N.C. App. 425, 524 S.E.2d 375, 2000 N.C. App. LEXIS 7 (2000); Frances L. Austin Family L.P. v. City of High Point, 177 N.C. App. 753, 630 S.E.2d 37, 2006 N.C. App. LEXIS 1198 (2006).

§ 40A-48. Appointment of commissioners.

(a) A request to the clerk for the appointment of commissioners to determine compensation for the taking may be made in the answer of the owner, or may be made by motion of either the owner or the condemnor within 60 days after the filing of the answer. After the determination of other issues as provided by G.S. 40A-47, the clerk shall appoint three competent, disinterested persons residing in the county to serve as commissioners. The commissioners shall be sworn and shall go upon the land to appraise the compensation for the property taken and report their findings to the court within a time certain. Each commissioner shall be a person who has no right, title, or interest in or to the property being condemned, is not related within the third degree to the owner or to the spouse of the owner, is not an officer, employee, or agent of the condemnor, and is disinterested in the rights of the parties in every way.

(b) The commissioners shall have the power to inspect the property, hold hearings, swear witnesses, and take evidence as they may, in their discretion, deem necessary, and shall file with the court a report of their determination of the damages sustained.

(c) The report of commissioners shall be in writing and in a form substantially as follows:

TO THE SUPERIOR COURT OF ____________ COUNTY

We, ____________ and ____________ Commissioners appointed by the Court to assess the compensation to be awarded to ____________, the owner of property interest in certain land lying in ____________ County, North Carolina, which has been taken by the ____________ (condemnor), for public purposes, do hereby certify that we convened, and, having first been duly sworn, visited the premises, and took such evidence as was presented to us, and after taking into full consideration the quality and quantity of the land and all other facts which reasonably affect its fair market value at the time of the taking, we have determined the fair market value of the property taken to be the sum of $____________ and the compensation for the damage to the remainder of the land of the owner by reason of the taking to be the sum of $____________ (if applicable). GIVEN under our hands, this the ________ day of ____________, ________.

____________. (SEAL)
____________ (SEAL)
____________ (SEAL)

(d) A copy of the report shall at the time of filing be mailed certified or registered mail by the clerk to each of the parties or to their counsel of record. Within 30 days after the mailing of the report, either the condemnor or the owner, may except thereto and demand a trial de novo by a jury as to the issue of compensation. Upon the receipt of such demand the action shall be placed on the civil issue docket of the superior court for trial de novo by a jury as to the issue of compensation, provided, that upon agreement of both parties trial by jury may be waived and the issue determined by the judge. The report of commissioners shall not be competent as evidence upon the trial of the issue of compensation in the superior court, nor shall evidence of the deposit by the condemnor into the court be competent upon the trial of the issue of compensation. If no exception to the report of commissioners is filed within the time prescribed, final judgment shall be entered by the judge upon a determination and finding by him that the report of commissioners plus interest computed in accordance with G.S. 40A-53 of this Chapter, awards to the property owners just compensation. In the event that the judge is of the opinion and, in his discretion, determines that the award does not provide just compensation, he shall set aside the award and order the case placed on the civil issue docket for determination of the issue of compensation by a jury. (1981, c. 919, s. 1; 1999, c. 456, s. 59.)

CASE NOTES

Cited in Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-49. No request for commissioners.

After the determination of other issues as provided by G.S. 40A-47, if no request has been made for the appointment of commissioners within the time permitted by G.S. 40A-48(a), the cause shall be transferred to the civil issue docket for trial as to the issue of just compensation. (1981, c. 919, s. 1.)

§ 40A-50. Parties, orders; continuances.

The judge shall appoint an attorney to appear for and protect the rights of any party or parties in interest who are unknown, or whose residence is unknown and who has not appeared in the proceeding by an attorney or agent. The State Treasurer as custodian of the Escheat Fund shall be notified of the appointment of such an attorney. The judge shall appoint guardians ad litem for such parties as are infants, incompetents, or other parties who may be under a disability, and without general guardian, and the judge shall have the authority to make such additional parties as are necessary to the complete determination of the proceeding.

Upon his own motion, or upon motion of any of the parties the judge may, in his discretion, continue the cause until the project is completed or until such earlier time as, in the opinion of the judge, the effect of condemnation upon said property may be determined. The motion may be heard at a hearing pursuant to G.S. 40A-47 or upon the coming on of the cause for trial, and shall be granted upon a proper showing that the effect of condemnation upon the subject property cannot presently be determined. (1981, c. 919, s. 1.)

§ 40A-51. Remedy where no declaration of taking filed; recording memorandum of action.

(a) If property has been taken by an act or omission of a condemnor listed in G.S. 40A-3(b) or (c) and no complaint containing a declaration of taking has been filed the owner of the property, may initiate an action to seek compensation for the taking. The action may be initiated within 24 months of the date of the taking of the affected property or the completion of the project involving the taking, whichever shall occur later. The complaint shall be filed in the superior court and shall contain the following: the names and places of residence of all persons who are, or claim to be, owners of the property, so far as the same can by reasonable diligence be ascertained; if any persons are under a legal disability, it must be so stated; a statement as to any encumbrances on the property; the particular facts which constitute the taking together with the dates that they allegedly occurred, and; a description of the property taken. Upon the filing of said complaint summons shall issue and together with a copy of the complaint be served on the condemnor. The allegations of said complaint shall be deemed denied; however, the condemnor within 60 days of service summons and complaint may file answer thereto. If the taking is admitted by the condemnor, it shall, at the time of filing the answer, deposit with the court the estimated amount of compensation for the taking. Notice of the deposit shall be given to the owner. The owner may apply for disbursement of the deposit and disbursement shall be made in accordance with the applicable provisions of G.S. 40A-44. If a taking is admitted, the condemnor shall, within 90 days of the filing of the answer to the complaint, file a map or plat of the property taken. The procedure hereinbefore set out in this Article and in Article 4 shall be followed for the purpose of determining all matters raised by the pleadings and the determination of just compensation.

(b) The owner at the time of filing of the complaint shall record a memorandum of action with the register of deeds in all counties in which the property involved is located. The memorandum is to be recorded among the land records of the county. The memorandum of action shall contain:

(1) The names of those persons who the owner is informed and believes to be or claim to be owners of the property;

(2) A description of the entire tract or tracts affected by the alleged taking sufficient for the identification thereof;

(3) A statement of the property allegedly taken; and

(4) The date on which owner alleges the taking occurred, the date on which said action was instituted, the county in which it was instituted, and such other reference thereto as may be necessary for the identification of said action.

(c) Nothing in this section shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property. (1981, c. 919, s. 1.)

Legal Periodicals. — For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

An inverse condemnation remedy is now provided in this jurisdiction by this section. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Inverse condemnation is simply a device to force a governmental body to exercise its power of condemnation, even though it may have no desire to do so. It allows a property owner to obtain compensation for a taking in fact, even though no formal exercise of the taking power has occurred. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

What Constitutes a "Project" Under this Section. — Although defendant designated the entire widening of the road as a "project," where there was evidence that individual sections were also referred to as "projects," because the road was widened in sections by different contractors, and there were beginning and ending points to the widening of each section, these individual sections met the definition of "projects" for purposes of subsection (a). McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Where plaintiffs sued for inverse condemnation by city whose road widening project was composed of many separate projects performed by more than one contractor, the plaintiffs had 24 months from the completion of the individual section of road encroaching upon their property which for purposes of subsection (a) was the "project" involving the taking. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Applicability of Subsection (c). — Although subsection (c) provides that "nothing in this action shall in any manner affect an owner's common-law right to bring an action in tort for damage to his property," it was not relevant in an inverse condemnation case, since an owner has no common-law right to bring a trespass action against a city. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Defendants' assertion of a counterclaim in condemnation action by city, alleging that property not included therein had been taken, properly placed the inverse condemnation issue before the court. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Remedy for Municipal Airport Overflight. — Private landowners no longer have any private common-law actions for damages in trespass or nuisance in municipal airport overflight cases; their sole remedy is inverse condemnation. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

This section provided the sole procedure by which plaintiffs could bring an inverse condemnation action involving a taking occurring as a result of the construction and operation of an airport runway. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

No simple test exists for determining when a taking occurs by aircraft overflights; rather, a particularized judgment of the facts of the individual case is necessary. Thus the date requirement of this section does not impose any stringent standard of specificity. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Plaintiffs' allegation of a very general taking by aircraft overflights "within the past two years" failed to allege with reasonable specificity when the alleged appropriation or taking occurred; however, rather than dismissing the complaint altogether, the court should have required plaintiffs to come forward in accordance with defendant's motion for a more definite statement and plead the facts which they possessed, so that the court could then rule on their timeliness and sufficiency. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

The statutory time begins to run on completion of the project or the taking, whichever is later. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

The individual section of widened roadway, which constituted the taking by inverse condemnation of plaintiff's property, was not completed until the maintenance period was completed; the statutory period runs from the completion of the "project," which does not necessarily mean it runs from the completion of construction. McAdoo v. City of Greensboro, 91 N.C. App. 570, 372 S.E.2d 742 (1988).

Cause of Action Time Barred. — Billboard owner's cause of action based on an alleged regulatory taking accomplished by enactment of zoning ordinance arose on April 15, 1985, the date the zoning ordinance at issue was enacted and not April 15, 1992, the end of the amortization period when the signs were required to be removed; plaintiff who did not file suit until May 11, 1992, over seven years after the enactment of the zoning ordinance at issue, was barred. Naegele Outdoor Adv., Inc. v. City of Winston-Salem, 340 N.C. 349, 457 S.E.2d 874 (1995).

Limitation Period for Taking Occurring Prior to Enactment of Chapter. — Where plaintiffs' action involving a taking incident to construction of an airport runway accrued in June 1979, and over two years later, in July 1981, new Chapter 40A was enacted, the period between such enactment and the cutoff date under the new limitation, five months and three weeks (July 10, 1981 to January 1, 1982) was not itself so unreasonably short as to deny plaintiffs due process of law, particularly in light of the fact that plaintiffs lived in an area where large numbers of inverse condemnation actions were filed within the statutory period. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

A municipality is solely liable for the damages that inevitably or necessarily flow from the construction of an improvement in keeping with the design of the condemnor, and contract provisions which require that work be accomplished upon public property or upon private property for which the city holds an easement do not alter the city's liability for such damages. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Damages to land outside city's easements which inevitably or necessarily flow from the construction of the outfall result in an appropriation of land for public use. Such damages are embraced within the just compensation to which defendant landowners are entitled. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Migration of Cases from City Landfill. — Because this section, the inverse condemnation provision, provides a landowner's only remedy for alleged damage in the nature of a "taking," the court granted summary judgment as to multi-family apartment complex developer's state, common-law claims for nuisance, trespass, and negligence based on migration of methane gases from city landfill. Ashley Park Charlotte Assocs. v. City of Charlotte, 827 F. Supp. 1223 (W.D.N.C. 1993).

Strict Liability Action Was Not Precluded. — Developer's strict liability claim based on migration of methane gases from city landfill based on the North Carolina Oil Pollution and Hazardous Substances Control Act of 1978 was not preempted by this section. Ashley Park Charlotte Assocs. v. City of Charlotte, 827 F. Supp. 1223 (W.D.N.C. 1993).

Assessment of Costs. — Where although city filed a Declaration of Taking, it did not include property held to have been inversely condemned, the court's assessment of costs under G.S. 40A-8 was proper. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

Negligence Claim Based on Inadequate Storm Drainage Pipe. — Inverse condemnation statute, G.S. 40A-51, did not apply to preempt property owner's negligence claim for damage to her property allegedly caused by the municipality's failure to adequately maintain a storm drainage pipe running under her property, as G.S. 40A-51(c) specifically stated that nothing under the statutory section would affect a property owner's common-law right to bring an action in tort for damage to property. Howell v. City of Lumberton, 144 N.C. App. 695, 548 S.E.2d 835, 2001 N.C. App. LEXIS 570 (2001).

Taking Not Found. — When a city paid consideration for a sewer line easement to plaintiffs' predecessor in title, and later abandoned the easement and left a sewer pipe in the ground in question, this did not amount to a taking. The city had paid just compensation to the predecessor in title, and plaintiffs were entitled to nothing more. Frances L. Austin Family L.P. v. City of High Point, 177 N.C. App. 753, 630 S.E.2d 37, 2006 N.C. App. LEXIS 1198 (2006).

Applied in City of Raleigh v. Hollingsworth, 96 N.C. App. 260, 385 S.E.2d 513 (1989).

Cited in Guilford County Dep't of Emergency Servs. v. Seaboard Chem. Corp., 114 N.C. App. 1, 441 S.E.2d 177, cert. denied, 336 N.C. 604, 447 S.E.2d 390 (1994); Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986); VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989); Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989); Naegele Outdoor Adv., Inc. v. City of Durham, 803 F. Supp. 1068 (M.D.N.C. 1992); Robertson v. City of High Point, 129 N.C. App. 88, 497 S.E.2d 300 (1998).

§ 40A-52. Measure of compensation.

The commissioners, jury or judge shall determine the issue of compensation in accordance with the provisions of Article 4 of this Chapter. (1981, c. 919, s. 1.)

§ 40A-53. Interest as a part of just compensation.

To the amount awarded as compensation by the commissioners or a jury or judge, the judge shall add interest at the rate of six percent (6%) per annum on said amount from the date of taking to the date of judgment. Interest shall not be allowed from the date of deposit on so much thereof as shall have been paid into court as provided in this Article. (1981, c. 919, s. 1.)

CASE NOTES

Date of Taking Defined. — Date of taking is interpreted to mean the date that the condemnor obtains the right of possession of the property involved. Dare County Bd. of Educ. v. Sakaria, 127 N.C. App. 585, 492 S.E.2d 369 (1997).

Date of Taking Term of Art. — The term "date of taking" had acquired legal significance as a term or art for purposes of computation of interest at the time Chapter 40A was enacted and there is no apparent legislative intent to deviate from this accepted common law meaning. Dare County Bd. of Educ. v. Sakaria, 127 N.C. App. 585, 492 S.E.2d 369 (1997).

Trial court erred in awarding 14% interest from the time of entry of judgment until its satisfaction, even though G.S. 24-5(b) might be construed as allowing interest at the legal rate until judgment is satisfied, because this section specifically provides for interest in eminent domain actions during this period at the rate of 6% per annum. Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999).

Cited in State v. Shannon, — N.C. App. —, 642 S.E.2d 516, 2007 N.C. App. LEXIS 687 (2007).

§ 40A-54. Final judgments.

Final judgments entered in actions instituted under the provisions of this Article shall contain a description of the land affected, together with a description of the property acquired by the condemnor and a copy of said judgment shall be certified to the register of deeds in each county in which the land or any part thereof lies and be recorded among the land records of said county. (1981, c. 919, s. 1.)

CASE NOTES

Recording the Judgment. — In case involving the public taking of land outside easement for sewer lines, court ordered compliance with recordation requirements of this section. Concrete Mach. Co. v. City of Hickory, 134 N.C. App. 91, 517 S.E.2d 155 (1999).

§ 40A-55. Payment of compensation.

If there are adverse and conflicting claimants to the deposit made into the court by the condemnor or the additional amount determined as just compensation, on which the judgment is entered in said action, the judge may direct the full amount determined to be paid into said court by the condemnor and may retain said cause for determination of who is entitled to said moneys. The judge may by further order in the cause direct to whom the same shall be paid and may in its discretion order a reference to ascertain the facts on which such determination and order are to be made. (1981, c. 919, s. 1.)

CASE NOTES

Denial of Jury Trial on Issue of Ownership Upheld. — In special proceedings for condemnation of land for an airport, trial judge did not err in denying motion for a jury trial on the issue of ownership of the property, as the issue of ownership was not triable by a jury of right, and moreover, appellant did not demand a trial by jury in writing within the prescribed time. Raleigh-Durham Airport Auth. v. Howard, 88 N.C. App. 207, 363 S.E.2d 184 (1987), cert. denied, 322 N.C. 113, 367 S.E.2d 916 (1988).

Cited in In re Lee, 85 N.C. App. 302, 354 S.E.2d 759 (1987).

§ 40A-56. Refund of deposit.

In the event the amount of the final judgment is less than the amount deposited by the condemnor pursuant to the provisions of this Article, the condemnor shall be entitled to recover the excess of the amount of the deposit over the amount of the final judgment and court costs incident thereto. In the event there are not sufficient funds on deposit to cover said excess, the condemnor shall be entitled to a judgment for said sum against the person or persons having received said deposit. (1981, c. 919, s. 1.)

§§ 40A-57 through 40A-61: Reserved for future codification purposes.

Article 4.

Just Compensation.

§ 40A-62. Application.

The principles set down in this Article shall govern the determination of compensation to be awarded to the owner by the condemnor for the taking of his property. (1981, c. 919, s. 1.)

Legal Periodicals. — For a comment on the acquisition, abandonment, and preservation of rail corridors in North Carolina, see 75 N.C.L. Rev. 1989 (1997).

CASE NOTES

Editor's Note. — *Many of the cases below were decided under similar former provisions.*

Right of Eminent Domain Subject to Provision for Reasonable Compensation. — The right to exercise the power of eminent domain is always subject to the principle that there must be definite and adequate provision made for reasonable compensation to the owner of the property proposed to be taken. Town of Mount Olive v. Cowan, 235 N.C. 259, 69 S.E.2d 525 (1952).

The qualification of the right of eminent domain, that compensation should be made for private property taken for public use, is founded on justice and a due regard for basic property rights, and is applied in North Carolina. Bennett v. Winston-Salem Southbound R.R., 170 N.C. 389, 87 S.E. 133 (1915). See also, Johnston v. Rankin, 70 N.C. 550 (1874); Phillips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022, rev'd on other grounds on rehearing, 131 N.C. 225, 42 S.E. 587 (1902).

Duty of Condemnor to Pay Just Compensation. — When the right of condemnation is exercised, a duty is imposed on the condemnor to pay just compensation for the property taken. VEPCO v. King, 259 N.C. 219, 130 S.E.2d 318 (1963).

Right of Owner to Full and Ample Compensation. — A citizen must surrender his private property in obedience to the necessities of a growing and progressive state, but in doing so he is entitled to be paid full, fair and ample compensation, to be reduced only by such benefits as are special and peculiar to his land. He has the right to have and enjoy the general benefits which are common to him and to his neighbors, without being required to pay therefor merely because it so happens that the use of his land is necessary for the needs of the public. Stamey v. Burnsville, 189 N.C. 39, 126 S.E. 103 (1925).

Noncompensable Business Losses of Lessee. — Where an entire leasehold estate is taken in the exercise of the power of eminent domain, the lessee is not entitled to recover compensation for the incidental loss attributable to the costs of removing his stock of merchandise, fixtures and other personal property, the interruption or loss of business, or the loss of customers or good will, incident to the necessity of moving to a new location, since such losses are not property and are noncompensable. Williams v. State Hwy. Comm'n, 252 N.C. 141, 113 S.E.2d 263 (1960); Zourzoukis v. State Hwy. Comm'n, 252 N.C. 149, 113 S.E.2d 269 (1960).

Real Property Valuations for Ad Valorem Purposes Admissible. — Evidence of real property valuations made by the county for ad valorem tax purposes are admissible against the county, in an eminent domain proceeding, as an admission of a party opponent. Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

Cited in Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

§ 40A-63. In general.

The determination of the amount of compensation shall reflect the value of the property immediately prior to the filing of the petition under G.S. 40A-20 or the complaint under G.S. 40A-41 and except as provided in the following sections shall not reflect an increase or decrease due to the condemnation. The day of the filing of a petition or complaint shall be the date of valuation of the interest taken. (1981, c. 919, s. 1.)

Legal Periodicals. — For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

CASE NOTES

Editor's Note. — *Many of the cases below were decided under similar former provisions.*

Measure of Damages. — The measure of damages or just compensation to be paid to the landowner is the difference in the fair market value of the land immediately before the taking and the fair market value immediately after the taking of the easement. Duke Power Co. v. Ribet, 25 N.C. App. 87, 212 S.E.2d 182 (1975).

Valuation of Land as of Date of Taking. — For the purpose of determining the sum to be paid as compensation for land taken under the right of eminent domain, the value of the land taken should be ascertained as of the date of the taking, which is when the proceeding is begun. City of Kings Mountain v. Goforth, 283 N.C. 316, 196 S.E.2d 231 (1973).

In determining the fair market value of property taken in condemnation, it is generally regarded as competent to show the value of the property within a reasonable time before and/or after the taking as bearing upon its value at the time of the appropriation. Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

Price of Reconveyed Property. — Section 136-19, when read consistently with this section and G.S. 40A-65, as well as with the Fifth Amendment to the U.S. Const., dictates that the State not profit from overreaching seizures by eminent domain; therefore, Department of Transportation (DOT) was required to reconvey property acquired by eminent domain but unused by the DOT to the assigns of the original owner at the original purchase price, plus interest at the legal rate compounded annually. Ferrell v. DOT, 104 N.C. App. 42, 407 S.E.2d 601 (1991), aff'd, 334 N.C. 650, 435 S.E.2d 309 (1993).

Corporation damaging adjacent property while constructing a railroad is liable in damages just as a private individual would be. Staton v. Norfolk & C.R.R., 111 N.C. 278, 16 S.E. 181 (1892).

Right to Cut Trees Cannot Be Taken without Compensation. — Where the right to cut trees was not acquired when right-of-way was condemned, and was not paid for in the first proceeding, the right could not in a subsequent proceeding be taken without compensation. Weyerhaeuser Co. v. Carolina Power & Light Co., 257 N.C. 717, 127 S.E.2d 539 (1962).

Compensation for the right to cut trees should be made in a lump sum under the established rule for measuring damages in condemnation proceedings. Weyerhaeuser Co. v. Carolina Power & Light Co., 257 N.C. 717, 127 S.E.2d 539 (1962).

Owner Held Entitled to Com- pensatory Damages. — Landowner was entitled to compensatory damages for the cutting of crossties on land not included in the right-of-way, and the negligent filling of ditches instead of building bridges over them in constructing the roads necessary to remove the timber, and for breaking down fences. Waters v. Greenleaf-Johnson Lumber Co., 115 N.C. 648, 20 S.E. 718 (1894).

Cited in Greensboro-High Point Airport Auth. v. Irvin, 306 N.C. 263, 293 S.E.2d 149 (1982); Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993); Dare County Bd. of Educ. v. Sakaria, 127 N.C. App. 585, 492 S.E.2d 369 (1997).

§ 40A-64. Compensation for taking.

(a) Except as provided in subsection (b), the measure of compensation for a taking of property is its fair market value.

(b) If there is a taking of less than the entire tract, the measure of compensation is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken.

(c) If the owner is to be allowed to remove any timber, building or other permanent improvement, or fixtures from the property, the value thereof shall not be included in the compensation award, but the cost of removal shall be considered as an element to be compensated. (1981, c. 919, s. 1; 2001-487, s. 17.)

CASE NOTES

Editor's Note. *— Many of the cases below were decided under similar former provisions.*

Landowner's Son Competent to Give Opinion of Land Value. — The son of a landowner who had exhibited a great deal of familiarity with the property, as well as neighboring properties, and was familiar with the value of these properties was competent to give an opinion as to the land value. Craven County v. Hall, 87 N.C. App. 256, 360 S.E.2d 479 (1987), cert. denied, 321 N.C. 471, 364 S.E.2d 919 (1988).

The sales prices of voluntary sales of property similar in nature, location, and condition to the land being condemned is admissible as evidence of the value of that land if the other sales are not too remote in time. Whether the properties are sufficiently similar to admit such evidence is a question to be determined by the trial judge in his sound discretion, usually after a hearing on the issue conducted out of the presence of the jury. City of Winston-Salem v. Cooper, 315 N.C. 702, 340 S.E.2d 366 (1986).

Evidence of Comparable Sales of Farmland. — Where farmland is condemned as an easement, it is not error to exclude evidence of comparable sales nearby if there is a large difference in the size of the tracts, despite little difference in zoning and water availability. Duke Power Co. v. Smith, 54 N.C. App. 214, 282 S.E.2d 564 (1981).

Evidence Sufficient for Jury Question. — Where defendant landowner's evidence consisted of the before and after values of the tract that sewer line easement affected, there was sufficient evidence to go to the jury. Guilford County v. Kane, 114 N.C. App. 243, 441 S.E.2d 556 (1994).

Instruction as to Sentimental Value. — In an action in eminent domain, the judge properly advised the jury foreman the sentimental value should not be considered in determining the value of just compensation. Carolina Power & Light Co. v. Merritt, 50 N.C. App. 269, 273 S.E.2d 727, cert. denied, 302 N.C. 220, 276 S.E.2d 914 (1981), decided under former Chapter 40.

Agreement to Furnish Fire Protection as Compensation. — A municipality has the authority to compensate landowners for a water and sewer line easement across a tract of land located outside the municipal limits by an agreement to furnish fire protection for any buildings located on such tract, and such agreement does not constitute a waiver of the municipality's governmental immunity with respect to torts committed in the maintenance or operation of its fire department. Valevais v. City of New Bern, 10 N.C. App. 215, 178 S.E.2d 109 (1970).

When a town sought to have property valued free of any claims which it could assert, the town could not, after the value had been fixed, claim any part of the award. Town of Hertford v. Harris, 263 N.C. 776, 140 S.E.2d 420 (1965).

Measure of compensation to one who loses right to remove sand and gravel from the property of another, when that right has never been exercised and the sand and gravel remain in the ground untouched, is the fair market value of the sand and gravel in place. In re Lee, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

Where petitioner which had the contractual right to remove sand and gravel from property which was condemned, failed to show by credible and convincing evidence the value of its interest in the condemned land, petitioner was entitled to nominal damages only. In re Lee, 85 N.C. App. 302, 354 S.E.2d 759, cert. denied, 320 N.C. 513, 358 S.E.2d 520 (1987).

Testimony Regarding the Separate Valuation for Timber. — The court refused to adopt the "unit rule" of valuation and held that testimony regarding the separate valuation for timber found on condemned property was properly admitted into evidence; "preventing an appraiser witness from disclosing [information regarding enhancing components] seems to be at odds with the practice of real estate appraisal, and prevents an accurate reflection for the jury of the fair market value of the condemned property." City of Hillsborough v. Hughes, 140 N.C. App. 714, 538 S.E.2d 586, 2000 N.C. App. LEXIS 1270 (2000).

Effect of Condemnation on Lost Rental Value. — Testimony by owner of rental property that the value of property remaining after taking would be diminished was permissible, and instruction that testimony was competent only on the question of impact on fair market value, and not lowered or lost rents, was adequate. City of Fayetteville v. M.M. Fowler, Inc., 122 N.C. App. 478, 470 S.E.2d 343 (1996).

This Section Compared with § 136-112(1). — Section 136-112(1) violates the equal protection rights of the property owners who have part of a tract of land condemned for highway purposes because they are denied the just compensation received by other property owners also subjected to condemnation proceedings. A property owner will receive just compensation if the taking is imposed under this section, even though the same property owner is not entitled to compensation which is just if the imposed taking is under G.S. 136-112(1). A property owner receiving compensation under G.S. 136-112(2) is not subjected to an offset for general benefits while a property owner under G.S. 136-112(1) is. DOT v. Rowe, 138 N.C. App. 329, 531 S.E.2d 836, 2000 N.C. App. LEXIS 615 (2000).

Cited in Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986); City of Durham v. Woo, 129 N.C. App. 183, 497 S.E.2d 457 (1998), cert. denied, 348 N.C. 496, 518 S.E.2d 380 (1998).

§ 40A-65. Effect of condemnation procedure on value.

(a) The value of the property taken, or of the entire tract if there is a partial taking, does not include an increase or decrease in value before the date of valuation that is caused by (i) the proposed improvement or project for which the property is taken; (ii) the reasonable likelihood that the property would be acquired for that improvement or project; or (iii) the condemnation proceeding in which the property is taken.

(b) If before completion the project is expanded or changed to require the taking of additional property, the fair market value of the additional property does not include a decrease in value before the date of valuation caused by any of the factors described in subsection (a), but does include an increase in value before the date on which it became reasonably likely that the expansion or change of the project would occur, if the increase is caused by any of the factors described in subsection (a).

(c) Notwithstanding subsections (a) and (b), a decrease in value before the date of valuation which is caused by physical deterioration of the property within the reasonable control of the property owner, and by his unjustified neglect, may be considered in determining value. (1981, c. 919, s. 1.)

CASE NOTES

Price of Reconveyed Property. — Section 136-19, when read consistently with G.S. 40A-63 and this section, as well as with the Fifth Amendment to the U.S. Const., dictates that the State not profit from overreaching seizures by eminent domain; therefore, Department of Transportation (DOT) was required to reconvey property acquired by eminent domain but unused by the DOT to the assigns of the original owner at the original purchase price, plus interest at the legal rate compounded annually. Ferrell v. DOT, 104 N.C. App. 42, 407 S.E.2d 601 (1991), aff'd, 334 N.C. 650, 435 S.E.2d 309 (1993).

Evidence of Highest and Best Use as If Not Under "Cloud of Condemnation" Was Proper. — In a condemnation action by an airport authority, the testimony of the condemnee's expert witness as to the property's highest and best use as if it had not been under a "cloud of condemnation" was proper. Since a property owner cannot capitalize on any increase in the property's value due to the reasonable likelihood that it will be acquired, the condemnor likewise cannot take advantage of any resulting decrease in the property due to the threat of condemnation. Raleigh-Durham Airport Auth. v. King, 75 N.C. App. 57, 330 S.E.2d 622 (1985).

Effect of Municipal Ordinance. — Fact that the value of condemned property was decreased by an ordinance passed by an entity that was different from the entity that sought to condemn the property did not preclude the application of G.S. 40A-65, preventing the use of the decreased value as the property's value for condemnation purposes, where the ordinance decreasing the property's value was caused by the purpose for which the property was condemned. Piedmont Triad Reg'l Water Auth. v. Unger, 154 N.C. App. 589, 572 S.E.2d 832, 2002 N.C. App. LEXIS 1529 (2002), cert. denied, 357 N.C. 165, 580 S.E.2d 695 (2003).

When landowners asserted that a decrease in the value of their property, due its inclusion in a "no-development" zone, pursuant to a county ordinance, was caused by the water development project for which the property was condemned by a water authority, the landowners were not collaterally attacking the ordinance. Piedmont Triad Reg'l Water Auth. v. Unger, 154 N.C. App. 589, 572 S.E.2d 832, 2002 N.C. App. LEXIS 1529 (2002), cert. denied, 357 N.C. 165, 580 S.E.2d 695 (2003).

When the value of landowners' property was decreased by its inclusion in a "no-development" zone created pursuant to a county ordinance to protect the watershed for a proposed reservoir, and the water authority subsequently sought to condemn the property, the ordinance causing a decrease in the property's value resulted from the reservoir project; thus, the landowners could introduce evidence of the value of the property before the ordinance was enacted, in the condemnation proceeding. Piedmont Triad Reg'l Water Auth. v. Unger, 154 N.C. App. 589, 572 S.E.2d 832, 2002 N.C. App. LEXIS 1529 (2002), cert. denied, 357 N.C. 165, 580 S.E.2d 695 (2003).

Cited in City of Durham v. Woo, 129 N.C. App. 183, 497 S.E.2d 457 (1998), cert. denied, 348 N.C. 496, 518 S.E.2d 380 (1998).

§ 40A-66. Compensation to reflect project as planned.

(a) If there is a taking of less than the entire tract, the value of the remainder on the valuation date shall reflect increases or decreases in value caused by the proposed project including any work to be performed under an agreement between the parties.

(b) The value of the remainder, as of the date of valuation, shall reflect the time the damage or benefit caused by the proposed improvement or project will be actually realized. (1981, c. 919, s. 1.)

CASE NOTES

Applied in Progress Energy Carolinas, Inc. v. Strickland, — N.C. App. —, 640 S.E.2d 856, 2007 N.C. App. LEXIS 404 (2007).

§ 40A-67. Entire tract.

For the purpose of determining compensation under this Article, all contiguous tracts of land that are in the same ownership and are being used as an integrated economic unit shall be treated as if the combined tracts constitute a single tract. (1981, c. 919, s. 1.)

CASE NOTES

Inchoate Dower Interest Sufficient. — A person's inchoate dower interest in his spouse's real property is interest sufficient to constitute an interest and estate in land for purposes of unity of ownership under this section. City of Winston-Salem v. Yarbrough, 117 N.C. App. 340, 451 S.E.2d 358, 1994 N.C. App. LEXIS 1259 (1994), cert. denied, 340 N.C. 110 (1995), cert. denied, 340 N.C. 260, 456 S.E.2d 519 (1995).

Land Used as Integrated Economic Unit. — Defendants' tracts of land, which defendants were holding for future development, were "being used as an integrated economic unit," as required under this section. City of Winston-Salem v. Yarbrough, 117 N.C. App. 340, 451 S.E.2d 358, 1994 N.C. App. LEXIS 1259 (1994), cert. denied, 340 N.C. 110 (1995), cert. denied, 340 N.C. 260, 456 S.E.2d 519 (1995).

Under G.S. 40A-67, contiguous tracts of land in the same ownership being used as an integrated economic unit are treated as if they were a single tract. DOT v. Roymac P'ship, 158 N.C. App. 403, 581 S.E.2d 770, 2003 N.C. App. LEXIS 1183 (2003), appeal dismissed, 358 N.C. 153, 592 S.E.2d 555 (2004).

Property owners were harmed by the trial court's error in refusing to grant them an evidentiary hearing under G.S. 40A-47 as to the proper description of land a city sought to condemn, because their offer of proof indicated that they would have offered evidence that they used their property "as a single economic unit" in conjunction with one another; such evidence might have been sufficient to establish "unity of use" affecting the valuation of the property under G.S. 40A-67. City of Winston-Salem v. Slate, — N.C. App. —, 647 S.E.2d 643, 2007 N.C. App. LEXIS 1705 (2007).

Unity of Ownership Required. — Unity of ownership needed to be shown in order to declare separate parcels of land united for condemnation purposes; where two separate corporations owned separate tracts of land, there was no unity of ownership and the tracts were not united for condemnation purposes. DOT v. Airlie Park, Inc., 156 N.C. App. 63, 576 S.E.2d 341, 2003 N.C. App. LEXIS 29 (2003), appeal dismissed sub nom. DOT v. Airlie, 357 N.C. 504, 587 S.E.2d 417 (2003).

No Unity of Use Found. — The trial court erred in finding that commercially-dedicated tracts C and D were part of the area affected by the taking where the four tracts (A, B, C, D) were separated by strips of land deeded to a city for streets and where the defendants' use and enjoyment of tracts C and D were not related to their use of tracts A and B, nor related to or affected by the area taken. Normally, lands will not be considered to constitute a single tract for the purpose of determining severance damages and benefits unless there is unity of use. DOT v. Rowe, 138 N.C. App. 329, 531 S.E.2d 836, 2000 N.C. App. LEXIS 615 (2000).

A partially-completed office park still meets the unity of use requirement. DOT v. Nelson Co., 127 N.C. App. 365, 489 S.E.2d 449 (1997).

§ 40A-68. Acquisition of property subject to lien.

Notwithstanding the provisions of an agreement, if any, relating to a lien encumbering the property:

(1) If there is a partial taking, the lienholder may share in the amount of compensation awarded only to the extent determined by the commissioners or by the jury or by the judge to be necessary to prevent an impairment of his security, and the lien shall continue upon the part of the property not taken as security for the unpaid portion of the indebtedness until it is paid; and

(2) Neither the condemnor nor owner is liable to the lienholder for any penalty for prepayment of the debt secured by the lien, and the amount awarded by the judgment to the lienholder shall not include any penalty therefor. (1981, c. 919, s. 1.)

§ 40A-69. Property subject to life tenancy.

If the property taken is subject to a life tenancy, the commissioners, the jury, or the judge may include in the judgment a requirement that:

(1) The award be apportioned and distributed on the basis of the respective values of the interests of the life tenant and remainderman;

(2) The compensation be used to purchase comparable property to be held subject to the life tenancy;

(3) The compensation be held in trust and administered subject to the terms of the instrument that created the life tenancy; or

(4) Any other equitable arrangement be carried out. (1981, c. 919, s. 1.)

Article 5.

Return of Condemned Property.

§ 40A-70. Return of condemned property.

Whenever a public condemnor listed in G.S. 40A-3(b) or (c) acquires real property by condemnation and thereafter determines that the property is not needed for the purpose for which it was condemned, and the public condemnor still owns the property, the public condemnor may reconvey the property to the original owner upon payment to the public condemnor of the full price paid to the owner when the property was taken by eminent domain, the cost of any improvements, together with interest at the legal rate to the date when the decision was made to offer the return of the property. Unless the public condemnor acquired the entire lot, block, or tract of land belonging to the original owner, the original owner must own the remainder of the original lot, block, or tract of land from which the property was acquired to purchase the property pursuant to this section. The public condemnor shall specify a date by which the property must be reconveyed and the payment made, which may not be less than 30 days after written notification to the original owner that the public condemnor has decided to offer the return of the property. (1991 (Reg. Sess., 1992), c. 980, s. 1.)

Chapter 41.

Estates.

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Survivorship Rights and Future Interests.

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ARTICLE 1.

Survivorship Rights and Future Interests.

§ 41-1. Fee tail converted into fee simple.

Every person seized of an estate in tail shall be deemed to be seized of the same in fee simple. (1784, c. 204, s. 5; R.C., c. 43, s. 1; Code, s. 1325; Rev., s. 1578; C.S., s. 1734; 1995, c. 190, s. 1; c. 525, s. 1.)

Cross References. — As to fee presumed, though word "heirs" omitted, see G.S. 39-1.

Legal Periodicals. — For discussion of the effect of this section upon the application of the rule in Shelley's case, see 1 N.C.L. Rev. 110 (1923).

For case law survey on real property, see 41 N.C.L. Rev. 500 (1963).

For case law survey as to the rule in Shelley's case, see 44 N.C.L. Rev. 1036 (1966).

For case law survey as to real property, see 45 N.C.L. Rev. 964 (1967).

For comment on the rule in Shelley's case, see 4 Wake Forest Intra. L. Rev. 132 (1968).

For article, "The Rule in Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For note discussing the enforceability of assessments against property owners in residential developments in light of Figure Eight Beach Homeowners' Ass'n v. Parker, 62 N.C. App. 367, 303 S.E.2d 336, cert. denied, 309 N.C. 320, 307 S.E.2d 170 (1983), see 7 Campbell L. Rev. 33 (1984).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

CASE NOTES

I. General Consideration.
II. Rule in Shelley's Case.
III. Application and Illustrative Cases.

I. GENERAL CONSIDERATION.

Editor's Note. — *Many of the cases under this section were decided prior to the enactment of G.S. 41-6.3, which abolished the rule in Shelley's case.*

History and purpose of this section. See Walter v. Trollinger, 192 N.C. 744, 135 S.E. 871 (1926).

Estates Tail Converted. — The section converted by one stroke of the legislative pen estates tail into fee simple. Hodges v. Lipscomb, 128 N.C. 57, 38 S.E. 281 (1901).

Form of Acquisition Not Changed. — The act of 1784, which subsequently converted the estate tail into a fee simple, did not change the original form of the acquisition, which still continued to be by purchase. Ballard v. Griffin, 4 N.C. 237 (1815).

The word "children" is ordinarily a word of purchase. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

"Heirs of their bodies" is equivalent to the words "heirs general." Revis v. Murphy, 172 N.C. 579, 90 S.E. 573 (1916); Cohoon v. Upton, 174 N.C. 88, 93 S.E. 446 (1917).

When the term "heirs of the body" is used in its technical sense, it imports a class of persons to take indefinitely in succession, from generation to generation. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

Remainder Dependent upon Estate Tail. — The section will bar a remainder dependent upon an estate tail, in possession of tenant in tail, at the time of passing the section. Lane v. Davis, 2 N.C. 362 (1796).

Confirmation of Alienation in Fee. — This section converted no estates tail into estates in fee, but such whereof there was a person seized and possessed, and confirmed only such alienations in fee as had been made by tenants in tail in possession since the year 1777. Wells v. Newbolt, 1 N.C. 450 (1802).

Cited in Williamson v. Cox, 218 N.C. 177, 10 S.E.2d 662 (1940); Lackey v. Hamlet City Bd. of Educ., 258 N.C. 460, 128 S.E.2d 806 (1963); White v. Lackey, 40 N.C. App. 353, 253 S.E.2d 13 (1979); Pugh v. Davenport, 60 N.C. App. 397, 299 S.E.2d 230 (1983).

II. RULE IN SHELLEY'S CASE.

Statement of Rule. — A good definition of the rule in Shelley's case, and the most general, is as follows: "That when the ancestor by any gift or conveyance taketh an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, in fee or in tail, the word 'heirs' is a word of limitation of the estate and not a word of purchase." Nichols v. Gladden, 117 N.C. 497, 23 S.E. 459 (1895). See also the statement of the rule in Smith v. Proctor, 139 N.C. 314, 51 S.E. 889, 2 L.R.A. (n.s.) 172 (1905); Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

The rule in Shelley's case says, in substance, that if an estate of freehold be limited to A, with remainder to his heirs, general or special, the remainder, although importing an independent gift to the heirs, as original takers, shall confer the inheritance on A, the ancestor. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

Force of Rule in North Carolina. — The common-law doctrine known as the rule in Shelley's case is in force in this State. Nichols v. Gladden, 117 N.C. 497, 23 S.E. 459 (1895) (decided under prior law).

Rule has never been abolished in North Carolina, and this section does not affect that principle of law. Dawson v. Quinnerly, 118 N.C. 188, 24 S.E. 483 (1896); Hammer v. Brantley, 244 N.C. 71, 92 S.E.2d 424 (1956).

Nature and Operation of Rule. — The rule in Shelley's case is a rule of law and not of construction, and, no matter what the intention of the grantor or testator may have been, if an estate is granted or given to one for life and after his death to his heirs or "heirs of his body," and no other words are superadded which to a certainty show that other persons than the heirs general of the first taker are meant, the rule applies and the whole estate vests in the first taker. Nichols v. Gladden, 117 N.C. 497, 23 S.E. 459 (1895).

Where the conveyance is to the first taker for life and then by whatever language employed to his bodily heirs or heirs of his body, the rule in Shelley's case applies and the first taker acquires a fee. Whitson v. Barnett, 237 N.C. 483, 75 S.E.2d 391 (1953).

When a devise is to a named person for life with remainder after his death to "his heirs" or "his bodily heirs" or the "heirs of his body," nothing else appearing, the devisee becomes seized of a fee simple estate upon the death of the testator subject to any prior life estate created by the will. Hammer v. Brantley, 244 N.C. 71, 92 S.E.2d 424 (1956).

The rule in Shelley's case operates as a rule of property without regard to the intent of the grantor or devisor. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

Rule in Shelley's case applies to personalty as well as to realty. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

Whenever applicable, the rule in Shelley's case applies to both real and personal property in this jurisdiction. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

Limitation within Rule Passes a Fee Simple. — A limitation coming within the rule in Shelley's case, recognized as existent in this State, operates as a rule of property, passing when applicable a fee simple, both in deeds and wills, regardless of a contrary intent on the part of the testator or grantor appearing in the instrument. Wallace v. Wallace, 181 N.C. 158, 106 S.E. 501 (1921).

Difference between Words of Purchase and Words of Limitation. — In considering the applicability of the rule in Shelley's case, it is important to draw and constantly keep in mind the difference between words of purchase and words of limitation. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

When the rule in Shelley's case says that the words "heirs" or the "heirs of the body" of A are words of limitation and not words of purchase, it simply means that "heirs" or the "heirs of the body" refer to and are read in connection with the estate given to A, extending or modifying that estate, and are not taken as describing a group to whom an estate will first attach. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

"Heirs" or "Heirs of the Body". — The words "heirs" or "heirs of the body" must be taken in their technical sense, or carry the estate to the entire line of heirs to hold as inheritors under our canons of descent; but should these words be used as only designating certain persons, or confining the inheritance to a restricted class of heirs, the rule does not apply, and the ancestor or the first taker acquires only a life estate according to the meaning of the express words of the instrument. Wallace v. Wallace, 181 N.C. 158, 106 S.E. 501 (1921).

The rule in Shelley's case applies whenever judicial exposition determines that heirs are described, though informally, under a term correctly descriptive of other objects, but stands excluded whenever it determines that other objects are described, though informally, under the term heirs. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

III. APPLICATION AND ILLUSTRATIVE CASES.

Deed Sufficient Formerly to Convey Fee Tail. — A deed, which was sufficient under the old law to confer a fee tail, is sufficient under this section, where a contrary intent may not be gathered from the instrument construed as a whole, to convey an estate in fee simple, but such a deed must be distinguished from a conveyance in which the words "bodily heirs" are used as descriptio personarum, which merely conveys to them an estate in remainder and as purchasers from the grantor. Harrington v. Grimes, 163 N.C. 76, 79 S.E. 301 (1913). See Whitfield v. Garriss, 134 N.C. 24, 45 S.E. 904 (1903); Jones v. Ragsdale, 141 N.C. 200, 53 S.E. 842 (1906); Sessoms v. Sessoms, 144 N.C. 121, 56 S.E. 687 (1907); Perrett v. Bird, 152 N.C. 220, 67 S.E. 507 (1910). See also Acker v. Pridgon, 158 N.C. 337, 74 S.E. 335 (1912); Puckett v. Morgan, 158 N.C. 344, 74 S.E. 15 (1912).

Conveyance to One and Heirs of the Body. — A conveyance of land to A and "her heirs by the body of R (her husband) and assigns forever" was a fee tail at common law, but under this section it is converted into a fee simple absolute, unaffected by the fact that there were children of the marriage living at the time of the execution of the conveyance; and in this case, construing the instrument as a whole, it evidences the intent of the grantor that it should be so interpreted. Revis v. Murphy, 172 N.C. 579, 90 S.E. 573 (1916); Whitley v. Arenson, 219 N.C. 121, 12 S.E.2d 906 (1941).

If testatrix intended to use the term in its strict technical sense, a devise to one and his "bodily heirs" would violate the rule against perpetuities, or might create a fee tail, and in either case a fee simple would vest in the first taker. Elledge v. Parrish, 224 N.C. 397, 30 S.E.2d 314 (1944).

An estate to H during his life, with remainder to the testator's son "and his bodily heirs," vests a life estate in the land in H, with an estate tail in remainder to the son, which, under our statute, is converted into a fee simple. And upon the falling in of the life estate, the son can convey a good fee simple title. Howard v. Edwards, 185 N.C. 604, 116 S.E. 1 (1923), distinguishing Leathers v. Gray, 101 N.C. 162, 7 S.E. 657 (1888) and Chamblee v. Broughton, 120 N.C. 170, 27 S.E. 111 (1897).

A devise to A for life and at her death to the heirs of her body presents a classic case for application of the rule in Shelley's case. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

By a devise to A for life and at her death to the heirs of her body, the rule in Shelley's case, and the doctrine of merger, give A an estate tail which this section converts into a fee simple. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

Where a testatrix devised and bequeathed all her property to her daughter during her lifetime and at her death to the "heirs of her body, if any," with further provision that if the daughter should die before testatrix without heirs of the body, the property should go to named collateral kin, the daughter took a fee tail under the rule in Shelley's case, which was converted into a fee simple by this section. Ray v. Ray, 270 N.C. 715, 155 S.E.2d 185 (1967).

Child Adopted by Unmarried Daughter. — Where will provided for remainder interest to an unmarried daughter "to have and to hold the same to her and the heirs of her body," any child adopted by her would satisfy the conditions of the will and could inherit as a bodily heir. Russell v. Russell, 101 N.C. App. 284, 399 S.E.2d 415, cert. denied, 328 N.C. 577, 403 S.E.2d 514 (1991).

Deed to Daughter, "Her Children or Heirs". — Grantors executed a deed to their daughter and "her children or heirs." At the time of the execution of the deed the daughter had no children. It was held that the deed conveyed an estate tail to the daughter, which estate is converted into a fee simple by this section, and the daughter had power to dispose of the property by will. Davis v. Brown, 241 N.C. 116, 84 S.E.2d 334 (1954).

Conveyance to One and His Children. — Where a conveyance is made to A and his children, and A has children at the time the deed is executed, A and his children take as tenants in common, but if A has no children at the time the deed is executed, A takes an estate tail which is converted into a fee by this section. Davis v. Brown, 241 N.C. 116, 84 S.E.2d 334 (1954).

When the devise is to one for life and after his death to his children or issue, the rule in Shelley's case has no application, unless it manifestly appears that such words are used in the sense of heirs generally. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

Devise to Go on Devisees' Deaths to Their "Children & So On". — Where testatrix stated she "wanted" the land in question to go to her brother and at his death to his three sons and his named grandson, with further provision that at their deaths testatrix "wanted" the land to go to their "children & so on", the brother took a life estate with remainder to his children and the named grandson in fee under the rule in Shelley's case, since it is apparent that testatrix used the word "children" in the sense of an indefinite line of succession and created an estate tail converted into a fee by this section. Wilson v. Spain, 260 N.C. 482, 133 S.E.2d 189 (1963).

Devise to One and Lawful Heirs of His Body. — A devise to S and the lawful heirs of his body forever confers an estate in fee tail, converted into a fee simple under the section. Sessoms v. Sessoms, 144 N.C. 121, 56 S.E. 687 (1907). See Wool v. Fleetwood, 136 N.C. 460, 48 S.E. 785 (1904).

Devise to testator's wife for her natural life and at her death to testator's daughter and "her bodily heirs" vested a life estate in the land to the wife, with an estate tail in remainder to the daughter, whose interest was converted under this section into a defeasible fee simple, and, even though the wife conveyed her present life estate interest to her daughter, the daughter's interest could only be defeated in the event that she died without having children. Russell v. Russell, 101 N.C. App. 284, 399 S.E.2d 415, discretionary review denied, 328 N.C. 577, 403 S.E.2d 514 (1991).

Where Words "Bodily Heirs" Not Used in Technical Sense. — If it appears by correct construction that the words "bodily heirs" are not used in the technical sense as conveying the estate to the entire line of heirs of the first taker, as inheritors under the canons of descent, but as words designating certain persons, the rule in Shelley's case does not apply. Whitson v. Barnett, 237 N.C. 483, 75 S.E.2d 391 (1953).

Where the conveyance was made "to Roy Whitson and bodily heirs, and their heirs and assigns," Roy Whitson being the father of four children, it was held that the words "bodily heirs" were intended to mean children and not heir general in the technical sense. The words were interpreted to mean "to Roy Whitson and children, and their heirs and assigns." Whitson v. Barnett, 237 N.C. 483, 75 S.E.2d 391 (1953).

Effect of § 41-6. — Where a deed is executed to "M and the heirs of her body by her husband S begotten, or upon failure thereafter her death to the nearest heirs of S," and at the date of the execution of the deed M has children living, the deed conveys a fee tail special to M which is converted to a fee simple by this section, defeasible upon her dying without surviving children by S, and her children do not take as tenants in common with her, G.S. 41-6, providing that a limitation to the heirs of a living person shall be construed to be the children of such person, being applicable only when there is no precedent estate conveyed to the living person, and the condition as to the failure of heirs referring to the death of M without surviving children and not to the birth of issue, there being issue born at the date of the execution of the deed, and the ulterior limitation is not barred by the birth of such issue. Paul v. Paul, 199 N.C. 522, 154 S.E. 825 (1930), distinguishing Sharpe v. Brown, 177 N.C. 294, 98 S.E. 825 (1919). See Bank of Pilot Mountain v. Snow, 221 N.C. 14, 18 S.E.2d 711 (1942).

A deed to a married woman and her heirs by her present husband, with granting clause, habendum and warranty to "parties of the second part, their heirs and assigns," is held to convey to the married woman a fee tail special, which is converted into a fee simple absolute by this section. Whitley v. Arenson, 219 N.C. 121, 12 S.E.2d 906 (1941).

A deed to a widow and the heirs of her body by her late husband creates an estate tail which is converted by this section into a fee simple absolute in the widow, and her children by her deceased husband take no interest in the land; G.S. 41-6 is not applicable, since it applies only when no preceding estate is conveyed to the "ancestor" of the "heirs." Bank of Pilot Mountain v. Snow, 221 N.C. 14, 18 S.E.2d 711 (1942).

A deed to grantor's wife "and to her heirs" by grantor, conveys a fee tail special, converted by this section into a fee simple absolute. Pittman v. Stanley, 231 N.C. 327, 56 S.E.2d 657 (1949).

A devise to testator's wife, "to her and her heirs by me," vests in the wife a fee tail special, converted by this section into a fee simple, and her estate is not affected or limited to a life estate with remainder in fee to the heirs of testator by subsequent provision in the item that testator's wife should have exclusive and sole use of the property and "should she have living heirs by me, then all my estate … shall belong to her and her heirs in fee simple," in the absence of a reverter or limitation over in the event the wife should not have children born to her marriage with testator. Sharpe v. Isley, 219 N.C. 753, 14 S.E.2d 814 (1941).

Life Estate with Limitation over to Bodily Heirs. — A devise of lands for life, followed by a separate paragraph, to the "bodily heirs" of the devisees named after their death, creates an estate in fee tail, which is enlarged into a fee simple under this section. Keziah v. Medlin, 173 N.C. 237, 91 S.E. 836 (1917).

Where a husband conveys his lands to his wife for life and to her bodily heirs begotten by him, the estate conveyed is an estate tail special under the rule in Shelley's case, converted into a fee simple absolute by this section. Morehead v. Montague, 200 N.C. 497, 157 S.E. 793 (1931).

Conveyance to Husband and Wife for Life Then to Heirs of the Body of Wife. — A deed conveyed to husband and wife a life estate and expressed grantor's intent to convey only a lifetime right to said grantees, with provision that said grantees should have and hold said tract of land during their natural lives and then to the heirs of the body of the feme grantee. It was held that the husband took only a life estate, and the conveyance being to the wife and then to heirs of her body, the rule in Shelley's case applied, and the estate in fee tail conveyed to the wife was converted by this section into a fee simple absolute. Edgerton v. Harrison, 230 N.C. 158, 52 S.E.2d 357 (1949).

Devise "to Have and to Hold for the Heirs of Their Bodies". — A devise of lands to the wife of the testator for life, and at her death or remarriage to their two children, by name, to have and to hold during their natural lives for the heirs of their bodies, constitutes an estate tail, converted by this section into a fee simple. Washburn v. Biggerstaff, 195 N.C. 624, 143 S.E. 210 (1928).

Remainder to "Male Heirs, They to Share and Share Alike". — The will in question devised certain lands to testator's son for life "and then to be divided equally among his male heirs, they to share and share alike" and it was held that even if it be conceded that the words "male heirs" should be construed "heirs" under the provisions of this section, the addition of the words "share and share alike" prevents the application of the rule in Shelley's case, and upon the death of the son, his sole male heir takes the fee in the property by purchase under the will. Cheshire v. Drewry, 213 N.C. 450, 197 S.E. 1 (1938).

Devise to Grandchildren for Their Lives, Then "to Their Bodily Heirs". — The rule in Shelley's case does not apply to a devise to testator's grandchildren during the term of their natural lives, then "to their bodily heirs, or issue surviving them," with limitation over of the share of any grandchild who should die without issue to his next of kin, since it is apparent that the word "heirs" was not used in its technical sense, and the grandchildren take only a life estate. Williams v. Johnson, 228 N.C. 732, 47 S.E.2d 24 (1948).

The use of the word "children" following the life estate does not create a fee simple estate or fee tail estate which would be converted by this section into a fee simple estate where a will devises real estate to the three daughters of testator, naming them, "during the time of their natural lives" and provides that "the share of each one of my said daughters shall upon her death go to her children and their heirs absolutely," for the word "children" is a word of purchase. Moore v. Baker, 224 N.C. 133, 29 S.E.2d 452 (1944).

"Lawful Heirs". — Where a devise is to one for life and then to his "lawful heirs," the word "lawful," qualifying the word "heirs," does not have the effect of preventing the latter word from operating as one of limitation and of restricting the meaning of the words "lawful heirs" to that of "children," who will take not by descent from their parent, but by purchase from the devisor. Wool v. Fleetwood, 136 N.C. 460, 48 S.E. 785 (1904).

"Heirs, if Any". — A conveyance to one for "his lifetime, and at his death to his heirs, if any," invokes the application of the rule in Shelley's case and vests a fee in the first taker. The use of the phrase "if any" does not prevent the application of the rule, since there is no limitation over. Glover v. Glover, 224 N.C. 152, 29 S.E.2d 350 (1944).

"Heirs or Heiresses of Her Body". — A devise to P, "during her natural life, and after her death to the begotten heirs or heiresses of her body," vested in P an absolute estate in fee simple. Leathers v. Gray, 101 N.C. 162, 7 S.E. 657 (1888).

"Or Other Lineal Descendants". — The superadded words "or other lineal descendants ... to have and to hold the same to them and their heirs, executors and administrators absolutely" do not demonstrate that testator contemplated an indefinite succession from generation to generation. Wright v. Vaden, 266 N.C. 299, 146 S.E.2d 31 (1966).

Devise "for Life Only". — A devise of lands to the testator's named children "for life only and then to their body heirs," falls within the rule in Shelley's case, notwithstanding the use of the words "for life only," and carries to the remainderman a fee tail under the old law, converted by our statute into a fee simple title. Merchants Nat'l Bank v. Dortch, 186 N.C. 510, 120 S.E. 60 (1923), citing Harrington v. Grimes, 163 N.C. 76, 79 S.E. 301 (1913).

Reverter upon Death without Surviving Heirs. — The interpretation that a deed for life and then to "the surviving heirs of her body" conveys the fee simple title, under this section, does not apply when the grantor uses the additional words, "but should she die without leaving such heir or heirs, then the same is to revert back to her nearest of kin according to law," for then the intent is manifest that the conveyance is of a defeasible fee depending upon whether the first taker died without leaving children surviving her. Smith v. Parke, 176 N.C. 406, 97 S.E. 209 (1918).

A devise to testator's daughter and her bodily heirs, and if she dies without bodily heirs, then in trust for the heirs of testator's sisters, is held to create a fee simple estate in the daughter, defeasible upon her dying without children or issue, it being apparent that the words "bodily heirs" used in the devise meant children or issue, as otherwise the limitation over to the heirs of testator's sisters would be meaningless. Murdock v. Deal, 208 N.C. 754, 182 S.E. 466 (1935).

Where land is devised to a person for life at her death to vest in the testator's children during their natural lives and at their death to vest in their lawful heirs, and should they leave no lawful heirs, then to the testator's lawful heirs, such children take a fee simple absolute on the death of the life tenant. Wool v. Fleetwood, 136 N.C. 460, 48 S.E. 785 (1904).

Where a testator devises realty to a grandson, and upon the grandson's death without children, then the realty to descend to other grandchildren, such devise vests a fee simple estate in the first devisee, defeasible only on condition that he die without leaving heirs of his body. Whitefield v. Garriss, 134 N.C 24, 45 S.E. 904 (1903).

When Defeasible Estate Becomes Absolute. — A conveyance to a granddaughter and the heirs of her own body passed an estate in fee tail, which by this section was converted into a fee simple, defeasible under the terms of the deed if no child was born to her, but which became absolute upon the birth of a child Sharpe v. Brown, 177 N.C. 294, 98 S.E. 825 (1919). See Paul v. Paul, 199 N.C. 522, 154 S.E 825 (1930).

An estate in remainder to the testator's son "and to his children or issue, but in case he should die childless and without issue, then .. to my heirs in equal degree in fee simple," there being no child or children of the son until long after the testator's death, was held to create an estate tail at common law, which was converted into a fee simple by this section, defeasible upon the testator's son dying without issue and as there was an ultimate limitation over to persons coming within its terms, the testator's son and his child or issue could not convey a fee simple title. Ziegler v. Love, 185 N.C. 40, 115 S.E. 887 (1923).

§ 41-2. Survivorship in joint tenancy defined; proviso as to partnership.

Except as otherwise provided herein, in all estates, real or personal, held in joint tenancy, the part or share of any tenant dying shall not descend or go to the surviving tenant, but shall descend or be vested in the heirs, executors, or administrators, respectively, of the tenant so dying, in the same manner as estates held by tenancy in common: Provided, that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, are vested in the surviving partner, in order to enable him to settle and adjust the partnership business, or pay off the debts which may have been contracted in pursuit of the joint business; but as soon as the same is effected, the survivor shall account with, and pay, and deliver to the heirs, executors and administrators respectively of such deceased partner all such part, share, and sums of money as he may be entitled to by virtue of the original agreement, if any, or according to his share or part in the joint concern, in the same manner as partnership stock is usually settled between joint merchants and the representatives of their deceased partners. Nothing in this section prevents the creation of a joint tenancy with right of survivorship in real or personal property if the instrument creating the joint tenancy expressly provides for a right of survivorship, and no other document shall be necessary to establish said right of survivorship. Upon conveyance to a third party by less than all of three or more joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created among the third party and the remaining joint tenants, who remain joint tenants with right of survivorship as between themselves. Upon conveyance to a third party by one of two joint tenants holding property in joint tenancy with right of survivorship, a tenancy in common is created between the third party and the remaining joint tenant. A conveyance of any interest in real property by a party to himself and one or more other parties, as joint tenants with right of survivorship, creates in the parties that interest, if the instrument of conveyance expressly provides for a joint tenancy with right of survivorship. (1784, c. 204, s. 6; R.C., c. 43, s. 2; Code, s. 1326; Rev., s. 1579; C.S., s. 1735; 1945, c. 635; 1989 (Reg. Sess., 1990), c. 891, s. 1; 1991, c. 606, s. 1.)

Cross References. — As to personal representatives holding in joint tenancy, see G.S. 28A-13-5. As to survivorship among trustees given power of sale, see G.S. 45-8.

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 891, which amended this section, provided in s. 3: "Nothing in this act shall be construed to affect the validity of instruments that provide for a right of survivorship executed prior to the effective date of this act." The act became effective January 1, 1991.

Session Laws 1991, c. 606, which amended this section, in section 2 provides: "A conveyance of any interest in real property occurring between January 1, 1991, and the effective date of this act [October 1, 1991] by a party to himself and one or more other parties that expressly provides for a joint tenancy with a right of survivorship shall have created such an interest."

Legal Periodicals. — For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

For comment on tenancy by the entirety in North Carolina, see 59 N.C.L. Rev. 997 (1980).

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "The Joint Tenancy Makes a Comeback in North Carolina," see 69 N.C.L. Rev. 491 (1991).

CASE NOTES

I. General Consideration.
II. Estates of Husband and Wife.
III. Joint Tenancy in Partnership Property.

I. GENERAL CONSIDERATION.

Survivorship Only Abolished as Incident of Joint Tenancy. — This section abolished survivorship only where it follows as a legal incident to an existing joint tenancy. Vettori v. Fay, 262 N.C. 481, 137 S.E.2d 810 (1964).

Right of survivorship has been statutorily abolished where it follows as legal incident to an existing joint tenancy. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

"Estate" in Most General Sense Includes Choses in Action. — "Estate" is derived from status, and in its most general sense means position or standing in respect to the things and concerns of this world. In this sense it includes choses in action. Pippin v. Ellison, 34 N.C. 61 (1851); Webb v. Bowler, 50 N.C. 362 (1858); Hurdle v. Outlaw, 55 N.C. 75 (1854).

But it is also used in a much more restricted sense, and is then put in opposition to a chose in action, or mere right, to signify something which one has in possession, or a vested remainder, or reversion without dispute or adverse possession. Taylor v. Dawson, 56 N.C. 86 (1856). See Bond v. Hilton, 51 N.C. 180 (1858).

Section Applies Only to Estates of Inheritance. — The act of 1784, converting joint tenancies into estates in common, applies only to estates of inheritance. Blair v. Osborne, 84 N.C. 417 (1881); Powell v. Morisey, 84 N.C. 421 (1881).

If the purpose had been to include all estates in joint tenancy, that purpose would have been better served by abolishing the "jus accrescendi" in a few direct words to that effect, instead of resorting to words applicable only to estates of inheritance held in joint tenancy in real estate, and absolute estates held in joint tenancy in personalty. Powell v. Allen, 75 N.C. 450 (1876).

This section which abolished the right of survivorship in joint tenancies in estates of inheritance, does not apply to a joint tenancy in a life estate where no estate of inheritance is involved. Dew v. Shockley, 36 N.C. App. 87, 243 S.E.2d 177, cert. denied, 295 N.C. 465, 246 S.E.2d 9 (1978).

Concurrent Life Estates Not Affected. — Concurrent life estates still stand untouched by this section, and the old feudal presumption in favor of joint tenancies with survivorship remains. Dew v. Shockley, 36 N.C. App. 87, 243 S.E.2d 177, cert. denied, 295 N.C. 465, 246 S.E.2d 9 (1978).

Joint Estates for Life and Estates by Entirety Not Affected. — Joint tenancies are not abolished by the section. It abolishes the right of survivorship in joint tenancies in fee, but does not affect joint estates for life or estates by entirety. Vass v. Freeman, 56 N.C. 221 (1857); Powell v. Allen, 75 N.C. 450 (1876); Blair v. Osborne, 84 N.C. 417 (1881); Powell v. Morisey, 84 N.C. 421 (1881); Burton v. Cahill, 192 N.C. 505, 135 S.E. 332 (1926).

In Powell v. Allen, 75 N.C. 450 (1876), in construing the act of 1784, now this section, Chief Justice Pearson says: "It is obvious that these words cannot be made to apply to joint tenants for life." Burton v. Cahill, 192 N.C. 505, 135 S.E. 332 (1926).

Legatees May Hold as Joint Tenants. — Legatees may still hold by a joint tenancy in North Carolina, though the incident of survivorship was abolished by the act of 1784, now this section. Vass v. Freeman, 56 N.C. 221 (1857).

When Remaindermen Take as Tenants in Common. — A deed of gift, executed by W.B. to his son J.B., "during his natural life only, and then to return to the male children of the said J.B., lawfully begotten of his body, for the want of such to return to the male children of my other sons W and B, their proper use, benefit and behoof of him, them and every of them, and to their heirs and assigns forever," vested a life estate in J.B., with remainder in fee to his sons as tenants in common under the section. Brown v. Ward, 103 N.C. 173, 9 S.E. 300 (1889).

Survivorship May Be Provided for by Contract. — This section abolishes survivorship, where the joint tenancy would otherwise have been created by the law, but does not operate to prohibit persons from entering into written contracts as to land, or verbal agreements as to personalty, such as to make the future rights of the parties depend upon the fact of survivorship. Taylor v. Smith, 116 N.C. 531, 21 S.E. 202 (1895); Jones v. Waldroup, 217 N.C. 178, 7 S.E.2d 366 (1940); Bunting v. Cobb, 234 N.C. 132, 66 S.E.2d 661 (1951); Wilson County v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960).

This section does not operate to prohibit persons from entering into written contracts as to lands so as to make future rights of the parties depend upon survivorship. Vettori v. Fay, 262 N.C. 481, 137 S.E.2d 810 (1964).

Parties who wish to create a right of survivorship applicable to joint bank accounts must comply with requirements of § 41-2.1(a). In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

Survivorship in Personalty Must Be Pursuant to Contract. — Since the abolition of survivorship in joint tenancy, the right of survivorship in personalty, if such right exists, must be pursuant to contract and not by operation of law or statutory provision. Wilson v. Ervin, 227 N.C. 396, 42 S.E.2d 468 (1947);

Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956).

A verbal agreement between two parties owning a note, payable to them jointly, that upon the death of either without issue it shall belong to the survivor is valid. Taylor v. Smith, 116 N.C. 531, 21 S.E. 202 (1895).

Instrument Held Ineffective to Provide for Survivorship. — While this section may not preclude tenants in common from providing for survivorship by adequate contract inter sese, an instrument executed by them which merely expresses a general intent that the survivor should take the fee, without any words of conveyance, is ineffective. The execution by the administrator of the deceased tenant in common of a deed to the surviving tenant, made under the supposed authority of the contract, is without effect. Pope v. Burgess, 230 N.C. 323, 53 S.E.2d 159 (1949).

Applied in Powell v. Malone, 22 F. Supp. 300 (M.D.N.C. 1938).

Cited in Buffaloe v. Barnes, 226 N.C. 313, 38 S.E.2d 222 (1946); O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 817 (1980); McLain v. Wilson, 91 N.C. App. 275, 371 S.E.2d 151 (1988); Mutual Community Savs. Bank v. Boyd, 125 N.C. App. 118, 479 S.E.2d 491 (1996).

II. ESTATES OF HUSBAND AND WIFE.

Section Inapplicable to Conveyances to Husband and Wife. — The act of 1784, now this section, abolishing survivorship in joint tenancies, does not apply to conveyances to husband and wife, for the reason assigned in Motley v. Whitemore, 19 N.C. 537 (1837), that "being in law but one person they have each the whole estate as one person; and on the death of either of them the whole estate continues in the survivor." Long v. Barnes, 87 N.C. 329 (1882); Smith v. Gordon, 204 N.C. 695, 169 S.E. 634 (1933).

In construing this statute, the Supreme Court held that it had no application to an estate granted to husband and wife, on the ground that it is not an estate in joint tenancy, but an entirety estate. Motley v. Whitemore, 19 N.C. 537 (1837); Gray v. Bailey, 117 N.C. 439, 23 S.E. 318 (1895); Woolard v. Smith, 244 N.C. 489, 94 S.E.2d 466 (1956).

Survivorship in Joint Bank Accounts. — Where agreements of husband and wife relating to savings accounts provide that the accounts are held by them as joint tenants with right of survivorship, and not as tenants in common, the right of survivorship exists pursuant to the contracts, and upon the death of the husband the widow is entitled to take the whole. Bowling v. Bowling, 243 N.C. 515, 91 S.E.2d 176 (1956).

Estate by Entireties Not Abolished. — It has been held in several well considered decisions of the Supreme Court that our Constitution and the later statutes relative to the property and rights of married women have not thus far destroyed or altered the nature of this estate by entireties, a conveyance to a husband and wife. Bruce v. Sugg, 109 N.C. 202, 13 S.E. 790 (1891); Ray v. Long, 132 N.C. 891, 44 S.E. 652 (1903); West v. Aberdeen & R.R., 140 N.C. 620, 53 S.E. 477 (1906); Bynum v. Wicker, 141 N.C. 95, 53 S.E. 478 (1906); Jones v. W.A. Smith & Co., 149 N.C. 318, 62 S.E. 1092 (1908); McKinnon, Currie & Co. v. Caulk, 167 N.C. 411, 83 S.E. 559 (1914). See also Martin v. Lewis, 187 N.C. 473, 122 S.E. 180 (1924).

The right of survivorship applies to estates in land conveyed jointly to husband and wife, and title vests in the heirs of the one surviving the other. Murchison v. Fogleman, 165 N.C. 397, 81 S.E. 627 (1914).

A conveyance to a husband and wife, as such, creates an estate of entirety, and does not make them joint tenants or tenants in common. Neither can alien without the consent of the other, and the survivor takes the whole. Needham v. Branson, 27 N.C. 426 (1845); Todd v. Zachary, 45 N.C. 286 (1853); Woodford v. Higly, 60 N.C. 234 (1864); Long v. Barnes, 87 N.C. 329 (1882).

Where the husband and wife purchase property, each furnishing a portion of the purchase money, an estate in entirety and not a joint estate is created which they hold per tout et non per my. Ray v. Long, 132 N.C. 891, 44 S.E. 652 (1903).

III. JOINT TENANCY IN PARTNERSHIP PROPERTY.

Joint Tenancy of Partnership in Land. — This section provides that land jointly purchased for partnership purposes shall, upon the death of one partner, survive to the others for the purpose of paying the partnership debts. Real estate held and used for partnership purposes is subject to partnership debts to the exclusion of the heir or widow of the deceased. When the partnership debts are satisfied, if there is any remainder, such share as would have fallen to the deceased partner, shall be delivered over to the heirs, executors, administrators or assigns. Stroud v. Stroud, 61 N.C. 525 (1868).

Upon Settlement Partnership Land Descends as Real Estate. — When land is purchased in fee by partnership funds and for partnership purposes, and one partner dies, upon the settlement of the partnership debts his share of the land descends to his heir as real estate. Summey v. Patton, 60 N.C. 601 (1864).

When lands are purchased by a partnership with partnership funds, upon the death of one of the partners, in the absence of any agreement in the articles of partnership to the contrary, his share therein descends to his heir at law as real estate, if the personal property of the partnership is sufficient to pay all the partnership debts and demands. Sherrod v. Mayo, 156 N.C. 144, 72 S.E. 216 (1911).

Heir May Recover from Surviving Partner. — The heir at law to whom a deceased partner had conveyed by deed his share of lands purchased with partnership funds is entitled to the lands against the rights of the surviving partner, in an action by the latter for possession for the purpose of winding up the partnership affairs, when it appears that the partnership personalty is sufficient for the purpose of paying the partnership debts and satisfying any claim the surviving partner may have, and there is no provision in the articles of the partnership agreement of a contrary purpose. Sherrod v. Mayo, 156 N.C. 144, 72 S.E. 216 (1911).

Immaterial Whether Claim Is by Deed or Inheritance. — When the rule applies that lands purchased by partnership funds descend to the heir at law, it is immaterial whether the heir of the deceased partner claims his interest by deed from him or by inheritance. Sherrod v. Mayo, 156 N.C. 144, 72 S.E. 216 (1911).

Section 59-74 is to be read in connection with this section respecting the settlement of partnership affairs by surviving partners. Coppersmith v. Upton, 228 N.C. 545, 46 S.E.2d 565 (1948).

The fact that the surviving partner instituting action on a partnership asset has not filed a bond as required by § 59-74, is not ground for nonsuit, since the requirement of a bond is for the protection of the estate of the deceased partner, and the objection is not available to one who is merely a debtor of the partnership. This conclusion is consonant with G.S. 59-75, which provides that upon failure of the surviving partner to file bond, the clerk of the superior court shall appoint a collector of the partnership upon application of any person interested in the estate of the deceased partner. Coppersmith v. Upton, 228 N.C. 545, 46 S.E.2d 565 (1948).

OPINIONS OF ATTORNEY GENERAL

Effect on Common Law Application to Joint Bank Accounts. — See opinion of the Attorney General to Mr. W.C. York, Department of Insurance, 41 N.C.A.G. 352 (1971).

§ 41-2.1. Right of survivorship in bank deposits created by written agreement.

(a) A deposit account may be established with a banking institution in the names of two or more persons, payable to either or the survivor or survivors, with incidents as provided by subsection (b) of this section, when both or all parties have signed a written agreement, either on the signature card or by separate instrument, expressly providing for the right of survivorship.

(b) A deposit account established under subsection (a) of this section shall have the following incidents:

(1) Either party to the agreement may add to or draw upon any part or all of the deposit account, and any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn.

(2) During the lifetime of both or all the parties, the deposit account shall be subject to their respective debts to the extent that each has contributed to the unwithdrawn account. In the event their respective contributions are not determined, the unwithdrawn fund shall be deemed owned by both or all equally.

(3) Upon the death of either or any party to the agreement, the survivor, or survivors, become the sole owner, or owners, of the entire unwithdrawn deposit, subject to the following claims listed below in subdivisions a. through e. upon that portion of the unwithdrawn deposit which would belong to the deceased had the unwithdrawn deposit been divided equally between both or among all the joint tenants at the time of the death of the deceased:

a. The allowance of the year's allowance to the surviving spouse of the deceased;

b. The funeral expenses of the deceased;

c. The cost of administering the estate of the deceased;
d. The claims of the creditors of the deceased; and
e. Governmental rights.

(4) Upon the death of one of the joint tenants provided herein the banking institution in which said joint deposit is held shall pay to the legal representative of the deceased, or to the clerk of the superior court if the amount is less than two thousand dollars ($2,000), the portion of the unwithdrawn deposit made subject to the claims and expenses as provided in subdivision (3) above, and may pay the remainder to the surviving joint tenant or joint tenants. Said legal representative shall hold the portion of said unwithdrawn deposit paid to him and not use the same for the payment of the claims and expenses as provided in subdivision (3) above unless and until all other personal assets of the estate have been exhausted, and shall then use so much thereof as may be necessary to pay said claims and expenses. Any part of said unwithdrawn deposit not used for the payment of said claims and expenses shall, upon the settlement of the estate, be paid to the surviving joint tenant or tenants.

(c) This section shall be subject to the provisions of law applicable to transfers in fraud of creditors.

(d) This section shall not be deemed exclusive; deposit accounts not conforming to this section, and other property jointly owned, shall be governed by other applicable provisions of the law.

(e) As used in this section:

(1) "Banking institution" includes commercial banks, industrial banks, building and loan associations, savings and loan associations, and credit unions.

(2) "Deposit account" includes both time and demand deposits in commercial banks and industrial banks, installment shares, optional shares and fully paid share certificates in building and loan associations and savings and loan associations, and deposits and shares in credit unions.

(3) "Unwithdrawn deposit" shall be the amount in the deposit account held by the banking institution at the time of the death of the joint tenant; provided, however, that the banking institution shall not be held responsible for any amount properly paid out of said account prior to notice of such death.

(f) This section does not repeal or modify any provisions of the law relating to estate or inheritance taxes.

(g) A deposit account under subsection (a) of this section may be established by a written agreement in substantially the following form:

"We, the undersigned, hereby agree that all sums deposited at any time, including sums deposited prior to this date, in the ________________ (name of institution) in the joint account of the undersigned, shall be held by us as co-owners with the right of survivorship, regardless of whose funds are deposited in said account and regardless of who deposits the funds in said account. Either or any of us shall have the right to draw upon said account, without limit, and in case of the death of either or any of us the survivor or survivors shall be the sole owner or owners of the entire account. This agreement is governed by the provisions of § 41-2.1 of the General Statutes of North Carolina.

Witness our hands and seals, this ________ day of ________, ________.

____ (Seal)
____ (Seal)
____ (Seal)
____ (Seal)"

(1959, c. 404; 1963, c. 779; 1969, c. 863; 1973, c. 840; 1975, c. 19, s. 14; 1977, c. 671, ss. 1, 2; 1998-69, s. 11; 1999-337, s. 9; 1999-456, s. 59.)

Legal Periodicals. — For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966); 46 N.C.L. Rev. 520 (1968).

For note on joint bank accounts with the right of survivorship in North Carolina, see 46 N.C.L. Rev. 669 (1968).

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

For article, "The Joint Tenancy Makes a Comeback in North Carolina," see 69 N.C.L. Rev. 491 (1991).

CASE NOTES

Rights of Creditors. — The legislature has not enacted any statute with respect to the rights of creditors against property held by virtue of a contract creating a joint tenancy with right of survivorship, except as to the right of survivorship in bank deposits created by a written agreement by husband and wife as provided by this section. Wilson County v. Wooten, 251 N.C. 667, 111 S.E.2d 875 (1960).

Effect of Deposit into Joint Account. — A deposit by one spouse into an account in the names of both, standing alone, does not constitute a gift to the other; the depositor is still deemed to be the owner of the funds. Myers v. Myers, 68 N.C. App. 177, 314 S.E.2d 809 (1984).

For a deposit by one spouse to constitute a gift to the other, there must be donative intent coupled with loss of dominion over the property; the donor must divest himself of all right and title to, and control of, the gift. Myers v. Myers, 68 N.C. App. 177, 314 S.E.2d 809 (1984).

Wife Held Entitled to Funds in Joint Bank Account. — Notwithstanding the terms of an antenuptial contract and the terms of decedent-husband's will in keeping with the contract, the wife is also entitled to the funds on deposit in a joint bank account, the contract for which was entered into after the marriage. Harden v. First Union Nat'l Bank, 28 N.C. App. 75, 220 S.E.2d 136 (1975).

Listing Survivorship Accounts on 90-Day Inventory Held Not to Make Accounts Part of Estate for Purpose of Right to Dissent. — Where executrix listed one-half of funds in survivorship accounts on 90-day inventory to comply with subdivisions (b)(3) and (4) of this section, listing accounts for this purpose on 90-day inventory did not make funds a part of net estate for purposes of determining right to dissent under former G.S. 30-1. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

Joint Bank Accounts with Survivorship Created Under Subsection (a) of This Section. — Because right of survivorship has been statutorily abolished where it follows as legal incident to existing joint tenancy, parties who wish to create right of survivorship applicable to joint bank accounts must comply with requirements of subsection (a) of this section. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

Account Established Under Subsection (a) Not Part of Net Estate. — Funds held by testator-spouse in joint tenancy with right of survivorship with third party established pursuant to subsection (a) of this section do not become part of testator-spouse's net estate for purposes of dissent statute. In re Estate of Francis, 327 N.C. 101, 394 S.E.2d 150 (1990).

The signature card constitutes the contract between the depositor of money, and the bank in which it is deposited, and it controls the terms and disposition of the account. Threatte v. Threatte, 59 N.C. App. 292, 296 S.E.2d 521 (1982); Myers v. Myers, 68 N.C. App. 177, 314 S.E.2d 809 (1984).

Or Signed Certificate Would Be Sufficient. — Either a properly executed signature card or a certificate signed by both parties and expressly providing for a right of survivorship would be sufficient to create a joint account with right of survivorship. Threatte v. Threatte, 59 N.C. App. 292, 296 S.E.2d 521 (1982).

Written agreement not signed by party asserting rights as a survivor is not sufficient to satisfy statutory requirements of subsection (a) of this section. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

Plain language of this section clearly requires that both parties sign a written agreement. In re Estate of Heffner, 99 N.C. App. 327, 392 S.E.2d 770 (1990), decided under law in effect prior to § 53-146.1.

A certificate of deposit did not itself constitute compliance with subsection (a) of this section since the certificate did not contain the signatures of the depositors and thus did not amount to a signed writing as contemplated by the statute. The provision of the certificate, "Payable to said depositor, or, if more than one, to either or any of said depositors or the survivors or survivor," absent any other evidence, was not dispositive as to the ownership of funds. The use of the conjunction "or" in the certificate did not establish the right of survivorship but merely created an agency for the one other than the depositor to withdraw funds, such agency terminating at depositor's death. O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 817 (1980).

Nor Did Signature Card Signed by Depositors. — A signature card signed by depositors did not comply with this section where the card did not expressly provide for the right of survivorship in the certificate of deposit in that there was no indication in the space provided on the signature card that gave effect to the survivorship provision. O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 817 (1980).

Where signature cards for savings and loan association accounts designated both parties "as joint tenants with right of survivorship" and instructed the savings and loan association "to act pursuant to any one or more of the joint tenants' signatures, shown below, in any manner in connection with this account and, ... to pay, without any liability for such payment, to any one or the survivor or survivors at any time," the withdrawal clause indicating that withdrawals were to be made only by the deceased party would be disregarded and the contractual terms allowing both parties the right to act in any manner regarding the account controlled. McLain v. Wilson, 91 N.C. App. 275, 371 S.E.2d 151 (1988), cert. denied, 324 N.C. 328, 377 S.E.2d 749 (1989).

Survivorship Account Not Created. — Where the materials of the parties showed without contradiction that though plaintiff and codepositor intended to establish a joint savings account with the right of survivorship, codepositor died before signing the agreement, the statutory terms for creating a survivorship account were not complied with, and plaintiff's action seeking the release of funds held in the savings account, titled in his name and that of the decedent, had no basis. Powell v. First Union Nat'l Bank, 98 N.C. App. 227, 390 S.E.2d 461 (1990).

No Trust Created. — Where deceased opened a savings account and on the application form wrote, "Payable to Rose Z. Weaver, as survivor only," there was no trust created with right of survivorship, since there was no evidence of a transfer or assignment of a present beneficial interest but only the expression of a desire that plaintiff own the account at the death of the depositor. Kyle v. Groce, 50 N.C. App. 204, 272 S.E.2d 609 (1980).

Change of Joint Account. — Where plaintiff and his former wife executed a joint account agreement with right of survivorship pursuant to this section, the joint account could be changed only by the signatures of all the parties to the joint account agreement or by one party's withdrawing the complete account and opening a new account. This section does not permit only one of the joint tenants of the account in question to change it from the original agreement executed by both parties to the detriment of the other. Benfield v. First Fed. Sav. & Loan Ass'n, 44 N.C. App. 371, 261 S.E.2d 150 (1979).

Abstention by Bankruptcy Court. — In a bankruptcy action concerning the issue of rights of ownership in a joint bank account with rights of survivorship, the bankruptcy court refused to rule on the issue since it was clearly one of state law requiring state expertise and, thus, the issue was one of unsettled North Carolina law on which a court of that state should have made a ruling. Kimrey v. Dorsett, 10 Bankr. 466 (Bankr. M.D.N.C. 1981).

Liability for Wrongful Conversion. — This section and the signature card serve only to discharge the bank from liability to its depositors; they do not release one depositor to a joint account from liability to another for a withdrawal which constitutes wrongful conversion. Myers v. Myers, 68 N.C. App. 177, 314 S.E.2d 809 (1984).

Co-defendants of step-daughter who transferred funds that were located in her joint bank accounts which she shared with her step-father, the decedent, were not entitled to summary judgment pursuant to this section on the plaintiff's conversion claims where the defendant/step-daughter knew that the money was not hers and that "[s]aid transfers were made without [his]knowledge or consent." Hutchins v. Dowell, 138 N.C. App. 673, 531 S.E.2d 900, 2000 N.C. App. LEXIS 781 (2000).

Action against Spouse for Conversion. — When one spouse deposits funds into a joint account with the other, the other is designated the depositor's agent, with authority to withdraw the funds. The depositing spouse, as principal, thus may bring an action in conversion against the withdrawing spouse to recover funds which that spouse has converted as agent. Myers v. Myers, 68 N.C. App. 177, 314 S.E.2d 809 (1984).

Applied in Johnson v. Northwestern Bank, 27 N.C. App. 240, 218 S.E.2d 722 (1975); Sutton v. Sutton, 35 N.C. App. 670, 242 S.E.2d 644 (1978); Salvation Army v. Welfare, 63 N.C. App. 156, 303 S.E.2d 658 (1983); Napier v. High Point Bank & Trust Co., 100 N.C. App. 390, 396 S.E.2d 620 (1990); Holloway v. Wachovia Bank & Trust Co., 104 N.C. App. 631, 410 S.E.2d 915 (1991).

Cited in Combs v. Eller, 30 N.C. App. 30, 226 S.E.2d 197 (1976); Moore v. Galloway, 35 N.C. App. 394, 241 S.E.2d 386 (1978); Stanley v. Miller, 42 N.C. App. 232, 256 S.E.2d 308 (1979); Kimrey v. Dorsett, 10 Bankr. 466 (M.D.N.C. 1981); Miller v. Miller, 117 N.C. App. 71, 450

S.E.2d 15 (1994); Davis v. Wrenn, 121 N.C. App. 156, 464 S.E.2d 708 (1995); Mutual Community Savs. Bank v. Boyd, 125 N.C. App. 118, 479 S.E.2d 491 (1996); State ex rel. Pilard v. Berninger, 154 N.C. App. 45, 571 S.E.2d 836, 2002 N.C. App. LEXIS 1407 (2002), cert. denied, 356 N.C. 694, 579 S.E.2d 100 (2003).

OPINIONS OF ATTORNEY GENERAL

Joint Bank Account; Decedent's Share Applied in Payment of Debts; As Basis for Computing Administrator's Bond Required. — See opinion of the Attorney General to Mr. Everitte Barbee, Clerk, Superior Court of Onslow County, 40 N.C.A.G. 23 (1970).

Unwithdrawn Deposits Which Would Have Belonged to Decedent Are Subject to Computation of Costs of Administration. — See opinion of the Attorney General to Mr. R.J. White, Jr., 42 N.C.A.G. 316 (1973).

§ 41-2.2. Joint ownership of securities.

(a) In addition to other forms of ownership, securities may be owned by any parties as joint tenants with rights of survivorship, and not as tenants in common, in the manner provided in this section.

(b)(1) A joint tenancy in securities as provided by this section shall exist when such securities indicate that they are owned with the right of survivorship, or otherwise clearly indicate an intention that upon the death of either party the interest of the decedent shall pass to the surviving party.

(2) Such a joint tenancy may also exist when a broker or custodian holds the securities for the joint tenants and by book entry or otherwise indicates (i) that the securities are owned with the right of survivorship, or (ii) otherwise clearly indicates that upon the death of either party, the interest of the decedent shall pass to the surviving party. Money in the hands of such broker or custodian derived from the sale of, or held for the purpose of, such securities shall be treated in the same manner as such securities.

(c) Upon the death of a joint tenant his interest shall pass to the surviving joint tenant. The interest of the deceased joint tenant, even though it has passed to the surviving joint tenant, remains liable for the debts of the decedent in the same manner as the personal property included in his estate, and recovery thereof shall be made from the surviving joint tenant when the decedent's estate is insufficient to satisfy such debts.

(d) This section does not repeal or modify any provisions of the law relating to estate or inheritance taxes.

(e) As used in this section, "securities" has the same meaning as in G.S. 41-40(9) and includes "security account" as that term is defined in G.S. 41-40(10). (1967, c. 864, s. 1; 1969, c. 1115, s. 2; 1989 (Reg. Sess., 1990), c. 891, s. 2; 1998-69, s. 12; 1999-337, s. 10; 2005-411, s. 3.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 891, which amended this section, provided in s. 3: "Nothing in this act shall be construed to affect the validity of instruments that provide for a right of survivorship executed prior to the effective date of this act." The act became effective January 1, 1991.

Legal Periodicals. — For article on joint ownership of corporate securities in North Carolina, see 46 N.C.L. Rev. 520 (1968).

For article, "The Joint Tenancy Makes a Comeback in North Carolina," see 69 N.C.L. Rev. 491 (1991).

CASE NOTES

Applied in Johnston Health Care Ctr., L.L.C. v. North Carolina Dep't of Human Res., 136 N.C. App. 307, 524 S.E.2d 352, 2000 N.C. App. LEXIS 20 (2000).

Cited in O'Brien v. Reece, 45 N.C. App. 610, 263 S.E.2d 817 (1980).

§§ **41-2.3, 41-2.4:** Reserved for future codification purposes.

§ 41-2.5. Tenancy by the entirety in mobile homes.

(a) When a husband and wife become co-owners of a mobile home, in the absence of anything to the contrary appearing in the instrument of title, they become tenants by the entirety with all the incidents of an estate by the entirety in real property, including the right of survivorship in the case of death of either.

(b) For the purpose of this section it shall be immaterial whether the property at any particular time shall be classified for any purpose as either real or personal. The provisions of subsection (a) shall not limit or prohibit any other type of ownership otherwise authorized by law.

(c) For purposes of this section "mobile home" means a portable manufactured housing unit designed for transportation on its own chassis and placement on a temporary or semipermanent foundation having a measurement of over 32 feet in length and over eight feet in width. As used in this Article, "mobile home" also means a double-wide mobile home which is two or more portable manufactured housing units designed for transportation on their own chassis, which connect on site for placement on a temporary or semipermanent foundation having a measurement of over 32 feet in length and over eight feet in width.

(d) This section does not repeal or modify any provisions of the law relating to estate or inheritance taxes. (1981, c. 507, s. 1; 1999-337, s. 11.)

Legal Periodicals. — For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

CASE NOTES

Security interest in a mobile home which was moveable, tangible property, was governed by Article 9 of the U.C.C. subsection (a) of this section, which provides that when a husband and wife become co-owners of a mobile home, in the absence of anything to the contrary appearing in the instrument of title, they become tenants by the entirety with all the incidents of an estate by the entirety in real property, does not dictate a contrary result. Joyce v. Cloverbrook Homes, Inc., 81 N.C. App. 270, 344 S.E.2d 58, cert. denied, 317 N.C. 704, 347 S.E.2d 42 (1986).

"Co-owner" Requirement. — Claimant spouse's assertion of the "innocent owner" defense provided by 18 U.S.C.S. § 983(d) in her claim to a camper, failed because the spouse could not establish that the camper was owned as tenants by the entirety; the spouse had not presented any evidence regarding the "co-owner" requirement of G.S. 41-2.5, nor had the spouse presented any evidence regarding the general requirement with entireties properties that spouses be identified either by name or title in the ownership document. United States v. 1999 Starcraft Camper Trailer, — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 76839 (M.D.N.C. Oct. 10, 2006).

Although no titles existed for mobile homes that were abandoned in a condemnation of a mobile home park, a bankruptcy debtor properly claimed exemptions in the mobile homes as jointly owned with the debtor's spouse, and thus held in tenancy by the entirety under G.S. 41-2.5; property tax records identified the debtor and the spouse as the owners of the mobile homes, the debtor and the spouse equally shared duties in maintaining and renting the mobile homes, a joint bank account was used with regard to income and expenses related to the mobile homes, and all other real property of the debtor was jointly owned with the spouse. In re Britt, 368 B.R. 471, 2007 Bankr. LEXIS 1490 (Bankr. E.D.N.C. 2007).

Cited in In re Foreclosure of Deed of Trust, 303 N.C. 514, 279 S.E.2d 566 (1981).

§ 41-3. Survivorship among trustees.

In all cases where only a naked trust not coupled with a beneficial interest has been created or exists, or shall be created, and the conveyance is to two or more trustees, the right to perform the trust and make estates under the same shall be exercised by any one of such trustees, in the event of the death of his cotrustee or cotrustees or the refusal or inability of the cotrustee or cotrustees to perform the trust; and in cases of trusts herein named the trustees shall hold as joint tenants, and in all respects as joint tenants held before the year 1784. (1885, c. 327, s. 1; Rev., s. 1580; C.S., s. 1736.)

Cross References. — As to limitation on actions by cotenants of personal property, see G.S. 1-29. As to survivorship among trustees with power of sale, see G.S. 45-8.

CASE NOTES

The trustees of a trust estate hold as joint tenants, and not as tenants in common. Cameron v. Hicks, 141 N.C. 21, 53 S.E. 728 (1906); Webb v. Borden, 145 N.C. 188, 58 S.E. 1083 (1907).

Loss of Right to Trustee Is Loss to Cestui and Cotrustees. — When a right of entry is barred and the right of action lost by a trustee through an adverse occupation, the cestui que trust and the cotrustees are also precluded from asserting claim to the land. Cameron v. Hicks, 141 N.C. 21, 53 S.E. 728 (1906).

Cited in In re Michal, 273 N.C. 504, 160 S.E.2d 495 (1968).

§ 41-4. Limitations on failure of issue.

Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within 10 lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it: Provided, that the rule of construction contained in this section shall not extend to any deed or will made and executed before the fifteenth of January, 1828. (1827, c. 7; R.C., c. 43, s. 3; Code, s. 1327; Rev., s. 1581; C.S., s. 1737.)

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

For note, "Rawls v. Early: A Refusal to Imply Conditions of Survivorship Upon Ascertained Contingent Remaindermen," see 68 N.C.L. Rev. 1343 (1990).

CASE NOTES

Editor's Note. — *Many of the cases under this section were decided prior to the enactment of G.S. 41-6.3, which abolished the rule in Shelley's case.*

Purpose of Section. — This section was enacted for the primary purpose of making contingent limitations good by fixing a definite time when the estate of the first taker shall become absolute, and also to establish a rule of interpretation by which the estate of the first taker shall be affected with the contingency till the time of his death unless a contrary intent appears on the face of the instrument. Sain v. Baker, 128 N.C. 256, 38 S.E. 858 (1901); Harrell v. Hagan, 147 N.C. 111, 60 S.E. 909 (1908); Kirkman v. Smith, 174 N.C. 603, 94 S.E. 423

(1917); Bell v. Kessler, 175 N.C. 525, 95 S.E. 881 (1918).

The primary purpose of the enactment of this section was not to abrogate the rule which favors the early vesting of estates but it has been given that effect under certain circumstances in the North Carolina decisions. Cabarrus Bank & Trust Co. v. Finlayson, 286 F.2d 251 (4th Cir. 1961).

This section was enacted in 1827 to meet the rule then generally prevailing in this country that a gift over on "death without issue" in a deed or will meant an indefinite failure of issue and hence was void for remoteness. Cabarrus Bank & Trust Co. v. Finlayson, 286 F.2d 251 (4th Cir. 1961).

The purpose of this section is to save gifts over upon the contingency of someone's dying without issue if the contingency occurs after the death of the testator or after some estate or period subsequent to his death. White v. Alexander, 290 N.C. 75, 224 S.E.2d 617 (1976).

The purpose of this section is to sustain the contingent interest created by the testator and ensure that the interest will pass in possession when and if the contingency occurs, even if the occurrence is after the death of the testator. Therefore, when the contingency is fulfilled the limitation is deemed to take effect. Hollowell v. Hollowell, 107 N.C. App. 166, 420 S.E.2d 827, aff'd, 333 N.C. 706, 430 S.E.2d 235 (1993).

Section Is Obligatory. — The rule laid down by this section is obligatory on the courts, and must be observed in all cases except, as provided by the statute, when a contrary intent is "expressly and plainly declared in the face of the deed or will." Patterson v. McCormick, 177 N.C. 448, 99 S.E. 401 (1919).

Inapplicable to Wills Executed before January 15, 1828. — See Rice v. Satterwhite, 21 N.C. 69 (1835); Brown v. Brown, 25 N.C. 134 (1842); Gibson v. Gibson, 49 N.C. 425 (1857); Patterson v. McCormick, 177 N.C. 448, 99 S.E. 401 (1919).

Does Not Interfere with Rule in Shelley's Case. — The section does not interfere with the application of the principle laid down in Shelley's case in determining the nature and extent of the precedent estate. This is declared in Sanderlin v. Deford, 47 N.C. 74 (1854), in construing a will executed in 1838. King v. Utley, 85 N.C. 59 (1881).

Doctrine of Shifting Uses and Executory Devises Unaffected. — This section is a rule of construction upholding the second and contingent estate upon the death of the first taker without heirs, etc., and does not change the application of the doctrine of shifting uses and executory devises in determining the nature and extent of the precedent estate. Sessoms v. Sessoms, 144 N.C. 121, 56 S.E. 687 (1907).

Common-Law Rule Superseded. — Where there was a devise of lands for life, then to J and C equally, and in case "they or either of them die without issue," then to the heirs of certain others and the survivor of J and C equally, it was held that the common-law doctrine that a limitation contingent upon death and failure of issue is void for remoteness gives place to the new rule of construction enacted by this section, made applicable since January 15, 1828, without restriction as to immediate estates, and a contrary intent not being expressly and plainly declared in the face of the instrument, the death without issue referred to the death of J and C; and it appearing that J died without issue after the death of the first taker, and C survived, with issue, the absolute fee simple title to the lands was in C and the other ulterior remaindermen. Patterson v. McCormick, 177 N.C. 448, 99 S.E. 401 (1919).

Rule When Will Is Ambiguous. — Where there is ambiguity in a will as to whether the vesting of an estate devised for life with contingent limitation over shall be at the death of the testatrix or that of the first taker, under the principle that the law favors the early vesting of estates, the former will be taken; and where it clearly appears from the terms of the will and surrounding circumstances that that was the intent of the testatrix, it will not be affected by the section, by which a contingent limitation depending upon the dying of a person without heir, etc., is to vest at the death of such person. Westfeldt v. Reynolds, 191 N.C. 802, 133 S.E. 168 (1926); Moore v. Hunter, 46 N.C. App. 449, 265 S.E.2d 884 (1980).

Provisions of Section Prevail over Rule of Stare Decisis. — A vested interest in lands cannot be established under the doctrine of stare decisis in direct conflict with the expressions of a statutory change of the rule to the contrary, where the decisions relied upon are upon a construction of a written instrument made or executed before the statutory enactment and excepted by it from its provisions, and the subsequent decisions of affirmance of the old rule of construction are either conflicting among themselves or upon prior executed instruments excepted by the statute, or without express reference thereto; and this section, changing the rule of construction as to the vesting of an interest contingent upon a death with issue, cannot be affected by the rule laid down in Hilliard v. Kearney, 45 N.C. 221 (1853), and subsequent decisions on the subject. Patterson v. McCormick, 177 N.C. 448, 99 S.E. 401 (1919).

The law favors early indefeasible or absolute vesting of estates. As a corollary of this rule, such a construction is to be put upon conditional expressions, which render a testamentary gift defeasible, as to confine their operation to as early a period as the words of the will allow, so that it may become an absolute interest as soon as the language of the testator will permit. Elmore v. Austin, 232 N.C. 13, 59 S.E.2d 205 (1950); Moore v. Hunter, 46 N.C. App. 449, 265 S.E.2d 884 (1980).

Contingent Remaindermen Take Transmissible Estate. — Where there is a contingent executory devise to named persons in the event the first taker should die without issue, the persons who are to take the contingent limitation over are certain and only the event upon which they are to take is uncertain, and the contingent remaindermen take a transmissible estate which is not dependent upon their surviving the first taker, and upon the death of the contingent remaindermen prior to the death of the first taker without children then surviving, the estate goes to the heirs, next of kin, and successors of interest of the contingent remaindermen. Seawell v. Cheshire, 241 N.C. 629, 86 S.E.2d 256 (1955).

A contingent remainder dependent upon the death of a certain donee without issue means, under the terms of this section, without issue living at the time of death. Lee v. Oates, 171 N.C. 717, 88 S.E. 889 (1916).

The words that the gift over "shall be ... a limitation to take effect when such person dies not having such heir or issue, or child ... living at the time of his death, or born to him within ten lunar months thereafter" mean simply that the interest will be sustained and will pass in possession when and if the contingency, e.g., dying without issue, occurs, even if this event takes place after the death of the testator or grantor or after some intervening estate or period following his death. White v. Alexander, 290 N.C. 75, 224 S.E.2d 617 (1976).

The words, that the gift over "shall be ... a limitation to take effect when such person dies not having such heir or issue, or child ... living at the time of his death, or born to him within ten lunar months thereafter," do not mean that a determination of those persons who take the interest must necessarily wait until the event occurs. At what point in time those persons are determined remains a question of the testator's intent. White v. Alexander, 290 N.C. 75, 224 S.E.2d 617 (1976).

This section does not operate to postpone vesting of the reversion until the death of the life tenant without children because a reversion is not an estate created by limitation in a deed or will but is an estate created by operation of law. Atkins v. Burden, 31 N.C. App. 660, 230 S.E.2d 594 (1976), cert. denied, 291 N.C. 710, 232 S.E.2d 202 (1977).

Roll Must Be Called as of Death of First Taker. — To determine the effectiveness of a limitation over, the roll must be called as of the date of the death of the first taker. Turpin v. Jarrett, 226 N.C. 135, 37 S.E.2d 124 (1946).

Where a will set up a trust with provision that the income therefrom be divided among named beneficiaries for life and the corpus proportionately to their issue upon their deaths, with further provision that if a beneficiary should die without issue, his share of the corpus should become a part of, and be distributed in accordance with, the residuary clause, it was held that the person entitled to each share of the corpus was contingent upon whether each of the life beneficiaries died with or without issue surviving, and therefore the will set up a contingent and not a vested limitation, and the roll must be called as to each share of the corpus as of the death of its life beneficiary. Van Winkle v. Berger, 228 N.C. 473, 46 S.E.2d 305 (1948).

Where a contingent limitation over is made to depend upon the death of the first taker without children or issue, the limitation takes effect when the first taker dies without issue or children living at the time of his death. Williamson v. Cox, 218 N.C. 177, 10 S.E.2d 662 (1940).

Dying without heirs or issue, upon which a limitation over takes effect, is referable to the death of the first taker of the fee without issue living at the time of his death, and not to the death of any other person or to any intermediate period. House v. House, 231 N.C. 218, 56 S.E.2d 695 (1949). See Wachovia Bank & Trust Co. v. Waddell, 234 N.C. 34, 65 S.E.2d 317 (1951); Seawell v. Cheshire, 241 N.C. 629, 86 S.E.2d 256 (1955).

Not as of Death of Testator. — A devise of land to L with limitation that if she "shall die leaving issue surviving her, then to such issue and their heirs forever," but if she "die without issue surviving her, then the property to return to my eldest daughter," the vesting of the estate in remainder depends upon the contingency of the death of L without leaving "issue" surviving her, and not upon the death of the testatrix. Rees v. Williams, 164 N.C. 128, 80 S.E. 247 (1913), petition for rehearing dismissed, 165 N.C. 201, 81 S.E. 286 (1914).

Unless a contrary intent appears from the will, the event by which the estate must be determined will be referred not to the death of the devisor, but the holder of the particular estate itself, and the determinable quality of such an estate, or interest, will continue to affect it till the event occurs by which same is to be determined, or the estate becomes absolute. Patterson v. McCormick, 177 N.C. 448, 99 S.E. 401 (1919). See Williams v. Lewis, 100 N.C. 142, 5 S.E. 435 (1888); Harrell v. Hagan, 147 N.C. 111, 60 S.E. 909, 125 Am. St. R. 539 (1908).

Rule in Hilliard v. Kearney Changed. — Under the rule at common law a limitation contingent upon death without issue was void for remoteness because it referred to an indefinite failure of issue; and in order to give effect to the testator's intention the courts began to look for some intermediate time, such as the termination of the life estate, or some other designated period, and held that the phrase "dying without issue" was to be referred to this intermediate period. Hilliard v. Kearney, 45 N.C. 221 (1853). This principle was entirely changed by the act of 1827, which is now this section. American Yarn & Processing Co. v. Dewstoe, 192 N.C. 121, 133 S.E. 407 (1926). See Richlands Supply Co. v. Banks, 205 N.C. 343, 171 S.E. 358 (1933); Brock v. Franck, 194 N.C. 346, 139 S.E. 696 (1927); Whitley's Elec. Serv., Inc. v. Sherrod, 32 N.C. App. 338, 232 S.E.2d 223; 293 N.C. 498, 238 S.E.2d 607 (1977); Phillips v. Penland, 196 N.C. 425, 147 S.E. 731 (1929); Hussey v. Burgwyn, 51 N.C. 385 (1859); Robertson v. Pickerell, 77 N.C. 302 (1877); Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985); Tew v. Hinson, 215 N.C. 456, 2 S.E.2d 376 (1939); Phillips v. Penland, 196 N.C. 425, 147 S.E. 731 (1929); Hammond v. Williams, 215 N.C. 657, 3 S.E.2d 437 (1939); McKinnie Bros. Co. v. Wester, 188 N.C. 514, 125 S.E. 1 (1924); Whitley's Elec. Serv., Inc. v. Sherrod, 293 N.C. 498, 238 S.E.2d 607 (1977).

Section Applies Notwithstanding Intervening Life Estate. — On devise of an estate to M for life, then to G and K, and if they should die without bodily heirs, then over, the creation and existence of the life estate, without more, does not, of itself, affect the statutory rule of construction as to estates in remainder, and the contingency affecting such estates will continue to affect the same till the death of the first takers in remainder. Kirkman v. Smith, 175 N.C. 579, 96 S.E. 51 (1918). The section has been construed by the Supreme Court at least 26 times, and in every case in which it has come before the court for construction it has uniformly been held that "dying without heirs or issue," upon which a limitation over takes effect, is referable to the death of the first taker of the fee, without issue living at the time of his death, and not to the death of any other person or to any intermediate period. Patterson v. McCormick, 177 N.C. 448, 99 S.E. 401 (1919). See Coward v. Meyers, 99 N.C. 198, 6 S.E. 82 (1888); Dunning v. Burden, 114 N.C. 33, 18 S.E. 969 (1894); Kornegay v. Morris, 122 N.C. 199, 29 S.E. 875, reheard, 123 N.C. 128, 31 S.E. 375 (1898), petition to rehear dismissed, 124 N.C. 424, 32 S.E. 733 (1899); Harrell v. Hagan, 147 N.C. 111, 60 S.E. 909 (1908); Dawson v. Ennett, 151 N.C. 543, 66 S.E. 566 (1909); Perrett v. Bird, 152 N.C. 220, 67 S.E. 507 (1910); Elkins v. Seigler, 154 N.C. 374, 70 S.E. 636 (1911); Vinson v. Wise, 159 N.C. 653, 75 S.E. 732 (1912); Hobgood v. Hobgood, 169 N.C. 485, 86 S.E. 189 (1915); Whichard v. Craft, 175 N.C. 128, 95 S.E. 94 (1918).

First Taker Has Base and Qualified Fee. — O devised his lands to certain of his children, S, D, and J. By item 3 of the will a certain tract was devised to D and "the lawful heirs of his body lawfully begotten;" by item 9 it was provided that in case of death of either of the children, his portion should revert to the surviving one, with further contingent limitations. It was held that these items should be construed together, and that the estate devised to D was not in fee simple, but a base and qualified fee, defeasible on the death of D without leaving living lineal descendants. Perrett v. Bird, 152 N.C. 220, 67 S.E. 507 (1910).

First Taker Dying Without Issue Cannot Devise Property. — When a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the son, dying without children, cannot by will give his wife a life estate with the remainder to a third party. Sain v. Baker, 128 N.C. 256, 38 S.E. 858 (1901); Seawell v. Cheshire, 241 N.C. 629, 86 S.E.2d 256 (1955).

Instances of Fee Simple Defeasible. — A devise to testator's four sons, but if any one of them should "fail to become a father of a living child by lawful wedlock" his share should revert to the estate, was held to devise a fee simple to each son, defeasible upon his death without having a living child born in wedlock, but which becomes a fee simple absolute as to each son upon the birth of him of a living child in wedlock. Buffaloe v. Blalock, 232 N.C. 105, 59 S.E.2d 625 (1950).

By residuary clause, testator devised the remainder of his estate to his four sons, his sole heirs at law, each to take a defeasible fee to become absolute as to each upon the birth of a living child in wedlock. It was held that testator intended to dispose of all the residue of his estate in the residuary clause, including any reversion, and therefore if the fee of any one of the sons should be defeated, the reversion would go to the estate and pass under the residuary clause to the other sons or their heirs, who would not take as purchasers under the will but by descent from the devisees, and therefore deed executed by the four sons conveys the fee simple absolute, since the deed of each would estop him or his heirs from claiming any reversionary interest if such interest should thereafter arise. Buffaloe v. Blalock, 232 N.C. 105, 59 S.E.2d 625 (1950).

Testator devised a life estate to his wife with provisions that at her death his lands should be divided among his living children, with particular description as to the share each should take, with further provision that one daughter (who had living children at the time the will was executed) should take a life estate in her share with remainder to her children, and that his other named daughter and three named sons should have their share in fee simple forever "And if either one of my daughters shall die without issue, their share of the lands shall be equally divided among" the three named sons. It was held that the words "shall die without issue" refer to the death of the devisees of the fee and not to the death of the life tenant, and the daughters took a defeasible fee so that upon the death of one of them without issue her surviving, her share became vested in the three named sons. House v. House, 231 N.C. 218, 56 S.E.2d 695 (1949).

Where a will provided that some of the beneficiaries shall each receive a percentage of the income from the trust estate for 20 years, then, as to all of these, the trust shall terminate and each shall receive a like percentage of the corpus of the trust absolutely, but should any of them die before the termination of the trust, the interest and corpus shall go to their respective surviving issue, but if any die without issue surviving, "their respective shares shall be added to the residue of (the) estate," each of the beneficiaries, at the death of testator, had a vested interest, subject to the 20-year trust, in his or her respective share in fee, defeasible upon dying without issue before the termination of the trust. Little v. Wachovia Bank & Trust Co., 252 N.C. 229, 113 S.E.2d 689 (1960).

Where testatrix bequeathed property to her daughter or to the children of testatrix's son if the daughter should die childless, the daughter took only a defeasible title which terminated upon her death without children. Cabarrus Bank & Trust Co. v. Finlayson, 286 F.2d 251 (4th Cir. 1961).

Instance of Fee Simple Determinable. — Testator devised lands to his daughter with further provision that the gift should become absolute if she improved the land by erecting a dwelling or if she should die leaving issue, but that if she should fail to improve the lot or should die without living issue, then the lands should be disposed of as directed in a subsequent item. It was held that the devise created a fee simple determinable, and under the rule of construction requiring that the fee simple absolute should vest as soon as the language of the testator permits, the ambiguous provisions for defeasance must be read so as to require both of the specified contingencies to occur before the fee should be defeated, and therefore upon the erection of a dwelling house upon the property of the daughter her fee became absolute. Elmore v. Austin, 232 N.C. 13, 59 S.E.2d 205 (1950).

Estate Created Direct to Second Taker. — When by the operation of G.S. 41-1 a fee tail is converted into a fee simple, with a limitation of a fee upon the death of the first taker without heirs, a separate estate is created direct from the testator to the second taker upon the happening of the contingency, under the doctrine of shifting uses and by way of executory devise, and is not a qualification of the estate of the first taker, or too remote since the enactment of this section. Sessoms v. Sessoms, 144 N.C. 121, 56 S.E. 687 (1907).

A devise of lands to B in fee, "provided he has a child or children; but if he has no child, then to him for life," with limitation over to the testator's heirs at law, carries to the devisee a fee simple estate, defeasible upon his death without having had a child, the contingent event by which the estate is determined referring to the death of the devisee and holder of the prior estate unless a contrary intent clearly appears from the will itself; and upon the death of B and the nonhappening of the contingency named, the inheritance passes directly from the testator to the ultimate devisees. Burden v. Lipsitz, 166 N.C. 523, 82 S.E. 863 (1914).

An estate to M and her bodily heirs, without further limitation, is converted into a fee simple under G.S. 41-1, but such an estate followed by the words "if no heirs, said lands shall go back to my estate," will go over to the heirs of the grantor at the death of M, upon the nonhappening of the event, as a shifting use under the statute of uses, G.S. 41-7, whereunder a fee may be limited after a fee, by deed, and under the provisions of this section that every contingent limitation in a deed or will made to depend upon the dying of any person without heir or heirs of the body, or issue, shall be held to be a limitation to take effect when such person dies not having such heir, or issue, or child living at the time of his death. Willis v. Mutual Loan & Trust Co., 183 N.C. 267, 111 S.E. 163 (1922).

An estate to testator's daughter N for life, and to the lawful heirs of her body, creates an estate tail converted by our statute into a fee simple; and a further limitation "and if she should die leaving no heirs, then the lands to return to the G family," gives N a fee defeasible upon her death without issue, children, etc., under this section, and on her death, leaving children surviving, they take an unconditional fee, and can make an absolute conveyance thereof. Vinson v. Gardner, 185 N.C. 193, 116 S.E. 412 (1923).

Where a father devised the land in question to plaintiff "to be hers and to her heirs, if any, and if no heirs, to be equally divided with my other children," and at the time plaintiff executed deed to defendant, which was refused by him, plaintiff was married, but had been abandoned by her husband, and had no children, it was held that the plaintiff's deed did not convey the indefeasible fee to the land free and clear of the claims of all persons, whether the limitation over be regarded as a limitation over on failure of issue, or as not coming within the rule in Shelley's case. Hudson v. Hudson, 208 N.C. 338, 180 S.E. 597 (1935).

Applied in Conrad v. Goss, 227 N.C. 470, 42 S.E.2d 609 (1947); Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949); Blanchard v. Ward, 244 N.C. 142, 92 S.E.2d 776 (1956).

Cited in West v. Murphy, 197 N.C. 488, 149 S.E. 731 (1929); Rigsbee v. Rigsbee, 215 N.C. 757, 3 S.E.2d 331 (1939); Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365 (1941).

§ 41-5. Unborn infant may take by deed or writing.

An infant unborn, but in esse, shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born. (R.C., c. 43, s. 4; Code, s. 1328; Rev., s. 1582; C.S., s. 1738.)

Legal Periodicals. — For article, "The Rule in Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

For note on the wrongful death of a viable fetus, see 23 Wake Forest L. Rev. 849 (1988).

CASE NOTES

Unborn Infant Takes from Time of Conception. — This section gives the same capacity to an unborn infant to take property as such infant has under the law governing its right to take by inheritance or devise, which is from the time of conception. Mackie v. Mackie, 230 N.C. 152, 52 S.E.2d 352 (1949).

When Child Presumed In Esse. — For the purpose of capacity to take under a deed, it will be presumed in the absence of contrary evidence that a child is in esse 280 days prior to its birth. Mackie v. Mackie, 230 N.C. 152, 52 S.E.2d 352 (1949).

Grant Directly to Children of Living Person. — A grant of land directly to the children of a living person conveys the title only to those who are alive at the time of the execution of the deed, including a child then en ventre sa mere. Powell v. Powell, 168 N.C. 561, 84 S.E. 860 (1915).

Under a deed to a woman "and her children" a child en ventre sa mere at the date of the conveyance will take, but children born more than a year thereafter will not. Heath v. Heath, 114 N.C. 547, 19 S.E. 155 (1894).

Child Takes as Tenant in Common. — By virtue of this section a child if en ventre sa mere at the time the deed is executed takes as tenant in common with the living children. Campbell v. Everhart, 139 N.C. 503, 52 S.E. 201 (1905).

Life Estate to Parent with Limitation Over. — Where there is a reservation of a life estate in the parent or another, with limitation over to the children, all the children who are alive at the termination of the first estate, whether born before or after the execution of the deed, take thereunder. Powell v. Powell, 168 N.C. 561, 84 S.E. 860 (1915).

Remainder after Freehold to Children Not In Esse. — Where there is a deed to lands to an unmarried grantee for life, with remainder to his children, not then in esse, the life estate of the first taker is sufficient to uphold the estate of his children, though not in esse at the time, by way of contingent remainder till they are born, and thereafter as owners of a vested remainder. Johnson Bros. v. Lee, 187 N.C. 753, 122 S.E. 839 (1924).

Cited in Byerly v. Tolbert, 250 N.C. 27, 108 S.E.2d 29 (1959); Stam v. State, 47 N.C. App. 209, 267 S.E.2d 335 (1980).

§ 41-6. "Heirs" construed to be "children" in certain limitations.

A limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appear by the deed or will. (R.C., c. 43, s. 5; Code, s. 1329; Rev., s. 1583; C.S., s. 1739.)

Legal Periodicals. — For note on doctrine of worthier title, see 41 N.C.L. Rev. 317 (1963).

For article, "The Rule in Wild's Case in North Carolina," see 55 N.C.L. Rev. 751 (1977).

For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

I. General Consideration.
II. Illustrative Cases.

I. GENERAL CONSIDERATION.

Editor's Note. — *The cases under this section were decided prior to the enactment of G.S. 41-6.3, which abolished the rule in Shelley's case.*

Purpose of Section. — It seems that the main object of this section is to convert a contingent into a vested remainder under certain circumstances. It seems also to have been the purpose of the act to sustain a direct conveyance to the heirs of a living person. As there can be no heirs during the life of the ancestor, such a conveyance at common law would have been void unless there was something in the deed which indicated that by "the heirs" was meant the children of the person named. This section provides that in such a case the word "heirs" shall be construed to mean "children" and the limitation therefore would be good. By this construction of the section it does not affect the rule in Shelley's case. Starnes v. Hill, 112 N.C. 1, 16 S.E. 1011 (1893); Hartman v. Flynn, 189 N.C. 452, 127 S.E. 517 (1925).

"Limitation" Explained. — The word limitation has two different senses: the original sense, namely, that of a member of a sentence, expressing the limits or bounds to the quantity of an estate; and the derivative sense, namely, that of an entire sentence, creating and actually or constructively marking out the quantity of an estate. In this statute, the word is manifestly used in its derivative or secondary sense. Campbell v. Everhart, 139 N.C. 503, 52 S.E. 201 (1905). See Starnes v. Hill, 112 N.C. 1, 16 S.E. 1011 (1893).

The rule in Shelley's case is not abrogated by this section. Starnes v. Hill, 112 N.C. 1, 16 S.E. 1011 (1893).

Common-Law Rule Changed. — While as a general common-law rule, subject to some exceptions, a conveyance of an estate for life in lands to another, with remainder to the heirs of the grantor, could not divest the grantor of the fee, under the rule that nemo est haeres viventis, this does not prevail under the provisions of this section. Thompson v. Batts, 168 N.C. 333, 84 S.E. 347 (1915).

Section Applies Only When No Precedent Estate to Said Living Person. — The Code of 1883, s. 1329, now this section, providing that a limitation to the heirs of a living person shall be construed to be the children of such person, applies only when there is no precedent estate conveyed to said living person. Jones v. Ragsdale, 141 N.C. 200, 53 S.E. 842 (1906); Whitley v. Arenson, 219 N.C. 121, 12 S.E.2d 906 (1941).

If it were not true that this section applies only when there is no precedent estate conveyed to said living person, it would not only repeal the rule in Shelley's case, but would pervert every conveyance to "A and his heirs" into something entirely different from what those words have always been understood to mean. Marsh v. Griffin, 136 N.C. 333, 48 S.E. 735 (1904).

Conveyance to Living Person and Limitation to Heirs. — This section applies only when there is no precedent estate conveyed to said living person, nor is this section applicable where there is a conveyance to a living person, with a limitation to his heirs. Bank of Pilot Mt. v. Snow, 221 N.C. 14, 18 S.E.2d 711 (1942).

Conveyance Must Be to Heirs of Living Person. — This section applies only when the conveyance is to the heirs of a living person. Scott v. Jackson, 257 N.C. 658, 127 S.E.2d 234 (1962), commented on in 41 N.C.L. Rev. 317 (1963).

This section does not apply when the limitation is to a living person and his heirs. Whitley v. Arenson, 219 N.C. 121, 12 S.E.2d 906 (1941).

Applied in Sprinkle v. City of Reidsville, 235 N.C. 140, 69 S.E.2d 179 (1952); Clarke v. Clarke, 253 N.C. 156, 116 S.E.2d 449 (1960).

Cited in Williamson v. Cox, 218 N.C. 177, 10 S.E.2d 662 (1940).

II. ILLUSTRATIVE CASES.

Devise to "Heirs of His Children". — A testator devised a lot to trustees for 20 years from the date of his death and provided that at the end of said period the estate should "be equally divided between the heirs of my children, per stirpes." By virtue of this section, the word "heirs" as used in this item of the will, must be construed to mean the "children" of the son and daughter of the testator. Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949).

By his will, the testator devised a lot to trustees for 20 years from the date of his death, and at the expiration of such term to the "heirs of his children, to be equally divided between them, per stirpes." The testator left surviving two children, a son and a daughter, both of whom had children living at the date of testator's death. The son and daughter are now living. Under this section the word "heirs," as used in the will, must be construed to mean "children." Lide v. Wells, 190 N.C. 37, 128 S.E. 477 (1925).

"Lawful Heirs of Her Body". — Where a testator, by separate devises, gave to each of his three daughters, who were his only heirs at law, a certain tract of his land, with provision in each item "to her and the lawful heirs of her body in fee simple forever, and if she should die without a lawful heir of her body, then the property to go to the other surviving heirs," by the expression, "lawful heirs of her body," in the connection used, the testator intended "child" of his daughters. Kornegay v. Cunningham, 174 N.C. 209, 93 S.E. 754 (1917).

Remainder to Living Heirs of Grantor. — Grantor conveyed the land in question to her son after the reservation of a life estate, and by habendum stipulated that the grantee should have an estate for the term of his natural life and at his death to his issue surviving, with further provision that should he die without issue "then to the living heirs of" the grantor. It was held that the other children of grantor have a remainder contingent upon the death of the grantee without issue, which interest cannot be defeated by a conveyance executed by the grantee with the joinder of the grantor. Ellis v. Barnes, 231 N.C. 543, 57 S.E.2d 772 (1950).

Section Validates Conveyance Directly to Heirs of Living Person. — By virtue of the section a deed conveying land directly to the "heirs" of a living person passes whatever title the grantor had to the children of such person. Campbell v. Everhart, 139 N.C. 503, 52 S.E. 201 (1905).

A deed to "the heirs" of A, he being still alive, although void at common law, is good under this section, and is construed to be a limitation to the children of A, and includes after-born children. Graves v. Barrett, 126 N.C. 267, 35 S.E. 539 (1900).

A devise to the "heirs" of a person will be construed to be to his "children" in the absence of a contrary intention expressed in the instrument. Moseley v. Knott, 212 N.C. 651, 194 S.E. 100 (1937).

An estate granted to D for life and then to the heirs of S, who was then alive, is operative as to the conveyance of the remainder under Revival, s. 1583, now this section, which construes the word "heirs" to mean children, in such instances. Condor v. Secrest, 149 N.C. 201, 62 S.E. 921 (1908).

Child Born during Life of Life Tenant. — A devise was of lands to the widow of the testator for life, then to the heirs of his son J, and it appeared that the son was living at the time and had living children at the death of the testator and one born thereafter, during the continuance of the life estate. It was held that the devise, being to the heirs of a living person, conveyed such interest to the children of the person designated, and being, in terms, to a class, it included all who were members of the class and filled the description at the time the particular estate terminated, and therefore the child born after the death of the testator, but during the lifetime of the tenant for life, took his share with the other children of J. Cooley v. Lee, 170 N.C. 18, 86 S.E. 720 (1915).

Limitation to Heirs of One with Conditional Limitation Over. — Where an estate was devised to A "and the heirs of his body, but if he die without heirs living at the time of his death, then to the heirs of B," "heirs" was construed to mean children. Smith v. Brisson, 90 N.C. 284 (1884).

Limitation over Provided First Taker Dies Without Heirs. — Where a testator devises land to his son with a limitation over to his daughters, provided the son dies without heirs, the word "heirs" is construed to mean "children." Sain v. Baker, 128 N.C. 256, 38 S.E. 858 (1901).

Where a devise of lands is limited over should the first taker die without heirs, evidencing that the intent of the testator made the contingency to depend upon the first taker's dying without issue, this section has no application. Massengill v. Abell, 192 N.C. 240, 134 S.E. 641 (1926).

Reverter to Heirs upon Nonhappening of Contingency. — A conveyance of land in contemplation of marriage, to M, "to descend to the heirs of the body of the said M in fee simple, the issue of such marriage, and on failure of issue to revert to the heirs of" the grantor, the "reverter" to his heirs under this section meant to his children after the death of his wife and the nonhappening of the stated contingency. Thompson v. Batts, 168 N.C. 333, 84 S.E. 347 (1915).

"Lawfully Begotten Heirs of the Body". — It was held that "the lawfully begotten heirs of her body" in a will referred most obviously to the children of the devisee for life, of whom there were only two, and was construed to mean "the children of such person" since contrary intention did not appear from the will. Lockman v. Hobbs, 98 N.C. 541, 4 S.E. 627 (1887).

When Children Illegitimate. — Where a bequest is immediate — not dependent upon a preceding limited estate — to the heirs of a living person, and the children of such person are illegitimate, they have the right to take under the section which declares that a limitation to the "heirs" shall be construed to be the "children" of such person, unless a contrary intention appears. Howell v. Tyler, 91 N.C. 207 (1884).

§ 41-6.1. Meaning of "next of kin."

A limitation by deed, will, or other writing, to the "next of kin" of any person shall be construed to be to those persons who would take under the law of intestate succession, unless a contrary intention appears by the instrument. (1967, c. 948.)

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For article, "Class Gifts in North Carolina — When Do We 'Call The Roll'?," see 21 Wake Forest L. Rev. 1 (1985).

CASE NOTES

At the time of death of testatrix who died May 22, 1962, "next of kin" and, by implication, "nearest relatives" still retained their very narrow technical common-law meaning. Rawls v. Rideout, 74 N.C. App. 368, 328 S.E.2d 783 (1985).

Construction with § 28A-4-1. — For purposes of G.S. 28A-4-1, "next of kin" refers to the class of blood relatives of the decedent, thus the court erred in determining that the term was synonymous with "heirs," as used in this section. In re Estate of Bryant, 116 N.C. App. 329, 447 S.E.2d 468 (1994).

§ 41-6.2. Doctrine of worthier title abolished.

(a) The law of this State does not include: (i) the common-law rule of worthier title that a grantor or testator cannot convey or devise an interest to his own heirs, or (ii) a presumption or rule of interpretation that a grantor or testator does not intend, by a grant, devise or bequest to his own heirs or next of kin, to transfer an interest to them. The meaning of a grant, devise or bequest of a legal or equitable interest to a grantor's or testator's own heirs or next of kin, however designated, shall be determined by the general rules applicable to the interpretation of grants or wills.

(b) Subdivision (a)(i) of this section shall apply to all revocable trusts in existence as of February 26, 1979 and to all instruments, including revocable trusts, becoming effective after February 26, 1979, and subdivision (a)(ii) of this section shall apply to all instruments in existence as of February 26, 1979 and to all instruments becoming effective after February 26, 1979. If the application of this section to any instrument is held invalid, its application to other instruments to which it may validly be applied shall not be affected thereby. (1979, c. 88, s. 1.)

§ 41-6.3. Rule in Shelley's case abolished.

(a) The rule of property known as the rule in Shelley's case is abolished.

(b) This section shall become effective October 1, 1987, and applies to transfers of property that take effect on or after that date. (1987, c. 706, s. 1.)

Editor's Note. — Session Laws 1987, c. 706, s. 2, was codified in 2005 as subsection (b) of this section at the direction of the Revisor of Statutes.

§ 41-7. Possession transferred to use in certain conveyances.

By deed of bargain and sale, or by deeds of lease and release, or by covenant to stand seized to use, or deed operating by way of covenant to stand seized to use, or otherwise, by any manner or means whatsoever it be, the possession of the bargainor, releasor, or covenanter shall be deemed to be transferred to the bargainee, releasee, or person entitled to the use, for the estate or interest which such person shall have in the use, as perfectly as if the bargainee, releasee or person entitled to the use had been enfeoffed at common law with livery of seizin of the land intended to be conveyed by such deed or covenant. (27 Hen. VIII, c. 10; R.C., c. 43, s. 6; Code, s. 1330; Rev., s. 1584; C.S., s. 1740.)

Legal Periodicals. — For article, "Does the Fee Tail Exist in North Carolina?," see 23 Wake Forest L. Rev. 767 (1988).

CASE NOTES

I. General Consideration.
II. Trusts.

I. GENERAL CONSIDERATION.

History of Section. — It is conceded, on all hands, that the Statute of Uses, 27 Hen. VIII, c. 10, was in force and in use, in this State, up to the passage of the Revised Statutes (1836). Indeed, all of the conveyances of land adopted and used in this State are based on, and take effect by, the operation of that statute. In the Rev. Stat., c. 43, s. 4, and the Rev. Code, c. 43, s. 6, the words used in 27 Hen. VIII, c. 10, i.e., "When one person or persons stand, or be seized, or at any time thereafter shall happen to be seized of land, etc., to the use of any other person, persons, or body politic, by reason of any bargain, sale, feoffment, etc., or otherwise, by any manner or means whatsoever it be, the persons, etc., having the use, shall have the legal estate, etc.," are omitted and the provision is simply "By deed of bargain and sale, lease and release and covenant to stand seized, the possession shall be transferred to the bargainee, releasee, covenantee, etc." Substantially in this form the section is carried through all the various codes up to this one. The tendency, while no material change has been made, has been to make the section all inclusive by extending its application to every possible case involving the principle. Wilder v. Ireland, 53 N.C. 85 (1860).

Possession Transferred. — The statute of uses, substituted for 27 Hen. VIII, now this section, provides that the possession of the bargainor shall be transferred to the bargainee as perfectly as if the bargainee "had been enfeoffed at common law with the livery of seizin of the land intended to be conveyed, etc." Kirby v. Boyette, 118 N.C. 244, 24 S.E. 18 (1896).

Same Footing with Feoffments at Common Law. — Deeds of bargain and sale, and covenants to stand seized to uses, are put on the same footing with feoffments at common law, with respect to seizin, the declaration of uses thereon, and the consideration. Ivey v. Granberry, 66 N.C. 223 (1872); Love v. Harbin, 87 N.C. 249 (1882).

A use may be limited on a use. Rowland v. Rowland, 93 N.C. 214 (1885).

Necessity of Consideration. — A deed of bargain and sale is governed in this State by the same principles which were applied to it in England. It must have a pecuniary, or other valuable, consideration. Blount v. Blount, 4 N.C. 389 (1816); Brocket v. Foscue, 8 N.C. 64 (1820); Bruce v. Faucett, 49 N.C. 391 (1857).

If no consideration, either good or valuable, appears on the face of the instrument, or can be proved aliunde, the instrument will be void. Springs v. Hanks, 27 N.C. 30 (1844); Jackson v. Hampton, 30 N.C. 457 (1848); Bruce v. Faucett, 49 N.C. 391 (1857).

Resulting Use at Common Law. — At common law, where there was no consideration, the use would result to the feoffor, unless the declaration of the use or trust was contemporaneous with the transmutation of the legal title. Pittman v. Pittman, 107 N.C. 159, 12 S.E. 61 (1890).

Love and Affection as Consideration. — Though in form a deed is one of bargain and sale, yet if the only consideration is that of love and affection, it will operate as a covenant to stand seized. Slade v. Smith, 2 N.C. 326 (1796); Hatch v. Thompson, 14 N.C. 411 (1832); Cobb v. Hines, 44 N.C. 343 (1853); Bruce v. Faucett, 49 N.C. 391 (1857).

Where Legal and Equitable Title in Same Person. — Where one who has an equitable title acquires the legal title so that the same becomes united in the same person, the former is merged in the latter, and numerous decisions elsewhere are to the same effect. Peacock v. Stott, 101 N.C. 149, 7 S.E. 885 (1888), petition to rehear dismissed, 104 N.C. 154, 10 S.E. 456 (1889); Odom v. Morgan, 177 N.C. 367, 99 S.E. 195 (1919).

Exceptions to Rule That Beneficial Use Is Converted into Legal Ownership. — Where one person is seized to the use of another, the statute carries the legal estate to the person having the use. But three classes of cases are made exceptions to its operation, i.e.: (1) Where a use is limited on a use, (2) where a trustee is not seized but only possessed of a chattel interest, and (3) where the purposes of the trust make it necessary for the legal estate and the use to remain separate, as in the case of land conveyed for the separate use and maintenance of a married woman. Wilder v. Ireland, 53 N.C. 85 (1860); Kirby v. Boyette, 118 N.C. 244, 24 S.E. 18 (1896).

An estate of freehold to commence in futuro can be conveyed by a deed of bargain and sale operating under this section, or by executory devise; therefore, an estate to H for life and at her death to her children in fee, reserving a life estate to the grantor, is good. Savage v. Lee, 90 N.C. 320 (1884).

Covenant to Stand Seized on Death of Grantor. — Where there was a conveyance of real property upon the consideration of love and affection, reserving a life estate to the donor, it was held by the court that the conveyance was good; that it was a conveyance to stand seized to the use of the vendee on the death of the donor. Davenport v. Wynne, 28 N.C. 128 (1845). To the same effect in Hodges v. Spicer, 79 N.C. 223 (1878).

There cannot be the least doubt but that a covenant to stand seized to the use of another, after his own life, is good to pass the estate intended; for the law raises in the grantor an estate for life in the meantime to support the future estate. This has been decided in a vast number of instances. There is no point better established by the authorities. Sasser v. Blyth, 2 N.C. 340 (1796), overruling Ward v. Ward, 1 N.C. 59 (1793); Savage v. Lee, 90 N.C. 320 (1884).

Life Estate to Woman with Limitation Over to Children. — Where one devised, in 1828, to a trustee, to the use and benefit of a woman, for her life, remainder to the use of all her children, it was held that the legal estate in the remainder, by force of the statute, passed to the children she had at the time of the devise, subject to the participation of such as she might thereafter have. Wilder v. Ireland, 53 N.C. 85 (1860).

Future Contingent Use. — It is settled that a future contingent use to one unknown, or not in esse, cannot be raised by a deed of bargain and sale. It is also settled that a use cannot be raised by a general power of appointment given to the taker of the first estate in the use; and the case is much stronger where the power of appointment is given to a stranger. Smith v. Smith, 46 N.C. 135 (1853); Bruce v. Faucett, 49 N.C. 391 (1857).

Shifting or Springing Use. — Whenever the event happens when a shifting or springing use is to take effect, the statute of uses vests the legal seizin and ownership in the person entitled by virtue of the use. Lee v. Oates, 171 N.C. 717, 88 S.E. 889 (1916).

Fee Simple Limited after a Fee Simple. — A fee simple may be limited after a fee simple either by a deed or will by operation of the statute of uses; if by deed, it is a conditional limitation; if by will, it is an executory devise. Smith v. Brisson, 90 N.C. 284 (1884). See Rowland v. Rowland, 93 N.C. 214 (1885).

Applied in Craven County v. First Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E.2d 620 (1953).

Cited in Honeycutt v. Citizens Nat'l Bank, 242 N.C. 734, 89 S.E.2d 598 (1955).

II. TRUSTS.

This section merges the legal and equitable titles in the beneficiary of a passive trust, but as to active trusts, the legal title vests and remains in the trustee for the purpose of the trust. Fisher v. Fisher, 218 N.C. 42, 9 S.E.2d 493 (1940). See Security Nat'l Bank v. Sternberger, 207 N.C. 811, 178 S.E. 595 (1935).

Where the use is executed by the statute, the trustee takes no estate or interest, both the legal and equitable estates vesting in the cestui que trust; but where the use is not executed, the legal title passes to the trustee. Lee v. Oates, 171 N.C. 717, 88 S.E. 889 (1916).

As to the wife's life estate, so long as her husband lived, it was necessary that the trust for her separate use and maintenance should continue, as it was then active; but when her husband died, and the disability of coverture was removed, and there was no longer any necessity for a trustee to protect her interest, and as the trust then became passive, the statute executed the use and united the legal and equitable estates in her. Lee v. Oates, 171 N.C. 717, 88 S.E. 889 (1916). See Perkins v. Brinkley, 133 N.C. 154, 45 S.E. 541 (1903); Cameron v. Hicks, 141 N.C. 21, 53 S.E. 728 (1906); Springs v. Hopkins, 171 N.C. 486, 88 S.E. 774 (1916).

The Statute of Uses, 27 Henry VIII, preserved in this State by this section, merges the legal and equitable titles in the beneficiary of a passive trust. Wachovia Bank & Trust Co. v. Taylor, 255 N.C. 122, 120 S.E.2d 588 (1961).

Where conveyance of wife's property to trustee for her sole use and benefit during her life and, after her death, for the benefit of her husband was ineffective to create any estate or trust in favor of the husband because of noncompliance with a former version of G.S. 52-12, a passive trust for the wife for her natural life was created and it was executed by the statute. Pilkington v. West, 246 N.C. 575, 99 S.E.2d 798 (1957).

In a passive trust the legal and equitable titles are merged in the beneficiary by virtue of the statute of uses. Poindexter v. Wachovia Bank & Trust Co., 258 N.C. 371, 128 S.E.2d 867 (1963).

Rule Does Not Apply to Resulting Trust. — Where the plaintiff cited no North Carolina authority to support the argument that the statute of uses would be operative, and since the general rule is that the statute of uses applies only to express passive trusts and not to resulting or constructive trusts which arise by operation of law, under North Carolina law a resulting trust would not be executed. Greer v. United States, 448 F.2d 937 (4th Cir. 1971).

Or to Active Trusts. — While this section converts the beneficial use into the legal ownership and unites the legal and equitable estates in the beneficiary, this rule applies only to passive or simple trusts and not to active trusts. Patrick v. Beatty, 202 N.C. 454, 163 S.E. 572 (1932); Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936), citing Lee v. Oates, 171 N.C. 717, 88 S.E. 889 (1916).

This section merges the legal and equitable titles in the beneficiary of a passive trust, but the rule established by the statute does not apply to active trusts. Finch v. Honeycutt, 246 N.C. 91, 97 S.E.2d 478 (1957).

If the trust is active the legal and equitable titles do not merge. Poindexter v. Wachovia Bank & Trust Co., 258 N.C. 371, 128 S.E.2d 867 (1963).

An active trust is one where there is a special duty to be performed by the trustee in respect to the estate, such as collecting the rents and profits, or selling the estate, or the execution of some particular purpose. Chinnis v. Cobb, 210 N.C. 104, 185 S.E. 638 (1936), citing Perkins v. Brinkley, 133 N.C. 154, 45 S.E. 541 (1903); Finch v. Honeycutt, 246 N.C. 91, 97 S.E.2d 478 (1957).

Where there is any control to be exercised by the trustee or any duty to be performed by him in relation to the trust property or in regard to the beneficiaries, the trust is an active trust, and the legal and equitable titles do not merge in the beneficiaries. Finch v. Honeycutt, 246 N.C. 91, 97 S.E.2d 478 (1957).

Where a deed purports to convey land in trust, but prescribes no duties of any kind to be performed by the trustee, he is made a depositary only of title, and by operation of this section the legal, as well as the equitable, estate in the land passed to and became vested solely in the beneficiary. Pippin v. Barker, 233 N.C. 549, 64 S.E.2d 830 (1951).

Trust for "Sole and Separate Use" of Married Woman. — The words "for the sole and separate use," or equivalent language, qualifying the estate of a trustee for a married woman, must be construed as manifesting the intent on the part of the grantor to limit her right of alienation to the mode and manner expressly provided in the instrument by which the estate is created. Kirby v. Boyette, 118 N.C. 244, 24 S.E. 18 (1896).

Passive Trust for Husband and Wife. — Where a husband purchases realty and has the deed made to a trustee of a passive trust for the benefit of himself and wife, nothing else appearing, the instrument creates an estate by entirety. Akin v. First Nat'l Bank, 227 N.C. 453, 42 S.E.2d 518 (1947).

§ 41-8. Collateral warranties abolished; warranties by life tenants deemed covenants.

All collateral warranties are abolished; and all warranties made by any tenant for life of lands, tenements or hereditaments, the same descending or coming to any person in reversion or remainder, shall be void; and all such warranties, as aforesaid, shall be deemed covenants only, and bind the covenanter in like manner as other obligations. (4 Anne, c. 16, s. 21; 1852, c. 16; R.C., c. 43, s. 10; Code, s. 1334; Rev., s. 1587; C.S., s. 1741.)

CASE NOTES

For history and discussion of section, see Southerland v. Stout, 68 N.C. 446 (1873); Smith v. Ingram, 130 N.C. 100, 40 S.E. 984 (1902), petition to rehear dismissed, 132 N.C. 959, 44 S.E. 643 (1903).

Remainder Not Defeated by Warranty. — A warranty in a deed of a life tenant cannot defeat the remainder of the heirs by way of rebutter. Moore v. Parker, 34 N.C. 123 (1851); Starnes v. Hill, 112 N.C. 1, 16 S.E. 1011 (1893).

Where land is devised to a person for life, and at her death to her children, the children are not estopped by a deed with covenant of warranty executed by the life tenant. Hauser v. Craft, 134 N.C. 319, 46 S.E. 756 (1904).

Under this section a warranty in a deed of a life tenant does not bar or rebut the claim of heirs who can connect themselves with the outstanding remainder. This is so because such heirs take by purchase, i.e., as remaindermen, and not by descent, i.e., as heirs. Sprinkle v. City of Reidsville, 235 N.C. 140, 69 S.E.2d 179 (1952).

Warranty by Tenant by Curtesy. — Where a tenant by the curtesy sells land belonging to his wife, by deed of bargain and sale, in fee, with general warranty, the right of the heir of the wife to the land is not rebutted by the warranty. Johnson v. Bradley, 31 N.C. 362 (1849).

Warranty to Grantee but Not to Assigns. — Where a deed contains a warranty to the grantee, but not to his assigns, such assignees can neither maintain an action on such covenant nor defend under it against the grantor. Smith v. Ingram, 130 N.C. 100, 40 S.E. 984 (1902), petition to rehear dismissed, 132 N.C. 959, 44 S.E. 643 (1903).

Heir Rebutted by Ancestor's Warranty. — Where in an action to recover lands the plaintiff claims by paper title to his ancestor, without claim of possession, and it appears that his ancestor has conveyed the land to a stranger with full covenants and warranty of title prior to his having acquired it, the burden of proof is on the plaintiff to establish his title, and he cannot recover, for his ancestor's deed to the stranger, with covenant and warranty, destroys his right of action by rebutter, and passes the title to the grantee by estoppel. Olds v. Richmond Cedar Works, 173 N.C. 161, 91 S.E. 846 (1917).

§ 41-9: Repealed by Session Laws 1979, c. 180, s. 2.

Cross References. — For present provisions as to spendthrift trusts, see G.S. 36A-115.

Editor's Note. — Session Laws 1979, c. 180, s. 2, provided that this section was repealed, except as to wills or deeds executed prior to October 1, 1979.

§ 41-10. Titles quieted.

An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claims; and by any man or woman against his or her wife or husband or alleged wife or husband who have not lived together as man and wife within the two years preceding, and who at the death of such plaintiff might have or claim to have an interest in his or her estate, and a decree for the plaintiff shall debar all claims of the defendant in the property of the plaintiff then owned or afterwards acquired: Provided, that no such relief shall be granted against such husband or wife or alleged wife or husband, except in case the summons in said action is personally served on such defendant.

If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs. In any case in which judgment has been or shall be docketed, whether such judgment is in favor of or against the person bringing such action, or is claimed by him, or affects real estate claimed by him, or whether such judgment is in favor of or against the person against whom such action may be brought, or is claimed by him, or affects real estate claimed by him, the lien of said judgment shall be such claim of an estate or interest in real estate as is contemplated by this section. (1893, c. 6; 1903, c. 763; Rev., s. 1589; 1907, c. 888; C.S., s. 1743.)

Legal Periodicals. — For article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

I. General Consideration.
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I. GENERAL CONSIDERATION.

As to the history and purpose of this section, see McLean v. Shaw, 125 N.C. 491, 34 S.E. 634 (1899); Rumbo v. Gay Mfg. Co., 129 N.C. 9, 39 S.E. 581 (1901); Campbell v. Cronly, 150 N.C. 457, 64 S.E. 213 (1909); Plotkin v. Merchants' Bank & Trust Co., 188 N.C. 711, 125 S.E. 541 (1924).

This section is highly remedial. Plotkin v. Merchants' Bank & Trust Co., 188 N.C. 711, 125 S.E. 541 (1924).

This is a remedial statute which has been liberally construed; it is more comprehensive than the old suit in equity to remove a cloud from title. Jacobi Hdwe. Co. v. Jones Cotton Co., 188 N.C. 442, 124 S.E. 756 (1924); Maynard v. Holder, 216 N.C. 524, 5 S.E.2d 535 (1939).

This statute is remedial in nature, designed to provide a means for determining all adverse claims to land, including those formerly encompassed within the equitable proceedings to remove clouds on title. Boyd v. Watts, 73 N.C. App. 566, 327 S.E.2d 46 (1985), rev'd in part, 316 N.C. 622, 342 S.E.2d 840 (1986).

This section is liberally construed. York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

Liberally Construed to Execute Legislative Intent. — This section and the amendatory acts thereto, being remedial in nature, should have a liberal construction in order to execute fully the legislative intention and will. Stocks v. Stocks, 179 N.C. 285, 102 S.E. 306 (1920).

And to advance the remedy and permit the courts to bring the parties to an issue. Asheville Land Co. v. Lange, 150 N.C. 26, 63 S.E. 164 (1908); Wachovia Bank & Trust Co. v. Miller, 243 N.C. 1, 89 S.E.2d 765 (1955); Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

The beneficial purpose of this section is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971); Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Requirements for Prima Facie Case. — In order to establish a prima facie case for removing a cloud on title, a plaintiff must meet two requirements: (1) plaintiff must own the land in controversy, or have some estate or interest in it; and (2) defendant must assert some claim in the land which is adverse to plaintiff's title, estate or interest. Chicago Title Ins. Co. v. Wetherington, 127 N.C. App. 457, 490 S.E.2d 593 (1997), cert. denied, 347 N.C. 574, 498 S.E.2d 380 (1998).

The section deprives the defendant of no right, but affords him every opportunity of defending the validity of his title; but in the interest of peace and the settlement of controversies, it allows his adversary to put to the test of early judicial investigation, and does not compel plaintiff to wait on the defendant's pleasure as to the time when the inquiry shall be made, and thus give defendant an unfair advantage over him. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N.C. 668, 96 S.E. 99 (1918), appeal dismissed, 252 U.S. 341, 40 S. Ct. 330, 64 L. Ed. 601 (1920).

The fact that the plaintiff brings his action under this section deprives the defendant of no right. He has the right to defend the validity of his alleged title on every relevant ground available in any type of action involving recovery or possession of real property. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953).

Record of Exercising Option to Renew Lease Note Necessary. — In a suit to quiet title brought by a lessor, the trial court properly held that lessees had a leasehold interest in a tract through 2011, provided that they continued to tender rent; it was not necessary under G.S. 47-18 to record the exercise of an option to renew a lease, and by accepting rent for over 30 years, the lessor and its predecessors had waived the requirement of notice to extend the lease. Spruce Pine Indus. Park, Inc. v. Explosives Supply Co., 179 N.C. App. 524, 634 S.E.2d 264, 2006 N.C. App. LEXIS 1974 (2006).

The distinction between a suit to remove a cloud upon title and an action to quiet title under this section is clear. In the old equity action, to remove a cloud upon title to real property, the proceeding was an equitable one and was intended to remove a particular instrument or documentary evidence of title or encumbrance against the title, which was hanging over or threatening a plaintiff's rights therein. In a suit to quiet title to real property under this section, the proceeding is designed and intended to provide a means for determining all adverse claims, equitable or otherwise. It is not limited to a particular instrument, bit of evidence, or encumbrance but is aimed at silencing all adverse claims, documentary or otherwise. Any action that could have been brought under the old equitable proceeding to remove a cloud upon title may now be brought under the provisions of this section. York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

The General Assembly did not include personal property under the provisions of this section. Newman Mach. Co. v. Newman, 2 N.C. App. 491, 163 S.E.2d 279 (1968), rev'd on other grounds, 275 N.C. 189, 166 S.E.2d 63 (1969).

A bill to quiet title or to remove a cloud on title to personal property may be maintained in equity, in the absence of statutory authorization, where, by reason of exceptional circumstances, there is no adequate remedy at law. Newman Mach. Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

Even though there is no statute in North Carolina authorizing suits to quiet title to personalty, the Supreme Court adheres to the general rule that such suits may be maintained in equity where, due to exceptional circumstances, there is no adequate remedy at law. Newman Mach. Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

Since North Carolina has no statute regarding suits in equity to remove cloud or quiet title to personalty, the Supreme Court applies to such suits the same principles which obtained prior to enactment of this section when title to land was involved. Newman Mach. Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

In order to remove a cloud from a title, it is not necessary to allege and prove that the plaintiff had an estate in or title to the lands in controversy. It is only required that the plaintiff or plaintiffs have such an interest in the lands as to make the claim of the defendants adverse to him or them. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Burden on Plaintiffs. — In an action to quiet title under this section plaintiffs bear the burden of proving valid title in themselves which may be accomplished by either (1) reliance on the Real Property Marketable Title Act, or (2) utilization of traditional methods of proving title. Chappell v. Donnelly, 113 N.C. App. 626, 439 S.E.2d 802 (1994).

Title Not Necessarily Put in Issue. — By suit to remove a cloud from title, a plaintiff does not necessarily put his title in issue. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

For requirements in equity suits to remove cloud and quiet title to realty prior to enactment of this section, see Newman Mach. Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

If title becomes involved in a processioning proceeding under §§ 38-1 to 38-4, the proceeding becomes in effect an action to quiet title under this section. Roberts v. Sawyer, 229 N.C. 279, 49 S.E.2d 468 (1948); Bumgarner v. Corpening, 246 N.C. 40, 97 S.E.2d 427 (1957).

Where the only issue to be tried is the location of a dividing line, it is a processioning proceeding under Chapter 38. However, where title to the land is put in issue the clerk has no authority to pass on any question involved. He must transfer the proceeding to the regular session of superior court where it becomes in effect an action to quiet title pursuant to this section. Cobb v. Spurlin, 73 N.C. App. 560, 327 S.E.2d 244 (1985).

A declaratory action is an appropriate remedy to perform the function of the customary action to quiet title. York v. Newman, 2 N.C. App. 484, 163 S.E.2d 282 (1968).

Restraining Sale Under Execution. — Under this section the sheriff's sale of land by execution under a judgment may now be restrained by suit in equity when it will cast an additional cloud upon the title of the owner of the lands. Mizell v. Bazemore, 194 N.C. 324, 139 S.E. 453 (1927).

No statute of limitations runs against plaintiff bringing action for removal of a cloud upon title. Such an action is a continuing right, which exists as long as there is occasion for its exercise. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

But Theory of Relief May Determine Applicability of Limitations. — There is no express statute of limitations governing actions to quiet title under this section. It thus is necessary to refer to plaintiffs' underlying theory of relief to determine which statute, if any, applies. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

When Quiet Title Actions Are Treated as Ejectment Actions. — Actions to remove a cloud upon title are in essence ejectment actions and are properly reviewed as such where defendants are in actual possession and plaintiffs seek to recover possession. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Action Held Not One for Ejectment. — Where plaintiffs made no specific allegation that defendants were in actual possession at the time of the filing of their action, and did not seek specifically to recover possession in their demand for relief, but merely prayed for rents and profits and removal of certain deeds as a cloud upon their title, plaintiffs' action was not in essence one for ejectment controlled by G.S. 1-38 and 1-40; rather, plaintiffs' action was one to remove a cloud upon title which was not barred by any statute of limitations. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

Applied in Doub v. Harper, 234 N.C. 14, 65 S.E.2d 309 (1951); Edwards v. Arnold, 250 N.C. 500, 109 S.E.2d 205 (1959); Clay v. Clay, 259 N.C. 251, 130 S.E.2d 309 (1963); Twiford v. Harrison, 260 N.C. 217, 132 S.E.2d 321 (1963); J. Perry Jones Realty, Inc. v. McLamb, 21 N.C. App. 482, 204 S.E.2d 880 (1974); Boyce v. McMahan, 22 N.C. App. 254, 206 S.E.2d 496 (1974); VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985).

Cited in Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928); Sears v. Braswell, 197 N.C. 515, 149 S.E. 846 (1929); Bechtel v. Bohannan, 198 N.C. 730, 153 S.E. 316 (1930); Hinton v. Whitehurst, 214 N.C. 99, 198 S.E. 579 (1938); Whiteheart v. Grubbs, 232 N.C. 236, 60 S.E.2d 101 (1950); Newbern v. Barnes, 3 N.C. App. 521, 165 S.E.2d 526 (1969); Mayberry v. Campbell, 16 N.C. App. 375, 192 S.E.2d 27 (1972); McRorie v. Query, 32 N.C. App. 311, 232 S.E.2d 312 (1977); Heritage Communities of N.C., Inc. v. Powers, Inc., 49 N.C. App. 656, 272 S.E.2d 399 (1980); Simmons v. United States, 53 N.C. App. 216, 280 S.E.2d 463 (1981); Williams v. Sapp, 83 N.C. App. 116, 349 S.E.2d 304 (1986); Ballance v. Dunn, 96 N.C. App. 286, 385 S.E.2d 522 (1989); Foreman v. Sholl, 113 N.C. App. 282, 439 S.E.2d 169 (1994), cert. improvidently granted and appeal dismissed, 339 N.C. 593, 453 S.E.2d 162 (1995); Parrish v. Hayworth, 138 N.C. App. 637, 532 S.E.2d 202, 2000 N.C. App. LEXIS 784 (2000); Merrick v. Peterson, 143 N.C. App. 656, 548 S.E.2d 171, 2001 N.C. App. LEXIS 342 (2001).

II. NATURE AND SCOPE OF REMEDY.

A. Purpose.

This section was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner and which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value. And it should and does extend to such adverse and wrongful claims, whether in writing or parol, whenever a claim by parol, if established, could create an interest or estate in the property, as in case of a parol trust or a lease not required to be in writing. And suit should be allowed, too, when existent records or written instruments reasonably present such a claim, the statute preventing all hardship in such cases by its provision that if the holder does not insist on the same in his answer or does not answer at all, the plaintiff shall pay the costs. Satterwhite v. Gallagher, 173 N.C. 525, 92 S.E. 369 (1917); Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N.C. 668, 96 S.E. 99 (1918), appeal dismissed, 252 U.S. 341, 40 S. Ct. 330, 64 L. Ed. 601 (1920).

This section was designed to avoid some of the limitations imposed upon the remedies formerly embraced by a bill of peace or bill quia timet, and to establish an easy method of quieting titles of land against adverse claims. Newman Mach. Co. v. Newman, 275 N.C. 189, 166 S.E.2d 63 (1969).

To Leave Lands Unfettered. — The beneficial purpose of this section is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion, instead of remaining idle and unremunerative. Christman v. Hilliard, 167 N.C. 4, 82 S.E. 949 (1914); Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N.C. 668, 96 S.E. 99 (1918), appeal dismissed, 252 U.S. 341, 40 S. Ct. 330, 64 L. Ed. 601 (1920); Plotkin v. Merchants' Bank & Trust Co., 188 N.C. 711, 125 S.E. 541 (1924).

To Broaden the Equitable Remedy. — This section, giving the owner of lands the right to remove a cloud upon his title, is much broader in its scope and purpose than the equitable remedy theretofore allowed and administered in this State, and includes not only the right to remove an apparent lien under a docketed judgment, but also the potential claim of a wife to her inchoate right of dower in her husband's lands. Southern State Bank v. Sumner, 187 N.C. 762, 122 S.E. 848 (1924).

The statute has been said to be an extension of the remedy in equity theretofore existing for the removal of clouds on title, and is intended to afford an easy and expeditious mode of determining all conflicting claims to land, whether derived from a common source or from different and independent sources. It is highly remedial and beneficial in its nature, and should therefore be construed liberally. It is also a statute of repose, and for that reason is entitled to favorable consideration. Christman v. Hilliard, 167 N.C. 4, 82 S.E. 949 (1914); Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N.C. 668, 96 S.E. 99 (1918), appeal dismissed, 252 U.S. 341, 40 S. Ct. 330, 64 L. Ed. 601 (1920); East Carolina Lumber Co. v. Pamlico County, 242 N.C. 728, 89 S.E.2d 381 (1955).

The General Assembly of 1893 enacted the statute now codified as this section to avoid some of the limitations imposed upon the remedies formerly sought by a bill of peace or a bill quia timet, and to establish an easy method of quieting titles to land against adverse claims. Wells v. Clayton, 236 N.C. 102, 72 S.E.2d 16 (1952).

B. Interest Necessary to Bring Action.

Suit may be instituted by any person against any other person claiming an interest adverse to his title. Rutherford v. Ray, 147 N.C. 253, 61 S.E. 57 (1908).

An action must be based upon plaintiffs' ownership of some title, estate, or interest in real property, and defendants' assertion of some claim adverse to plaintiffs' title, estate, or interest, which adverse claim must be presently determinable. Vandiford v. Vandiford, 241 N.C. 42, 84 S.E.2d 278 (1954).

Plaintiff Need Not Prove Estate in or Title to Land. — The contention that a plaintiff in an action brought under this section must allege and prove that at the commencement of the action and at its trial he had an estate in or title to the land, cannot be sustained. It is only required that he have such an interest in the land that the claim of the defendant is adverse to him. Plotkin v. Merchants' Bank & Trust Co., 188 N.C. 711, 125 S.E. 541 (1924). But see Johnston v. Kramer Bros. & Co., 203 F. 733 (D.C.N.C. 1913); Etheridge v. Wescott, 244 N.C. 637, 94 S.E.2d 846 (1956).

Failure to Prove Prescriptive Easement. — There was inadequate evidence to take the issue of a prescriptive easement to the jury because the defendants had the burden of proving the elements necessary for a prescriptive easement and failed to meet that burden. Nichols v. Wilson, 16 N.C. App. 286, 448 S.E.2d 119, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

The statutory action to quiet title to realty consists of two essential elements. The first is that the plaintiff must own the land in controversy, or have some estate or interest in it; and the second is that the defendant must assert some claim to such land adverse to the plaintiff's title, estate or interest. Wells v. Clayton, 236 N.C. 102, 72 S.E.2d 16 (1952).

Remedy Given Whether in or out of Possession. — This section affords the remedy whenever one owns or has an estate or interest in real property, whether he is in or out of possession, and another sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true owner and which is reasonably calculated to burden and embarrass such owner in the full enjoyment or disposition of his property at a fair market value; the statute affords a remedy by disclaimer when the party does not in fact claim the "adverse interest" which is alleged to be a cloud on the title of the true owner. Satterwhite v. Gallagher, 173 N.C. 525, 92 S.E. 369 (1917); Vick v. Winslow, 209 N.C. 540, 183 S.E. 750 (1935). See Daniels v. Baxter, 120 N.C. 14, 26 S.E. 635 (1897).

The authorities to the effect that only one in possession may maintain an action to remove a cloud from title, were decisions rendered prior to the act of 1893, c. 6, Revisal, s. 1589. Since that statute, it is held that the action is maintainable, though plaintiff is not in the present possession or control of the property. Daniels v. Baxter, 120 N.C. 14, 26 S.E. 635 (1897); Campbell v. Cronly, 150 N.C. 457, 64 S.E. 213 (1909); Speas v. Woodhouse, 162 N.C. 66, 77 S.E. 1000 (1913).

Under this section, the plaintiff is not required to show that he is either in or out of possession. Nor is the plaintiff required to show that the defendant is an occupant or any more than a claimant of the land in controversy. Barbee v. Edwards, 238 N.C. 215, 77 S.E.2d 646 (1953).

Action Is Maintainable Though Plaintiff Might Have Maintained Ejectment. — This section is broad enough to cover an action to quiet the title to real property though the person sued may be wrongfully in possession and the plaintiff might have maintained ejectment. The complaint would not be demurrable merely for the reason that the allegations might be sufficient to support a possessory action. Pressly v. Walker, 238 N.C. 732, 78 S.E.2d 920 (1953).

Adverse Claimant to Execution Debtor. — If real estate levied upon should be claimed by one other than the execution debtor, then nothing can more quickly bring up for trial the plaintiff's prayer to have the cloud removed from his title than to allow the execution sale to take place. If the purchaser should delay to commence suit for recovery of possession, then the claimant can commence proceedings under the section. McLean v. Shaw, 125 N.C. 491, 34 S.E. 634 (1899).

Judgment Lien. — In McLean v. Shaw, 125 N.C. 491, 34 S.E. 634 (1899), it was held that it was not in contemplation of the act that a judgment lien should be included in the terms "estate" and "interest," as they are used in this section. This case was decided at September term, 1899. The legislature, at its session in 1903, by chapter 763, amended Laws 1893, c. 6, s. 1, by adding thereto the last sentence of the present section. "Estate" and "interest" now expressly embrace a judgment lien. Crockett v. Bray, 151 N.C. 615, 66 S.E. 666 (1909).

Correction of Life Estate into Fee Simple. — Defendants have a right, in order to avoid multiplicity of suits, to ask for the correction of a life estate deed, under which they claim, into a fee simple deed, by way of counterclaim, not merely as a matter of defense, but to remove a cloud upon the title, under this section. McLamb v. McPhail, 126 N.C. 218, 35 S.E. 426 (1900).

When Land Conveyed Pendente Lite. — Where the owner of lands in possession thereof or entitled thereto brings his action claiming as such owner to remove as a cloud upon his title the lien of one claiming under his mortgage, and pendente lite conveys the land to another with full warranty deed, he may continue to prosecute his suit against the mortgagee as to the title, being a real party in interest under G.S. 1-57, without claim of the right to the possession, under the provisions of this section; and where issue has been joined, he may, if successful, recover his costs. Plotkin v. Merchants' Bank & Trust Co., 188 N.C. 711, 125 S.E. 541 (1924).

Nonpayment of Taxes. — In a suit to remove a cloud on the title to lands, the suggestion that plaintiff's ancestors have not, for many years, paid the tax on the land, is immaterial, because to do so does not, under any statute in force in this State, work a forfeiture of title, otherwise than by a sale conducted in conformity with the law. Johnston v. Kramer

Bros. & Co., 203 F. 733 (D.C.N.C. 1913).

Lack of Standing. — Mortgage company that had no standing to dispute a foreclosure sale of the subject property also had no standing to bring a quiet title action against the purchaser in that foreclosure sale. Beneficial Mtg. Co. v. Hamidpour, 155 N.C. App. 641, 574 S.E.2d 163, 2002 N.C. App. LEXIS 1571 (2002), cert. dismissed, 357 N.C. 163, 580 S.E.2d 359 (2003), cert. denied, 357 N.C. 163, 580 S.E.2d 359 (2003).

Summary judgment quieting title in the seller of lots in a subdivision was properly granted; the seller had sought to quiet title to a parcel adjacent to the subdivision that was discovered when a new survey revealed that the seller and her husband did not convey all of certain real estate when they sold the subdivision lots, and the seller's title to this parcel was superior to that of the owners of lots in the subdivision, who purported to divide the parcel among themselves. Hensley v. Samel, 163 N.C. App. 303, 593 S.E.2d 411, 2004 N.C. App. LEXIS 375 (2004).

C. What Constitutes Cloud.

Includes Any Adverse Interest. — The language of this section is broad and liberal, showing the purpose of the General Assembly to permit any person to bring an action against another who claims an interest or estate in real property adverse to him. Plotkin v. Merchants' Bank & Trust Co., 188 N.C. 711, 125 S.E. 541 (1924).

Action Lies to Prevent Creation of Cloud. — An action will lie, not only to remove an existing cloud on title, but also to prevent one from being created, and where the object is merely preventive an injunction is the proper remedy to restrain the doing of the wrongful act. Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N.C. 668, 96 S.E. 99 (1918), appeal dismissed, 252 U.S. 341, 40 S. Ct. 330, 64 L. Ed. 601 (1920).

Defendant Need Only Be Claimant. — Under Laws 1893, c. 6, now this section, a plaintiff may maintain an action to remove a cloud from his title without showing that the defendant is an occupant or any more than a claimant of the land in controversy. Duncan v. Hall, 117 N.C. 443, 23 S.E. 362 (1895).

Adverse Claim Must Be Presently Determinable. — This section applies only to the extent the alleged adverse claims are presently determinable. Vandiford v. Vandiford, 241 N.C. 42, 84 S.E.2d 278 (1954).

Apparent Invalidity of Defendant's Title. — The plaintiff is not required to have possession as a condition precedent to his right of action, nor will the apparent invalidity of defendant's title deprive him of the statutory remedy. Daniels v. Baxter, 120 N.C. 14, 26 S.E. 635 (1897); Rumbo v. Gay Mfg. Co., 129 N.C. 9, 39 S.E. 581 (1901); Beck v. Meroney, 135 N.C. 532, 47 S.E. 613 (1904); Campbell v. Cronly, 150 N.C. 457, 64 S.E. 213 (1909); Carolina-Tennessee Power Co. v. Hiawassee River Power Co., 175 N.C. 668, 96 S.E. 99 (1918), appeal dismissed, 252 U.S. 341, 40 S. Ct. 330, 64 L. Ed. 601 (1920).

Obscure Contingent Limitations. — This section enlarges the power of the courts to entertain suits to quiet titles, where the conditions were formerly such that a possessory action could not be brought; and the section is liberally construed, so that the court can acquire jurisdiction to clear up obscure contingent limitations which are imposed upon titles. Campbell v. Cronly, 150 N.C. 457, 64 S.E. 213 (1909).

Will of Living Person. — A paper-writing, in form a will, executed by a person now living, is without legal significance either as a transfer of title or as a cloud thereon, until death of the testator and probate of the instrument. Vandiford v. Vandiford, 241 N.C. 42, 84 S.E.2d 278 (1954).

Invalid Judgment as Cloud. — A judgment, if invalid, would be such a cloud on the title, or such a direct menace to it, as to fall within the provisions of this section. Stocks v. Stocks, 179 N.C. 285, 102 S.E. 306 (1920).

An action to quiet title or to remove a cloud from title is equitable in its nature, and may now be maintained to remove from the title a cloud created by the apparent lien of an invalid judgment docketed in the county where the land lies. Holden v. Totten, 224 N.C. 547, 31 S.E.2d 635 (1944).

In an action to remove a cloud from plaintiff's title, caused by a docket judgment alleged to be invalid, a demurrer to the complaint, as not stating a cause of action, was properly overruled, this section being sufficiently broad to entitle plaintiff to maintain an independent action. Exum v. Carolina R.R., 222 N.C. 222, 22 S.E.2d 424 (1942).

Judgment Obtained by Fraud. — A complaint alleged, in effect, that the plaintiff had her dower laid off in the lands of her deceased husband, in which the defendant, her son, was properly represented, and thereafter the son, without the service of summons upon her, instituted an independent proceeding to annul the judgment, and falsely represented to her that the action had been withdrawn, and that she should not further consider it, and in consequence, and through his false representation, obtained a judgment in his favor, destroying her dower right. The complaint was held sufficient for the plaintiff to maintain an independent action to set aside the former judgment upon the issue of fraud, and also under this section to remove the former judgment as a cloud upon her title. Stocks v. Stocks, 179 N.C. 285, 102 S.E. 306 (1920).

Tax Deed. — Where a judgment entered in favor of the county in an action against the owner of land for taxes has been set aside upon motion after notice to the parties, the owner, in an action to remove cloud upon title, is entitled to judgment cancelling the tax deed. Galer v. Auburn-Asheville Co., 204 N.C. 683, 169 S.E. 642 (1933).

Foreclosure of Mortgage Given by Tenant in Common Prior to Partition. — The purchaser of land from one tenant in common, after the land had been allotted to the tenant in a special proceeding for partition, may maintain a suit to restrain foreclosure of a mortgage executed by the other tenant in common prior to partition, when the mortgagee advertises and seeks to sell a one-half interest in the entire tract, since such foreclosure would constitute a cloud on the purchaser's title. Rostan v. Huggins, 216 N.C. 386, 5 S.E.2d 162, 126 A.L.R. 410 (1939).

Contract Without Married Woman's Privy Examination. — A contract to convey the lands of a married woman, signed by her and her husband, but without her privy examination, when recorded is a cloud upon her title to the lands and subject to her suit to remove the same, within the intent and meaning of this section, though she is and remains in possession of the land. Satterwhite v. Gallagher, 173 N.C. 525, 92 S.E. 369 (1917).

Usurious charge of interest on notes did not affect the validity of the mortgage or deed of trust securing them under G.S. 24-2, and a suit brought to remove a cloud upon title to the lands under this section to the extent of the usurious charge of interest on the notes could not be maintained. Briggs v. Industrial Bank, 197 N.C. 120, 147 S.E. 815 (1929).

Proof Required of Plaintiff. — In a suit to remove a cloud upon the plaintiff's title under this section, the defendant claimed under a sale by foreclosure of a mortgage which the plaintiff attacked for fraud. It was held that the burden of proof was on the plaintiff to show the fraud by the preponderance of the evidence, and not by clear, strong and cogent proof as required in the information or correction of a conveyance of land. Ricks v. Brooks, 179 N.C. 204, 102 S.E. 207 (1920).

III. PLEADING AND PRACTICE.

A. In General.

When Suit Treated as Action of Ejectment. — A suit instituted to determine conflicting claims to real property, under Laws 1893, c. 6, now this section, may be properly treated as an action of ejectment, when the complaint alleges ownership in the plaintiff and possession in the defendant. Hines v. Moye, 125 N.C. 8, 34 S.E. 103 (1899); Baldwin v. Hinton, 243 N.C. 113, 90 S.E.2d 316 (1955); Hayes v. Ricard, 244 N.C. 313, 93 S.E.2d 540 (1956).

Plaintiff Has Burden of Establishing Title. — In an action to quiet title, the burden of proof is on the plaintiff to establish his title. He may do so by traditional methods or by reliance on the Real Property Marketable Title Act, Chapter 47B. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

The plaintiff is not bound to show as an independent proposition the invalidity and wrongfulness of the adverse claim. These matters are inseparably interwoven in the two essential elements of the action. The claim of the defendant is necessarily invalid and wrongful if it is adverse to the title, estate or interest of the true owner. Wells v. Clayton, 236 N.C. 102, 72 S.E.2d 16 (1952).

The plaintiff is not required to allege or show the specific circumstances giving rise to the defendant's adverse claim, unless it is essential for the plaintiff to overcome such claim in order to establish his own title, estate or interest. Hence, it is ordinarily sufficient for the plaintiff to allege and show in general terms that the defendant is asserting some claim adverse to him. Wells v. Clayton, 236 N.C. 102, 72 S.E.2d 16 (1952).

When Court Will Hear and Determine Without Action. — The courts will hear and determine a controversy submitted without action in suits brought by and against the parties in interest, wherein a vendee has refused to accept the title on the ground of its being doubtful, either in the exercise of their equitable jurisdiction, treating the controversy as a bill for specific performance, or under the provisions of this section, for the purpose of removing clouds upon obscure titles. Campbell v. Cronly, 150 N.C. 457, 64 S.E. 213 (1909).

When Adverse Claim Invalid. — Under Laws 1893, c. 6, now this section, where, in an action to determine conflicting claims to real property, plaintiff being in possession, the court finds the claim of defendant to be invalid, the action should not be dismissed, but the court should enter its decree removing the cloud upon the title. Rumbo v. Gay Mfg. Co., 129 N.C. 9, 39 S.E. 581 (1901).

Complaint Upheld. — Plaintiffs' complaint, which alleged that noncompliance with legal formalities voided two deeds, but did not allege fraud, despite failure to state specific facts underlying these allegations, nevertheless, under the liberal theory of notice pleading, was minimally sufficient to state a claim for relief under this section. Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986).

No defense bond is required in an action to quiet title under this section. Roberts v. Sawyer, 229 N.C. 279, 49 S.E.2d 468 (1948).

A judgment binds parties and privies only. Hines v. Moye, 125 N.C. 8, 34 S.E. 103 (1899).

Default Judgment against Non-Responding Defendants Cannot Automatically Extend to Answering Defendants. — A default final judgment against the non-responding defendants/property buyers did not adjudicate any rights, i.e. quiet title under this provision, between plaintiffs/conveyors of property and answering defendants/alleged innocent bona fide purchasers for value nor did it result in any admissions on behalf of defendant-appellants, bar any of their defenses or claims, or prejudice their rights. Little v. Barson Fin. Servs. Corp., 138 N.C. App. 700, 531 S.E.2d 889, 2000 N.C. App. LEXIS 792 (2000).

Costs. — Where the defendant disclaims title to lands in a suit to remove a cloud thereon, the plaintiff is chargeable with the costs under the express provisions of this section. Clemmons v. Jackson, 183 N.C. 382, 111 S.E. 609 (1922).

In an action for trespass and for damages, the plaintiff, after trial of issues as to trespass, etc., may not abandon these contentions upon the trial, and have the court consider the action as an equitable one to remove a cloud upon the title, and so avoid the payment of the full amount of the costs incident to the litigated issues. Clemmons v. Jackson, 183 N.C. 382, 111 S.E. 609 (1922).

B. Pleadings.

Sufficiency of Bill of Complaint. — Where a bill asserts that the complainant is the owner of certain designated lands, sets forth the chain of title, and alleges that the defendant claims an adverse interest in the said lands, which claim renders sale impossible and otherwise casts a cloud over complainant's title, it sufficiently states a cause of action to quiet title under this section. North Carolina Mining Co. v. Westfeldt, 151 F. 290 (W.D.N.C. 1907), rev'd on other grounds, 166 F. 706 (4th Cir. 1909).

A complaint, which alleged that defendant city claimed, without legal right thereto, a right-of-way on and over plaintiff's land, and that such claim was a cloud on his title, was sufficient to state a cause of action within the purview of this section. Cannon v. Wilmington, 242 N.C. 711, 89 S.E.2d 595 (1955), cert. denied, 352 U.S. 842, 77 S. Ct. 66, 1 L. Ed. 2d 58 (1956).

In an action to remove a cloud on title, a complaint alleging that defendants claimed under a receiver's deed and that the trustee in a prior deed of trust executed by the debtor was not a party to the receivership proceedings, is demurrable, since the mere fact that the trustee in the deed of trust was not a party does not in itself render the receiver's deed ineffectual. East Carolina Lumber Co. v. Pamlico County, 250 N.C. 681, 110 S.E.2d 278 (1959).

A complaint alleging that plaintiffs are the owners of a described tract of land by record title and that the State claims an interest therein by virtue of a specified registered deed, that plaintiffs have a superior title, and that the State's claim constituted a cloud on plaintiff's title is sufficient to state a cause of action to quiet title, and such action may be maintained against the State under the provisions of G.S. 41-10.1. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

A complaint meets the minimum requirements of this section where it alleges that the plaintiffs own the described land and that the defendant claims an interest therein adverse to them. York v. Newman, 2 N.C. 484, 163 S.E.2d 282 (1968).

A cause of action to remove a cloud from title is made out when the plaintiff introduces evidence that he has an interest in a described tract of land and the defendant is asserting, or attempting to assert, an unjust claim thereto. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Unnecessary to Allege Possession. — This section removed the necessity for alleging that the defendant was in possession. The plaintiff may now set out his claim of title, and if defendant disclaims any adverse claim, the plaintiff pays the cost, and the title as between them is settled. Asheville Land Co. v. Lange, 150 N.C. 26, 63 S.E. 164 (1908).

When Occupation Is Alleged. — But where the plaintiff alleges an occupation as the cause of action, not only must the allegation and proof correspond, but the testimony offered to show possession is open to objection and exception on the ground of competency. Duncan v. Hall, 117 N.C. 443, 23 S.E. 362 (1895).

Plaintiff's failure to show fee simple title to all the lands claimed is not fatal to its case. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Admission. — Where the defendants, by answer, admitted that the plaintiff owned an interest in the described lands, but asserted they also had an interest therein, this admission gave the plaintiff standing in court to challenge the defendants' claim as a cloud upon its title. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Answer Sufficient to Raise Issue. — Where the complaint in a suit to remove a cloud upon plaintiff's title to land alleges that the plaintiff is the owner of the locus in quo, and asks for a reformation of his deed to the lands to show that by mutual mistake the name of the grantee therein was that of a private business enterprise he was conducting, and that accordingly the defendants claimed an interest therein, an allegation in the answer in reply that the defendant had no knowledge or information sufficient to form a belief as to whether the plaintiff was conducting a business in the name of the grantee in the deed is sufficient to raise the issue, and a judgment in plaintiff's favor upon the pleadings is reversible error. Brinson v. Morris, 192 N.C. 214, 134 S.E. 453 (1926).

Issue as to Delivery of Deed. — Delivery of a deed is essential to its validity, and where the pleadings and evidence raise the question of delivery under this section the court's refusal to submit an issue thereon entitles appellant to a new trial. Ferguson v. Ferguson, 206 N.C. 483, 174 S.E. 304 (1934).

Pleadings Sufficient for Determination of Damages as in Condemnation. — Where, in addition, to the fact that general relief was prayed, the parties specifically asked that their rights be determined, and defendant, relying upon the right of eminent domain, asserted its right to flood lands in which plaintiffs owned mineral interests in derogation of plaintiffs' right of access, it was held that the damages resulting to plaintiffs from such floodings must be ascertained as in a suit for condemnation. Duke Power Co. v. Toms, 118 F.2d 443 (4th Cir. 1941).

The burden rests upon the defendant to establish a title which he has set up to defeat the complainant's claim of ownership. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

When the defendants alleged their title had its origin in a certain grant, from which they and their predecessors derived title, they thereby assumed the burden of locating the calls of the grant on the ground, and of showing that the grant covered at least a part of the lands described in the complaint. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

Where the defendants claim by record title, and not by adverse possession, and allege their record title had its genesis in a certain grant, the state of the pleadings casts upon them the burden of tracing their title to that grant. Resort Dev. Co. v. Phillips, 278 N.C. 69, 178 S.E.2d 813 (1971).

C. Jurisdiction of Courts.

Advisory Jurisdiction of Courts. — The advisory jurisdiction of courts of equity does not extend to the mere construction of a will to ascertain the rights thereunder of devisees or legatees. And such jurisdiction is not sustained under this section, when the suit is not brought by the plaintiff against some person claiming an adverse estate or interest. Heptinstall v. Newsome, 146 N.C. 503, 60 S.E. 416 (1908).

Dismissal of a suit brought by a group of beachfront landowners against the State of North Carolina, the State of North Carolina Department of Environment and Natural Resources, the Coastal Resources Commission, the Division of Coastal Management, and its director, was upheld on appeal because the landowners failed to allege in their complaint sufficient allegations to establish that the State of North Carolina asserted any claim of title to their land under G.S. 41-10.1 to have constituted a waiver of the state's sovereign immunity with regard to the landowners' suit to prevent the general public from interfering with their use of certain beach property, which the landowners claimed was deeded to them. Fabrikant v. Currituck County, 174 N.C. App. 30, 621 S.E.2d 19, 2005 N.C. App. LEXIS 2219 (2005).

Concurrent Jurisdiction of State and Federal Courts. — The remedy given by statutes of this character may be enforced in the federal court when the parties are inhabitants of different states. Johnston v. Kramer Bros. & Co., 203 F. 733 (E.D.N.C. 1913).

Where there is an action pending in the State courts to try the title to lands under this section, the State courts have thereby acquired jurisdiction over the property, and the federal courts will not entertain a suit in equity on the same facts and for the same relief. Westfeldt v. North Carolina Mining Co., 166 F. 706 (4th Cir.), cert. denied, 214 U.S. 516, 29 S. Ct. 697, 53 L. Ed. 1064, appeal dismissed, 215 U.S. 586, 30 S. Ct. 404, 54 L. Ed. 339 (1909).

This section does not enlarge the jurisdiction of federal courts of equity, as it merely regulates procedure and does not create any substantive right. And, even if it could be considered as creating an equitable right, it would not authorize the trial by a federal court of equity of what is in essence an action of ejectment, for the reason that in such action the defendant is entitled under the federal Constitution to a trial by jury. Wood v. Phillips, 50 F.2d 714 (4th Cir. 1931).

In an action under this section, while it is true that a federal court of equity lacks jurisdiction of a suit brought against a number of defendants claiming severally different portions of the land in dispute, that ground may oust the court's jurisdiction only in respect to those defendants who raise the objection, and, where title and possession in the complainant is sufficiently alleged, it is error to dismiss the suit as to those defendants who have made no defense, but submitted themselves and their interests to the jurisdiction of the court. New Jersey & N.C. Land & Lumber Co. v. Gardner-Lacy Lumber Co., 178 F. 772 (4th Cir. 1910).

Removal of Action to Federal Court. — Action to quiet title to real property in which plaintiff, the record owner, alleged that defendant had placed an IRS tax lien on the property, and that defendant's IRS tax lien was acting as a cloud on plaintiff's title and preventing plaintiff from selling or alienating the property was properly removed to federal district court, as the essential focus of plaintiff's action was the validity, priority, and extinguishment of the IRS tax lien. Wilkinson v. United States, 724 F. Supp. 1200 (W.D.N.C. 1989).

§ 41-10.1. Trying title to land where State claims interest.

Whenever the State of North Carolina or any agency or department thereof asserts a claim of title to land which has not been taken by condemnation and any individual, firm or corporation likewise asserts a claim of title to the said land, such individual, firm or corporation may bring an action in the superior court of the county in which the land lies against the State or such agency or department thereof for the purpose of determining such adverse claims. Provided, however, that this section shall not apply to lands which have been condemned or taken for use as roads or for public buildings. (1957, c. 514.)

CASE NOTES

Betterments claim is not a claim of title to land. It is, instead, a claim demanding payment for permanent improvements to the land over and above the value of the use and occupation of the land. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

State Did Not Consent to Be Sued for Betterments. — Construing this section strictly, a claim for betterments is not a claim of title to land. The State therefore has not consented to be sued for betterments and is entitled to the full protection of its sovereign immunity. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

"Claim of Title to Land" Cannot Be Broadened to Include Claim for Betterments. — Sovereign immunity is a common-law doctrine to which the existing exceptions or waivers have been mandated by the legislature, and statutes which waive the benefits of the doctrine of sovereign immunity are to be strictly construed. Thus, the phrase "claim of title to land" contained in this section cannot be broadened to include a claim for betterments under G.S. 1-340. The betterments statute does not, by its terms, create a right against the State. State v. Taylor, 322 N.C. 433, 368 S.E.2d 601 (1988).

Suit May Be Brought to Determine Extent of Easement Granted by State. — A controversy between an individual and the State as to the extent of an easement granted to the individual by the State may be made the basis of a suit against the State in the superior court under G.S. 1-253, since such suit involves title to realty within the purview of this section. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963).

Sufficiency of Complaint. — A complaint alleging that plaintiffs are the owners of a described tract of land by record title and that the State claims an interest therein by virtue of a specified registered deed, that plaintiffs have a superior title, and that the State's claim constituted a cloud on plaintiff's title is sufficient to state a cause of action to quiet title, and such action may be maintained against the State under the provisions of this section. Williams v. North Carolina State Bd. of Educ., 266 N.C. 761, 147 S.E.2d 381 (1966).

Dismissal of a suit brought by a group of beachfront landowners against the State of North Carolina, the State of North Carolina Department of Environment and Natural Resources, the Coastal Resources Commission, the Division of Coastal Management, and its director, was upheld on appeal because the landowners failed to allege in their complaint sufficient allegations to establish that the State of North Carolina asserted any claim of title to their land under G.S. 41-10.1 to have constituted a waiver of the state's sovereign immunity with regard to the landowners' suit to prevent the general public from interfering with their use of certain beach property, which the landowners claimed was deeded to them. Fabrikant v. Currituck County, 174 N.C. App. 30, 621 S.E.2d 19, 2005 N.C. App. LEXIS 2219 (2005).

When the title to the property is no longer in question, plaintiffs may not sue the State for any further damages. Mattox v. State, 21 N.C. App. 677, 205 S.E.2d 364 (1974).

Where the defendant city was already in possession of the disputed property at the time of plaintiff's action, the action was in the nature of ejectment and merely an action to try title. Costner v. City of Greensboro, 37 N.C. App. 563, 246 S.E.2d 552 (1978).

Applied in East Carolina Lumber Co. v. Pamlico County, 250 N.C. 681, 110 S.E.2d 278 (1959); Roten v. State, 8 N.C. App. 643, 175 S.E.2d 384 (1970).

§ 41-11. Sale, lease or mortgage in case of remainders.

In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale, lease or mortgage of the property by a special proceeding in the superior court, which proceeding shall be conducted in the manner pointed out in this section. Said proceeding may be commenced by summons by any person having a vested interest in the land, and all persons in esse who are interested in said land shall be made parties defendant and served with summons in the way and manner now provided by law for the service of summons in other special proceedings, as provided by Rule 4 of the Rules of Civil Procedure, and service of summons upon nonresidents, or persons whose names and residences are unknown, shall be by publication as now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors, or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the clerk of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem, to represent such remainderman, upon whom summons shall be served as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such actions, and when counsel is needed to represent him, to make this known to the clerk, who shall by an order give instructions as to the employment of counsel and the payment of fees.

The court shall, if the interest of all parties require or would be materially enhanced by it, order a sale of such property or any part thereof for reinvestment, either in purchasing or in improving real estate, less expense allowed by the court for the proceeding and sale, and such newly acquired or improved real estate shall be held upon the same contingencies and in like manner as was the property ordered to be sold. The court may authorize the loaning of such money subject to its approval until such time when it can be reinvested in real estate. And after the sale of such property in all proceedings hereunder, where there is a life estate, in lieu of said interest or investment of proceeds to which the life tenant would be entitled to, or to the use of, the court may in its discretion order the value of said life tenant's share during the probable life of such life tenant, to be ascertained as now provided by law, and paid out of the proceeds of such sale absolutely, and the remainder of such proceeds be reinvested as herein provided. Any person or persons owning a life estate in lands which are unproductive and from which the income is insufficient to pay the taxes on and reasonable upkeep of said lands shall be entitled to maintain an action, without the joinder of any of the remaindermen or reversioners as parties plaintiff, for the sale of said property for the purpose of obtaining funds for improving other nonproductive and unimproved real estate so as to make the same profit-bearing, all to be done under order of the court, or reinvestment of the funds under the provisions of this section, but in every such action when the rights of minors or other persons not sui juris are involved, a competent and disinterested attorney shall be appointed by the court to file answer and represent their interests. The provisions of the preceding sentence, being remedial, shall apply to cases where any title in such lands shall have been acquired before, as well as after, its passage — March 7, 1927.

The clerk of the superior court is authorized to make all orders for the sale, lease or mortgage of property under this section, and for the reinvestment or securing and handling of the proceeds of such sales, but no sale under this section shall be held or mortgage given until the same has been approved by the resident judge of the district, or the judge holding the courts of the district at the time said order of sale is made. The approval by the resident judge of the district may be made by him either during a session of court or at chambers. All orders of approval under said statute by judges resident in the district heretofore made either during a session of court or at chambers are hereby ratified and validated.

The court may authorize the temporary reinvestment, pending final investment in real estate, of funds derived from such sale in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or bonds of the State of North Carolina issued since the year 1972; but in the event of such reinvestment, the commissioners, trustees or other officers appointed by the court to hold such funds shall hold the bonds in their possession and shall pay to the life tenant and owner of the vested interest in the lands sold only the interest accruing on the bonds, and the principal of the bonds shall be held subject to final reinvestment and to such expense only as is provided in this section. Temporary reinvestments, as aforesaid, in any direct obligation of the United States of America or any indirect obligation guaranteed both as to principal and interest or State bonds heretofore made with the approval of the court of all or a part of the funds derived from such sales are ratified and declared valid.

The court shall, if the interest of the parties require it and would be materially enhanced by it, order such property mortgaged for such term and on such condition as to the court seems proper and to the best interest of the interested parties. The proceeds derived from the mortgage shall be used for the purpose of adding improvements to the property or to remove existing liens on the property as the court may direct, but for no other purpose. The mortgagees shall not be held responsible for determining the validity of the liens, debts and expenses where the court directs such liens, debts and expenses to be paid. In all cases of mortgages under this section the court shall authorize and direct the guardian representing the interest of minors and the guardian ad litem representing the interest of those persons unknown or not in being to join in the mortgage for the purpose of conveying the interest of such person or persons. In all cases of mortgages under this section the owner of the vested interest or his or her legal representative shall within six months from the date of the mortgage file with the court an itemized statement showing how the money derived from the said mortgage has been expended, and shall exhibit to the court receipts for said money. Said report shall be audited in the same manner as provided for the auditing of guardian's accounts. The owner of the vested interest or his or her legal representative shall collect the rents and income from the property mortgaged and apply the proceeds first to taxes and discharge of interest on the mortgage and the annual curtailment as provided thereby, or if said person uses or occupies said premises he or she shall pay the said taxes, interest and curtailments and said party shall enter into a bond to be approved by the court for the faithful performance of the duties hereby imposed, and such person shall annually file with the court a report and receipts showing that taxes, interest and the curtailment as provided by the mortgage have been paid.

The mortgagee shall not be held responsible for the application of the funds secured or derived from the mortgage. The word "mortgage" whenever used herein shall be construed to include deeds in trust. (1903, c. 99; 1905, c. 548; Rev., s. 1590; 1907, cc. 956, 980; 1919, c. 17; C.S., s. 1744; Ex. Sess. 1921, c. 88; 1923, c. 69; 1925, c. 281; 1927, cc. 124, 186; 1933, c. 123; 1935, c. 299; 1941, c. 328; 1943, cc. 198, 729; 1947, c. 377; 1951, c. 96; 1967, c. 954, s. 3; 1971, c. 528, s. 39.)

Cross References. — As to constitutional restriction against perpetuities, see N.C. Const., Art. I, § 34. As to vagueness of description of land in pleadings, see G.S. 8-39. As to vagueness of description in conveyance, see G.S. 39-2. As to sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse, see G.S. 41-11.1. As to partition sales of real property generally, see G.S. 46-22 to 46-34.

Legal Periodicals. — For comment on the 1941 amendment, see 19 N.C.L. Rev. 506 (1941).

For brief discussion of the 1947 amendment, see 25 N.C.L. Rev. 390 (1947).

For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

CASE NOTES

I. General Consideration.
II. Action in Superior Court for Sale.
III. Sale and Reinvestment.
IV. Illustrative Cases.

I. GENERAL CONSIDERATION.

Constitutionality and Validity. — Revisal, s. 1590, now this section, providing for the sale of contingent remainders, is constitutional and valid. Smith v. Miller, 151 N.C. 620, 66 S.E. 671 (1909), petition for rehearing dismissed, 152 N.C. 314, 67 S.E. 746 (1910).

This section does not interfere with the essential rights of ownership, but, operating in addition to those already possessed, is constitutional and valid. Pendleton v. Williams, 175 N.C. 248, 95 S.E. 500 (1918).

Retroactive Effect. — Chapter 99, Laws 1903, Rev., s. 1590, now this section, is valid, even when allowed to reach back and affect estates already created by will, though only so far as it is permitted to apply to interests not yet vested. Anderson v. Wilkins, 142 N.C. 154, 55 S.E. 272 (1906). See Springs v. Scott, 132 N.C. 548, 44 S.E. 116 (1903).

The decision in Springs v. Scott was approved in Hodges v. Lipscomb, 133 N.C. 199, 45 S.E. 556 (1903), a case in which it appeared that the will was made prior to the passage of Laws 1903, c. 99. It was there held that the act of 1903 operated retrospectively, so as to apply to contingent interest created by a will which had already taken effect by the death of the testator. Anderson v. Wilkins, 142 N.C. 154, 55 S.E. 272 (1906).

Purpose of Section. — To prevent any possible doubt of the existence of the power of the court, upon the application of all the parties in interest, the trustee representing contingent remaindermen, and to provide for its exercise and protect the interest of all parties in remainder, whether in esse or not, the act of 1903, now this section, was passed. McAfee v. Green, 143 N.C. 411, 55 S.E. 828 (1906).

The purpose of this section is not to obtain predictive declarations of future rights of the parties, inter se, but rather to promote the interest of all the parties by allowing the sale of desirable land free from restrictions imposed by the presence of uncertainties as to whom the land will ultimately belong. Crumpton v. Crumpton, 290 N.C. 651, 227 S.E.2d 587 (1976).

The remedial purpose of this section may be served where there are contingent remainders over to persons not in being, or the contingency has not happened which will determine who the ultimate remaindermen are, but to achieve the desired result the provisions of the statute must be observed. Barnes v. Dortch, 245 N.C. 369, 95 S.E.2d 872 (1957).

Section Does Not Destroy Interest of Remote Contingent Remaindermen. — It was not the purpose of this section to destroy the interest of the remote contingent remaindermen, but to enable the present owners to sell the property and make a good title to the same, and to require that the proceeds be held as a fund, subject to the claims of persons who may ultimately be entitled thereto, and safeguard their rights in all respects. Poole v. Thompson, 183 N.C. 588, 112 S.E. 323 (1922). See Lancaster v. Lancaster, 209 N.C. 673, 184 S.E. 527 (1936).

It will be noted that this section does not, either in its terms or purpose, profess or undertake to destroy the interest of the contingent remaindermen in the property, but only contemplates and provides for a change of investment, and, subject to the right to use a reasonable portion of the amount for the improvement of the remainder, when properly safeguarded, it impresses upon the fund the same contingencies and limitations as were imposed upon the original property. Dawson v. Wood, 177 N.C. 158, 98 S.E. 459 (1919).

When Section Applicable. — This section (before the 1927 amendment) and G.S. 41-12 apply only to a sale of property in which there are or have been contingent interests. Waddell v. United Cigar Stores, 195 N.C. 434, 142 S.E. 585 (1928).

The 1927 amendment, where the land is unproductive, etc., extends the right of action to include life estates where there are vested remaindermen and reversioners without their joinder. The section theretofore had reference only to contingent remainders. Stepp v. Stepp, 200 N.C. 237, 156 S.E. 804, 76 A.L.R. 536 (1931).

A sale under this section can be ordered only in a "special proceeding," which must be instituted before the clerk of the superior court, and the section has no application to an action for waste under G.S. 1-533. Parrish v. Parrish, 247 N.C. 584, 101 S.E.2d 480 (1958).

Strict Compliance Required. — In order that a valid conveyance of the land in fee simple be made pursuant to this section, it is essential that the provisions of the statute be strictly complied with. Blades v. Spitzer, 252 N.C. 207, 113 S.E.2d 315 (1960).

Applied to Charitable and Other Trusts. — Courts, in the exercise of general equitable jurisdiction, may, in proper instances, decree a sale of estate in remainder and affected by contingent interests, for reinvestment, or a portion thereof, when it is shown that it is necessary for the preservation of the estate and the protection of its owners; and this principle is not infrequently applied in the proper administration of charitable and other trusts, notwithstanding limitations in instruments creating them that apparently impose restrictions on the powers of the trustee in this respect, when it is properly established that the sale is required by the necessities of the case and the successful carrying out of the dominant purposes of the trust. Middleton v. Rigsbee, 179 N.C. 437, 102 S.E. 780 (1920).

The sale of an estate in remainder affected under the terms of a will with certain ultimate and contingent interests in trust will not be affected by a clause in the will requiring that the principal of the trust fund shall not be used or diminished during the period of 30 years, with a certain exception, the limitation applying only to the administration of the trust estate, and not preventing the court from ordering a sale when required by the necessities of the estate for its preservation. Middleton v. Rigsbee, 179 N.C. 437, 102 S.E. 780 (1920).

Section Does Not Limit Power of Court over Trusts. — This section, authorizing those who have a vested interest in land with contingent remainders over to persons not in being to petition for and procure the sale of the land for reinvestment, does not limit the power of the court to supervise the administration of trust estates and to enter such orders and decrees in respect thereto as circumstances may require, so that the interest of contingent remaindermen and other beneficial owners may be sold to preserve the trust estate from destruction. First-Citizens Bank & Trust Co. v. Rasberry, 226 N.C. 586, 39 S.E.2d 601 (1946).

Power of Court Independent of Section. — The court, without regard to the Act of 1903, now this section, has the power to order the sale of real estate limited to a tenant for life, with remainder to children or issue, and upon failure thereof, over to persons, all or some of whom are not in esse, when one of the class being first in remainder after the expiration of the life estate is in esse and a party to the proceeding to represent the class, and upon decree passed, and sale and title made pursuant thereto, the purchaser acquires a perfect title as against all persons in esse or in posse. Springs v. Scott, 132 N.C. 548, 44 S.E. 116 (1903).

While the courts of this State do not have inherent power to decree a sale and pass title to the purchaser of lands, with remainder limited upon a contingency that would prevent the ascertainment of the ultimate takers, or any of them, till the death of the life tenant, this power is now conferred by the express terms of our statute in all cases where there is a vested interest in real estate, with a contingent interest over to persons not in being, or when the contingency has not happened which shall determine who the remaindermen are, under the procedure therein laid down. Dawson v. Wood, 177 N.C. 158, 98 S.E. 459 (1919).

Decree May Be Binding on Persons Not in Esse. — A lease authorized by the decree of a court of chancery may be binding upon beneficiaries not in esse, when their interests are the same as those of persons in being who are subjected by due process to the jurisdiction of the court. Waddell v. United Cigar Stores, 195 N.C. 434, 142 S.E. 585 (1928), wherein a lease of trust property was held valid over the objection that it might extend beyond the term of the trust.

Status of Remainders. — Contingent remainders are no longer considered mere possibilities which cannot be transferred, but a remainderman whose estate is contingent may convey it. 2 N.C.L. Rev. 126; Beacon v. Amos, 161 N.C. 357, 77 S.E. 407 (1913).

Applied in Cheshire v. Carolina Power & Light Co., 54 N.C. App. 467, 283 S.E.2d 810 (1981).

Cited in Smith v. Witter, 174 N.C. 616, 94 S.E. 402 (1917); Hines v. Williams, 198 N.C. 420, 152 S.E. 39 (1930); Greene v. Stadiem, 198 N.C. 445, 152 S.E. 398 (1930); Cole v. Cole, 229 N.C. 757, 51 S.E.2d 491 (1949); Davis v. Griffin, 248 N.C. 539, 103 S.E.2d 728 (1958); Menzel v. Menzel, 250 N.C. 649, 110 S.E.2d 333 (1959); De Lotbiniere v. Wachovia Bank & Trust Co., 2 N.C. App. 252, 163 S.E.2d 59 (1968); Simpson v. Simpson, 29 N.C. App. 14, 222 S.E.2d 747 (1976); Stoney v. MacDougall, 31 N.C. App. 678, 230 S.E.2d 592 (1976).

II. ACTION IN SUPERIOR COURT FOR SALE.

General Requirements for Sale. — Lands devised for life with contingent limitations over may be sold for reinvestment under the provisions of this section, under the court's order, subject to its future approval of the sale, when it is made to appear that the best interest of all parties so requires, and those living and in present interest are represented in person, and unborn children by guardian ad litem. McLean v. Caldwell, 178 N.C. 424, 100 S.E. 888 (1919).

Jurisdiction Cannot Be Conferred by Consent. — Jurisdiction of the superior court of an action by owner of a vested estate against contingent remaindermen to sell land cannot be conferred by consent, and this section, authorizing such an action, must be strictly complied with. Watson v. United States, 34 F. Supp. 777 (M.D.N.C. 1940).

Jurisdiction on Appeal from Proceedings Improperly Brought before Clerk. — Lands subject to contingent limitations may be sold by order of the judge of the superior court in term (now during a session of court), on appeal in proceedings in partition improperly brought before the clerk, by retaining jurisdiction for the purpose of settling the controversy. Ryder v. Oates, 173 N.C. 569, 92 S.E. 508 (1917).

Where an action is wrongfully brought before the clerk of the superior court and is taken to the superior court by appeal, the superior court having original jurisdiction, it will be retained for hearing. Springs v. Scott, 132 N.C. 548, 44 S.E. 116 (1903).

Authority of Clerk. — It was not contemplated by this section that the rights of parties should be entrusted to the clerks of the superior court in ordinary special proceedings without approval or confirmation by a judge of the superior court. Ray v. Poole, 187 N.C. 749, 123 S.E. 5 (1924).

Proceedings Brought under § 46-3. — A tenant for life may not, directly or indirectly, affect the title of those in remainder, whether having a vested or contingent interest in the lands, by joining them in their proceedings for a division or sale for that purpose, brought before the clerk of the court under the provisions of G.S. 46-3, and these proceedings so brought cannot be validated by derivative jurisdiction in the superior court, on appeal, under the provisions of this section, it being required that the proceedings be originally brought in the latter jurisdiction, with certain requirements for the protection of contingent remaindermen, which must be strictly followed; and, though under G.S. 46-23, 46-24 a sale is provided when the land is affected with a contingent interest in remainder, not presently determinable, the proceedings are therein required to be brought upon petition of such remaindermen, and not upon that of the life tenants. Ray v. Poole, 187 N.C. 749, 123 S.E. 5 (1924).

Life Tenant May Not Have Partition under § 46-24. — A tenant for life in lands may not by adversary proceedings against the remaindermen compel the sale of lands for partition of the proceeds under G.S. 46-24, but upon a proper showing the sale for reinvestment may be ordered in equitable proceedings under the provisions of this section. Smith v. Suitt, 199 N.C. 5, 153 S.E. 602 (1930).

Who May Institute Suit. — Proceedings to have lands sold that are subject to a life estate, with limitation over, upon contingencies which will prevent the ascertainment of the remaindermen during the life of the first taker, etc., may be instituted by any person having a present vested interest in the lands. Dawson v. Wood, 177 N.C. 158, 98 S.E. 459 (1919).

The life beneficiary of a trust estate has a vested equitable estate therein so as to entitle her to institute proceedings for the sale of lands of the estate for reinvestment, and the trustees are proper parties to the proceeding. Blades v. Spitzer, 252 N.C. 207, 113 S.E.2d 315 (1960).

Plaintiff Must Have Vested Interest. — In a proceeding under this section to sell real property in which there is a contingent interest, plaintiff must be a person having a vested interest in the property to be sold, and the sale must be passed upon by the judgment of the superior court. The contingent interest alone cannot be sold. Butler v. Winston, 223 N.C. 421, 27 S.E.2d 124 (1943).

Where one who had no vested estate in land brought action in the superior court against contingent remaindermen to sell land, the court lacked jurisdiction of the action, and hence the judgment ordering sale of the land was void and could be collaterally attacked. Watson v. United States, 34 F. Supp. 777 (M.D.N.C. 1940). See Barnes v. Dortch, 245 N.C. 369, 95 S.E.2d 872 (1957).

Necessary Parties. — Where timber growing upon lands was devised to testator's daughter for her life, and at her death to such of her children and grandchildren then living as she might have appointed in her will, or, upon her failure to exercise the power of appointment, to her children and grandchildren then living, objection to proceedings brought by the devisee and her children and grandchildren then living on the ground that no one having a vested interest in the land had been made a party could not be sustained. Midyette v. Lycoming Timber & Lumber Co., 185 N.C. 423, 117 S.E. 386 (1923). See Thompson v. Humphrey, 179 N.C. 44, 101 S.E. 738 (1919).

In proceedings under this section certain contingent interests in land held in trust were sold and reinvested in other lands in accordance with the terms of the trust in the original deed conveying them. The title acquired under the original deed in trust by the trustee had become passive in him, and it was held that as, under the statute of uses, the legal and equitable title had merged in the same person, neither the trustee nor his heirs were necessary parties to the owner's action against a purchaser to enforce his contract of purchase, and especially so when all vested and contingent interests were represented by some of the parties to the suit. Lee v. Oates, 171 N.C. 717, 88 S.E. 889 (1916).

Construing the statute, as amended, in Hodges v. Lipscomb, 133 N.C. 199, 45 S.E. 556 (1903), the court held that it was only necessary to make parties defendant those of the contingent remaindermen who, on the happening of the contingency, would presently have an estate in the property at the time of action commenced, and as to others more remotely interested they could have their interest represented and protected by the guardian ad litem as the statute provides. Dawson v. Wood, 177 N.C. 158, 98 S.E. 459 (1919).

A special proceeding under this section to authorize the sale for reinvestment of certain land in which there are contingent interests must be brought by a person having a vested interest in the land and those, who on the happening of the contingency would presently have an estate in the property at the time the proceeding is commenced, made parties and served with summons. Barnes v. Dortch, 245 N.C. 369, 95 S.E.2d 872 (1957).

Effect of Omission of Persons Having Contingent Interests. — An order of sale and judgment of confirmation will not be vacated on the ground that certain contingent remaindermen were not made parties to the proceedings to sell, where the interest of the contingent remaindermen has, since the sale, been extinguished by failure of the contingency. Beam v. Gilkey, 225 N.C. 520, 35 S.E.2d 641 (1945).

Setting Aside Sale for Failure to Serve Summons on Infant. — Where in proceedings to sell lands affected with contingent interests the provisions of this section have been observed, and the clerk has appointed a guardian ad litem for contingent interests and for infant parties, the failure to serve summons on a minor is to be regarded as an irregularity that will not render the sale void and a nullity. However, on a proper showing, the sale may be set aside as to all the parties except an innocent purchaser without notice of the irregularity; and on appeal to the Supreme Court, when this fact is not apparent, the case will be remanded for its ascertainment. Welch v. Welch, 194 N.C. 633, 140 S.E. 436 (1927).

Where Guardian Appointed after Sale. — In a proceeding under this section to sell all the contingent interest in certain lands of minors and unborn children, where petitioners were represented by a guardian, judgment of sale signed on the day before the guardian's appointment was void. Butler v. Winston, 223 N.C. 421, 27 S.E.2d 124 (1943).

When Action Abates. — An action against a contingent remainderman to sell the lands under this section abates upon the death of the remainderman prior to the termination of the life estate, when his limitation over is made to depend upon his surviving the life tenant. Redden v. Toms, 211 N.C. 312, 190 S.E. 490 (1937).

Estoppel by Judgment. — Where an executor under a will with power to sell the lands of his testate and reinvest the proceeds, etc., has died, and all persons in present and contingent interest have been made parties to an action wherein the court has substituted another as trustee, upon like trusts in every respect, and the decree was not appealed from, all the privies and parties are estopped as to all issuable matters therein, and may not deny the power of the substituted trustee to make sale of the lands as fully as the executor under the will was therein authorized to make. Hayden v. Hayden, 178 N.C. 259, 100 S.E. 515 (1919).

Preliminary Judgment for Payment of Betterments. — Where a preliminary judgment in proceedings to sell lands with contingent interests provides for the payment of betterments to the life tenant, and in this respect the judgment is not excepted to or appealed from, it is conclusive upon the parties as an estoppel. Pendleton v. Williams, 175 N.C. 248, 95 S.E. 500 (1918).

Judgment under Former Law Does Not Work Estoppel. — A former action determined before the enactment on the subject by the legislature, holding that contingent remainders in lands, etc., cannot be sold unless all persons who may by any possibility be interested unite in the decree, cannot estop the parties to proceedings thereafter brought under the provisions of this section. Pendleton v. Williams, 175 N.C. 248, 95 S.E. 500 (1918).

Irregularities in Judgment against Person Having no Interest. — Irregularity of entering a consent judgment against testator's minor grandson without investigation and approval of the court may be disregarded where the minor had no interest. Beam v. Gilkey, 225 N.C. 520, 35 S.E.2d 641 (1945).

III. SALE AND REINVESTMENT.

Section Contemplates Reinvestment. — This section contemplates that the proceeds of the sale, less expenses and perhaps the present worth of the life tenant's share, will be reinvested, either in purchasing or in improving real estate. Crumpton v. Crumpton, 290 N.C. 651, 227 S.E.2d 587 (1976).

Public or Private Sale Permissible. — The sale of estates affected with contingent interests, under the provisions of this section, may, in the sound discretion of the trial judge and subject to his approval, be made either at public auction or by private negotiation, as the best interests of the parties may require. Middleton v. Rigsbee, 179 N.C. 437, 102 S.E. 780 (1920). See McAfee v. Green, 143 N.C. 411, 55 S.E. 828 (1906).

Where the sale of land affected with remote contingent interests not ascertainable at the time, comes within the provisions of this section, the court having jurisdiction may order the property disposed of either at a public or private sale, when it is shown that, as to the one or the other, the best interests of the parties will be promoted, subject always to the approval of the court. Poole v. Thompson, 183 N.C. 588, 112 S.E. 323 (1922).

Where the provisions of this section have been observed in the sale of lands affected with contingent interests, the commissioner appointed to make the sale may effect the same by private negotiations, subject to the approval of the court, when it is properly made to appear that the best interests of the parties so require. Midyette v. Lycoming Timber & Lumber Co., 185 N.C. 423, 117 S.E. 386 (1923).

The court has the power to order the private sale of lands affected with contingent interests under the provisions of this section under a proper finding that it would be to the best interests of all concerned, without submitting this issue to the jury, and where the proceedings are properly had and all parties are before the court, the objection is untenable that the sale was made under the decision of the court, and the parties had not agreed thereto. DeLaney v. Clark, 196 N.C. 282, 145 S.E. 398 (1928). See Ryder v. Oates, 173 N.C. 569, 92 S.E. 508 (1917).

Bond Required. — Where the court decrees a sale of trust property for reinvestment, the trustees should be required to give bond, or other legal provision should be made, to assure the safety of the funds arising from the sale, notwithstanding that the will provides that the trustees should not be required to give bond in administering the trust, since in acting under the decree of the court the trustees act as commissioners of the court and not necessarily as trustees under the will. Blades v. Spitzer, 252 N.C. 207, 113 S.E.2d 315 (1960).

Decree Must Provide for Reinvestment. — Where real estate is sold under order of the court, the decree must provide for investment of the fund in such way as the court may deem best for the protection of all persons who have or may have remote or contingent interests. Springs v. Scott, 132 N.C. 548, 44 S.E. 116 (1903).

Discretion of Court and Clerk in Reinvestment. — Before the 1923 amendment, which inserted the first sentence of the third paragraph of this section, it was held that the preservation of the proceeds of the sale of lands, under this section, was referred to the sound discretion of the trial judge, and no error was found to an order requiring the funds to be paid into the office of the clerk of the superior court, to be loaned out by him or otherwise invested as required by law until the happening of the contingency, except that it should be so modified as to require that interest on these loans be allowed the owners of the particular estate, it appearing that they were given the usufruct of the land. Pendleton v. Williams, 175 N.C. 248, 95 S.E. 500 (1918).

Time of Reinvestment. — In Laws 1905, c. 548, the reinvestment in realty was required to be within two years, but such requirement was removed by the later Laws 1907, cc. 956 and 980, leaving the matter of reinvestment somewhat in the discretion of the court, but with clear intimation that the fund should be reinvested in realty when an advantageous opportunity should be offered. Dawson v. Wood, 177 N.C. 158, 98 S.E. 459 (1919).

Effect of Omitting Bond Required by § 1-407. — In all cases where property affected with unascertainable contingent remainders is ordered sold under the provisions of this section, it is now required by G.S. 1-407 that a bond be given to assure the safety of the funds arising from the sale; but where this is omitted from a judgment otherwise regular, it will not affect the title conveyed, though the decree should be modified in that respect by proper steps taken in the superior court. Poole v. Thompson, 183 N.C. 588, 112 S.E. 323 (1922).

Where an order has been made for the sale of timber growing upon lands affected with contingent interests, the court should also require its commissioner appointed for the sale to give bond for the preservation and proper application of the proceeds of sale, etc., under G.S. 1-407; but this provision does not affect the title of the purchaser, who is not required to see to the application of the funds, and the proper order in this respect may be supplied by amendment or supplementary decree. Midyette v. Lycoming Timber & Lumber Co., 185 N.C. 423, 117 S.E. 386 (1923).

Purchaser's Liability Ends When Money Paid into Court. — A purchaser of devised lands affected with a life estate and contingent limitation over, sold for reinvestment under the provisions of this section, is not ordinarily charged with the duty of looking after the proper disposition of the purchase money, and upon paying it into court, under its order, he is quit of further obligation concerning it. McLean v. Caldwell, 178 N.C. 424, 100 S.E. 888 (1919).

Where the purchaser at a sale of lands for reinvestment pays his money into the court or to the person authorized by order of court to receive it, ordinarily he is not required to see to the proper application of the fund, its safety being taken care of by the court in its final decree. DeLaney v. Clark, 196 N.C. 282, 145 S.E. 398 (1928).

Purchaser Takes Fee Simple Title. — A purchaser at a sale of land with contingent interests allowed under the provisions of this section acquires a fee simple title, upon payment of purchase price to the court or person authorized to receive it, without being required to see to the application of the funds, and on such payment made is quit of all obligations concerning it. Pendleton v. Williams, 175 N.C. 248, 95 S.E. 500 (1918).

Commissioner Held Without Authority to Insert Restrictions in Deed. — Where a commissioner was authorized by the court to sell part of the lands of an estate for reinvestment under the provisions of this section, and there were no restrictions in regard to the use of the property of the estate, and in the commissioner's report and recommendation of the offer to purchase, no authority to restrict the use of the property was asked, and none granted in the order of the court, it was held that the commissioner was without authority to insert restrictions in the deed to the purchaser, his authority being limited under the order of the court to the sale of the property and the distribution of the proceeds of sale. Southern Real Estate Loan & Trust Co. v. Atlantic Ref. Co., 208 N.C. 501, 181 S.E. 633 (1935).

IV. ILLUSTRATIVE CASES.

Where lands are affected with a contingent interest in remainder, not determinable during the life of the tenant for life, the holder of the vested interest and those in immediate remainder may proceed to have the lands sold under the provisions of this section, and have those remotely interested represented by guardian ad litem for the protection of their interests; and where it is made to appear that the interest of all parties requires, or will be materially enhanced by it, the court may order a sale of the property, or any part thereof, for reinvestment, either in purchasing or improving real estate, etc., or invested temporarily to be held under the same contingencies in like manner as the property ordered to be sold. Poole v. Thompson, 183 N.C. 588, 112 S.E. 323 (1922).

Complaints Held Good on Demurrer. — A testator devised his improved and unimproved lands, in the corporate limits of a town, to his daughter for life with remainder to her children living at her death, with ulterior limitations over to trustees on certain contingencies, and the life tenant brought proceedings for sale and reinvestment of the proceeds under the provisions of this section, having made parties of the persons interested in accordance with the statute, and alleged that by the sale the income would be largely increased, that the sale of the contemplated part to a purchaser she had secured for a certain price would enable her to make improvements on the land then without income, to make houses on other parts of the land more profitable for rental purposes, etc., that the property as it stood was rapidly depreciating, and that there were no available funds, otherwise, to meet the necessary and insistent demands. It was held that a demurrer was bad, and properly overruled. Middleton v. Rigsbee, 179 N.C. 437, 102 S.E. 780 (1920).

Where the complaint of a life tenant alleges that the land is unproductive and income therefrom is insufficient to pay the taxes and reasonable upkeep, and prays that the land be sold in accordance with this section, the demurrer of the vested remaindermen is improperly sustained, the complaint alleging at least one good cause for action. Stepp v. Stepp, 200 N.C. 237, 156 S.E. 804 (1931).

Suit Regarding Management of Trust Estate. — In a suit regarding the management of a trust estate where the trustee and the testator's wife and children are parties and the one living grandchild is made a party defendant and is represented by a guardian ad litem, who also represents as a class the other grandchildren not in esse, all parties having an interest in the estate are properly represented, and the judgment of the court is binding as to all interests. Spencer v. McCleneghan, 202 N.C. 662, 163 S.E. 753 (1932).

Where the grantors in a deed have erroneously assumed that they had title to the lands which they conveyed in fee, but which were affected by future contingent interest not at present ascertainable, and thereafter bring action to make title under the provisions of this section, and in these proceedings have protected the interest of the remote remaindermen by the appointment for them of a guardian ad litem, and have fully set forth the facts and circumstances of the former sale, and bring in the proceeds and submit them to the jurisdiction and orders of the court, the final judgment authorizing and confirming the sale, being had in conformity with the provisions of the statute, perfects the title, and same will inure to the benefit of the covenantee in the former deed, and for a breach of this covenant only nominal damages are recoverable. Myer v. Thompson, 183 N.C. 543, 112 S.E. 328 (1922).

Testator devised land to his five brothers and sisters and a nephew "for their lives and then to their children." The life tenants partitioned the land into equal shares, and the lot partitioned to a surviving brother, aged 75 without children, was conveyed by the children of the four deceased life tenants and the other surviving life tenant and her children to the wife of the surviving brother. The petitioners who purchased the lot from the surviving brother and his wife were not entitled to sell it by virtue of a proceeding under this section where the heirs of the testator living at the time of the proceeding were not made parties, since upon the death of the brother without issue the land would revert to the heirs of the testator living at that time. Barnes v. Dortch, 245 N.C. 369, 95 S.E.2d 872 (1957).

A will devised a life estate to daughter with remainder to her children but she renounced her life estate and it was adjudicated that the renunciation of the life estate accelerated the vesting of title in members of the class in esse at the time. It was held that the acceleration of the estate of the remaindermen did not change the date when the final roll call will be made to ascertain members of the class, and although members of the class in esse are not required to account for rents and profits pending the birth of other members of the class, after-born children must be let in, and the fee simple title to the land cannot be conveyed prior to the death of the life tenant except for reinvestment pursuant to judicial decree. Neill v. Bach, 231 N.C. 391, 57 S.E.2d 385 (1950).

A devise of an estate in trust with provision that the income therefrom should be paid to a designated beneficiary for life and, upon her death, the corpus should be divided among her children, with further provision that the child or children of any deceased child of the life tenant should take such child's share, requires that the remaindermen be ascertained upon the falling in of the life estate, who then take under the will and not as heirs of the life tenant, so that this section is applicable. Blades v. Spitzer, 252 N.C. 207, 113 S.E.2d 315 (1960).

Foreclosure of Tax Lien. — Where land held by a life tenant with contingent limitation over, the persons entitled to the remainder not being determinable until the death of the life tenant, was mortgaged by the life tenant and the mortgage was foreclosed upon default, it was held that in an action to foreclose the lien for taxes against the land under former G.S. 105-414, in which the purchaser at the foreclosure sale, the life tenant and the known contingent remaindermen were made parties, and the minor contingent remaindermen, the unknown contingent remaindermen and those not in esse were represented by guardian ad litem under this section, and the provisions of both statutes were fully and accurately followed, the purchaser at the commissioner's sale acquired the fee simple title. Rodman v. Norman, 221 N.C. 320, 20 S.E.2d 294 (1942).

Sale of Growing Timber. — The timber growing upon lands devised to the testator's named daughter for her sole and separate use during her life only, and at her death to such of her children and grandchildren then living as she may have appointed in her will, and upon her failure to have done so, to her children and grandchildren then living, during the life of the daughter, was affected by the contingencies contemplated by this section. Midyette v. Lycoming Timber & Lumber Co., 185 N.C. 423, 117 S.E. 386 (1923).

Order of Sale Held Invalid. — The proceeding in which an order for the sale of a lot was made was not instituted and was not conducted in accordance with this section. The power of sale was not exercised by virtue of the statute. The proceeding was brought before the clerk, and not in term. The minors were not represented by guardian ad litem appointed by the judge, but by a next friend appointed by the clerk. The order of sale was signed, not during the term (now session) of the superior court in Haywood County, but by the judge holding the courts of the twentieth district (which includes Haywood County), at Sylva, in Jackson County, in said district. The order of sale could not, therefore, be held valid. Lide v. Wells, 190 N.C. 37, 128 S.E. 477 (1925).

Effect of Invalid Decree for Sale and Reinvestment. — In an action brought under the provisions of this section, to sell certain lands devised to E for life with a contingent remainder to her children, it appeared that to further a scheme to erect a hotel on one of the lots, the court had decreed the sale of certain other of the lands and had appointed a commissioner to act in furtherance of its object. The lands were sold and the proceeds applied to the building of the hotel, but the funds being only sufficient to erect the skeleton work of the hotel, other of the lands were decreed by the court to be sold, and their proceeds to be likewise applied; these would not be sufficient for the purpose, and when erected the hotel would not be a desirable investment, especially in the unfurnished condition in which it then would be left. It was held: (1) That the decree for the further sale and reinvestment was void, not meeting the statutory requirement that the interests involved should be properly safeguarded; (2) that the court was without authority to order an investment or reinvestment of funds not then available, but depending upon the outcome of future sales of the land, and of this, notice was implied to third persons; (3) that the purchasers at the sale of the land derived to a clear title thereto; (4) that the commissioner came under no personal liability to the contractor or materialmen of the hotel building; (5) that endorsers of a note made to procure money for building the hotel had no claim on the hotel lot; (6) that the commissioner should sell the hotel lot and report to the court, and that the proceeds be held for the benefit of the devisees to the extent of the value of the lots and the costs of improvements thereon free from the claims of materialmen, etc. Smith v. Miller, 151 N.C. 620, 66 S.E. 671, petition for rehearing dismissed, 152 N.C. 314, 67 S.E. 746 (1910).

Mortgage for Permanent Improvements Held Improper. — The locus in quo was devised to testator's daughter for life with limitation over to the daughter's children. The daughter and her husband expended large sums in making permanent improvements upon the property, and instituted this proceeding against their children, in esse or which might thereafter be born, seeking to have a mortgage in the sum of $20,900 placed on the property to refinance an existing mortgage on the property in the sum of $10,000, and also unsecured notes executed by the life tenant representing a part of the moneys used in making said improvements. It was held that since the remaindermen were in no way liable for any sums expended by the life tenant in making permanent improvements, the finding by the court that the execution of the mortgage to refinance the indebtedness would materially enhance the interest of the remaindermen was erroneous, and judgment directing the execution of the mortgage to refinance the indebtedness should be reversed. Hall v. Hall, 219 N.C. 805, 15 S.E.2d 273 (1941).

§ 41-11.1. Sale, lease or mortgage of property held by a "class," where membership may be increased by persons not in esse.

(a) Wherever there is a gift, devise, bequest, transfer or conveyance of a vested estate or interest in real or personal property, or both, to persons described as a class, and at the effective date thereof, one or more members of the class are in esse, and there is a possibility in law that the membership of the class may later be increased by one or more members not then in esse, a special proceeding may be instituted in the superior court for the sale, lease or mortgage of such real or personal property, or both, as provided in this section.

(b) All petitions filed under this section wherein an order is sought for the sale, lease or mortgage of real property, or of both real and personal property, shall be filed in the office of the clerk of the superior court of the county in which all or any part of the real property is situated. If the order sought is for sale, lease or mortgage of personal property, the petition may be filed in the office of the clerk of the superior court of the county in which any or all of such personal estate is situated.

(c) All members of the class in esse shall be parties to the proceeding, and where any of such members are under legal disability, their duly appointed general guardians or their guardians ad litem shall be made parties. The clerk of the superior court shall appoint a guardian ad litem to represent the interests of the possible members of the class not in esse, and such guardian ad litem shall be a party to the proceeding.

(d) Upon a finding by the clerk of the superior court that the interests of all members of the class, both those in esse and those not in esse, would be materially promoted by a sale, lease or mortgage of any such property, he shall enter an order that the sale, lease or mortgage be made, and shall appoint a trustee to make such sale, lease or mortgage, in such manner and on such terms as the clerk may find to be most advantageous to the interests of the members of the class, both those in esse and those not in esse; but no sale, lease or mortgage shall be made, or shall be valid, until approved and confirmed by the resident judge of the district, or the judge holding the courts of the district. As a condition precedent to receiving the proceeds of the sale, lease or mortgage, the trustee shall be bonded in the same manner as a guardian for minors.

(e) In the event of a sale of any such property, the proceeds of sale shall be owned in the identical manner as the property was owned immediately prior to the sale; provided,

(1) The trustee appointed by the clerk as provided above may hold, manage, invest and reinvest said proceeds for the benefit of all members of the class, both those in esse and those not in esse, until

the occurrence of the event which will finally determine the identity of all members of the class; all such investments and reinvestments shall be made in accordance with the laws of North Carolina relating to the investment of funds held by guardians or minors; and all the provisions of G.S. 36-4, relating to the reduction in bonds of guardians or trustees upon investment in certain registered securities and the deposit of the securities with the clerk of the superior court, shall be applicable to the trustee appointed hereunder;

(2) The clerk by appropriate order, in lieu of holding, managing, investing and reinvesting the proceeds of sale, may pay or authorize the trustee to pay the entire amount of such proceeds to the living members of the class as they may be then constituted or to their duly appointed guardians, or to pay the ratable portion or portions of such proceeds to one or more of such living members or to their guardians; provided that, where the class would be closed by the death of the mother or mothers of the members of the class, said mother or mothers are living and have attained the age of 55, and upon the further condition that there be first filed with the clerk a bond conditioned upon the payment of the lawful share of any member of the class not then in esse, but who may thereafter come into being or otherwise become a member of the class, to such member or his guardian whenever he becomes a living member of the class. Such bond shall be payable to the State to the use of the additional members of the class and shall be either a cash bond or a premium bond executed by a surety company authorized to transact business in North Carolina. The penalty of such bond shall not be less than one and one fourth the amount of the proceeds of sale. Any bond filed hereunder shall be acknowledged before and approved by the clerk of the superior court.

(f) In the event the proceeds of sale shall be paid over to a trustee and invested by him as authorized above, the entire income actually received by the trustee from such investment shall be paid by said trustee periodically, and not less often than annually, in equal shares to the living members of the class as they shall be constituted at the time of each such payment, or to the duly appointed guardians of any such living members under legal disability.

(g) In the event the court orders a lease of the property, the proceeds from the lease shall be first used to defray the expenses, if any, of the upkeep and maintenance of the property, and the discharge of taxes, liens, charges and encumbrances thereon, and any remaining proceeds shall be paid over by the trustee in their entirety, not less often than annually, in equal shares to the living members of the class as they shall be constituted at the time of each such payment or to the duly appointed guardians of any such members under legal disability.

(h) Payments of income to the living members of the class as aforesaid shall constitute a full and final acquittance and disposition of the income so paid, it being the intent of this section that only the living members of the class (as they may be constituted at the time of each respective income payment) shall be entitled to the income which is the subject of the respective payment, and that possible members of the class not in esse shall not share in, or become entitled to the benefit of any income payment made prior to the time that such members are born and become living members of the class.

(i) In the event that there has been a sale of any of the property, and the proceeds of sale are being held, managed, invested and reinvested by a trustee as provided above, any member of the class who is of legal age and who is not otherwise under legal disability may sell, assign and transfer his entire right, title and interest (both as to principal and income) in the funds or investments so held by the trustee. Upon receiving written notice of such sale, assignment or transfer, the trustee shall recognize the purchaser, assignee and transferee as the lawful successor in all respects whatsoever to the right, title and interest (both as to principal and income) of the seller, assignor and transferor; but no such sale, transfer or assignment shall divest the trustee of his legal title in, or possession of, said funds or investments or (except as provided above) affect his administration of the trusts for which he was appointed.

(j) The court shall order a mortgage of the property only for one or more of the following purposes:

(1) To provide funds for the costs and expenses of court incurred in carrying out any of the provisions of this section;
(2) To provide funds for the necessary upkeep and maintenance of the property;
(3) To make reasonable improvements to the property;
(4) To pay off taxes, other existing liens, charges and encumbrances on the property.

(k) The mortgagee shall not be held responsible for the application of the funds secured or derived from the mortgage. As used in this section, references to mortgages shall also apply to deeds of trust executed for loan security purposes.

(*l*) Every trustee appointed pursuant to the provisions of this section shall file with the clerk of the superior court an inventory and annual accounts in the same manner as is now provided by law with respect to guardians.

(m) The superior court shall allow commissions to the trustee for his time and trouble in the effectuation of a sale, lease or mortgage, and in the investment and management of the proceeds, in the same manner and under the same rules and restrictions as allowances are made to executors, administrators, and collectors.

(n) Provided, however, this section shall not be applicable where the instrument creating the gift, devise, bequest, transfer or conveyance specifically directs, by means of the creation of a trust or otherwise, the manner in which the property shall be used or disposed of, or contains specific limitations, conditions or restrictions as to the use, form, investment, leasing, mortgage, or other disposition of the property.

(o) And provided further, this section shall not alter or affect in any way laws or legal principles heretofore, now, or hereafter existing relating to the determination of the nature, extent or vesting of estates or property interests, and of the persons entitled thereto. But where, under the laws and legal principles existing without regard to this section, a gift, devise, bequest, transfer or conveyance has the legal effect of being made to all members of a class, some of whom are in esse and some of whom are in posse, the procedures authorized hereby may be utilized for the purpose of promoting the best interests of all members of the class, and this section shall be liberally construed to effectuate this intent. The remedies and procedures herein specified shall not be exclusive, but shall be cumulative, in addition to, and without prejudice to, all other remedies and procedures, if any, which now exist or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise.

(p) The provisions of this section shall apply to gifts, devises, bequests, transfers, and conveyances made both before and after April 5, 1949. (1949, c. 811, s. 1; 1971, c. 641, s. 1; 1997-456, s. 27.)

Editor's Note. — Section 36-4, referred to in this section, has been repealed. As to trusts and trustees, see now Chapter 36A.

Subsection designations (a) through (p) were added pursuant to S.L. 1997-456, s. 27, which authorized the Revisor of Statutes to renumber or reletter sections and parts of sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Legal Periodicals. — For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

CASE NOTES

Section Limited to Proceedings Involving Sale, Lease or Mortgage. — This section appears to be limited to actions or proceedings involving the sale, lease or mortgage of property. McPherson v. First & Citizens Nat'l Bank, 240 N.C. 1, 81 S.E.2d 386 (1954).

Cited in De Lotbiniere v. Wachovia Bank & Trust Co., 2 N.C. App. 252, 163 S.E.2d 59 (1968); Crumpton v. Crumpton, 290 N.C. 651, 227 S.E.2d 587 (1976).

§ 41-12. Sales or mortgages of contingent remainders validated.

In all cases where property has been conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitations, where a judgment of a superior court has been rendered authorizing the sale or mortgaging, including execution of deeds of trust, of such property discharged of such contingent remainder, executory devise, or other limitations in actions or special proceedings where all persons in being who would have taken such property if the contingency had then happened were parties, such judgment shall be valid and binding upon the parties thereto and upon all other persons not then in being or whose estates had not been vested: Provided, that nothing herein contained shall be construed to impair or destroy any vested right or estate. (1905, c. 93; Rev., s. 1591; C.S., s. 1745; 1923, c. 64; 1935, c. 36.)

Cross References. — As to revocation of deeds of future interests made to persons not in esse, see G.S. 39-6.

Legal Periodicals. — As to the 1923 amendment, see 1 N.C.L. Rev. 285 (1923).

For article, "The Rule Against Perpetuities in North Carolina," see 57 N.C.L. Rev. 727 (1979).

For article, "Requiem for the Rule in Shelley's Case," see 67 N.C.L. Rev. 681 (1989).

CASE NOTES

Constitutionality and Validity. — This section is a valid exercise of legislative power. Anderson v. Wilkins, 142 N.C. 154, 55 S.E. 272 (1906).

This section, rendering valid judgments authorizing the sale of lands wherein there are contingent remainders, is constitutional and valid. Bullock v. Planters Cotton-Seed Oil Co., 165 N.C. 63, 80 S.E. 972 (1914).

So long as the interest remains contingent only, the legislature may act, for a bare expectancy or any estate depending for its existence on the happening of an uncertain event is within its control, not being a vested right which is protected by constitutional guaranties. Anderson v. Wilkins, 142 N.C. 154, 55 S.E. 272 (1906).

Partition Sale Not Authorized. — This section does not authorize or validate a partition sale at the instance of a life tenant against vested remaindermen, who are not infrequently children. Ray v. Poole, 187 N.C. 749, 123 S.E. 5 (1924).

Application. — A testator devised certain lands to his wife during her widowhood or life, which, at her death, were to be equally divided between the children or "their heirs." The lands were sold in partition in 1904, during the lifetime of the widow, and the children were made parties. One of these children died in 1906, before the death of her mother (1909) and her children, the grandchildren of the testator, brought suit to recover their interests in the land devised, claiming they had a vested interest therein in 1904, and not being parties to the proceedings, were not estopped by the judgment in partition. It was held that the plaintiffs had a contingent interest in the lands at the time of the sale, and were precluded from claiming the lands under the Validating Act of 1905 (Revisal, s. 1591, now this section). Bullock v. Planters Cotton-Seed Oil Co., 165 N.C. 63, 80 S.E. 972 (1914).

Cited in Hines v. Williams, 198 N.C. 420, 152 S.E. 39 (1930); Watson v. United States, 34 F. Supp. 777 (M.D.N.C. 1940); McRorie v. Shinn, 11 N.C. App. 475, 181 S.E.2d 773 (1971).

§ 41-13. Freeholders in petition for special taxes defined.

In all cases where a petition by a specific number of freeholders is required as a condition precedent to ordering an election to provide for the assessment or levy of taxes upon realty, all residents of legal age owning realty for life or longer term, irrespective of sex, shall be deemed freeholders within the meaning of such requirement. (1915, c. 22; C.S., s. 1746.)

CASE NOTES

Former Law. — "Freeholders," used in Laws 1911, c. 135, s. 1, amending Revisal, s. 4115, as to who are required to sign the petition for the laying off special school districts and levying a tax therein, did not include females. Gill v. Board of Comm'rs, 160 N.C. 176, 76 S.E. 203 (1912).

Women Now Included. — In ascertaining the necessary number of resident freeholders for a petition in a proposed new school district, women freeholders must be counted, under the provisions of this section. Chitty v. Parker, 172 N.C. 126, 90 S.E. 17 (1916).

§ 41-14: Reserved for future codification purposes.

ARTICLE 2.

Uniform Statutory Rule Against Perpetuities.

Editor's Note. — Permission to include the Official Comments was granted by the National Conference of Commissioners on Uniform State Laws and The American Law Institute. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

§ 41-15. Statutory rule against perpetuities.

(a) Except as otherwise provided in G.S. 41-23, a nonvested property interest is invalid unless:

- (1) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
- (2) The interest either vests or terminates within 90 years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

- (1) When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or
- (2) The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

- (1) When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or
- (2) The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under subdivision (a)(1), (b)(1), or (c)(1) of this section, the possibility that a child will be born to an individual after the individual's death is disregarded.

(e) If, in measuring a period from the creation of a property arrangement, language in a governing instrument:

(1) Seeks to disallow the vesting or termination of any interest beyond,
(2) Seeks to postpone the vesting or termination of any interest until, or
(3) Seeks to operate in effect in any similar fashion upon,

the later of (i) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the property arrangement or (ii) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives. (1995, c. 190, s. 1; 2007-390, s. 2.)

OFFICIAL COMMENT

A. General Purpose
B. Section 1(a)(1): Nonvested Property Interests that are Initially Valid
C. Section 1(a)(2): Wait-and-See — Nonvested Property Interests whose Validity is Initially in Abeyance
  1. The 90-Year Permissible Vesting Period
  2. Technical Violations of the Common-Law Rule
D. Sections 1(b)(1) and 1(c)(1): Powers of Appointment that are Initially Valid
E. Sections 1(b)(2) and 1(c)(2): Wait-and-See — Powers of Appointment whose Validity is Initially in Abeyance
F. The Validity of the Donee's Exercise of a Valid Power
G. Section 1(e): Effect of Certain "Later-of" Type Language; Coordination of Generation-Skipping Transfer Tax Regulations With Uniform Act
H. Subsidiary Common-Law Doctrines: Whether Superseded by this Act

Common-Law Rule Against Perpetuities Superseded. As provided in Section 9, this Act supersedes the common-law Rule Against Perpetuities (Common-law Rule) in jurisdictions previously adhering to it (or repeals any statutory version or variation thereof previously in effect in the jurisdiction). The Common-law Rule (or the statutory version or variation thereof) is replaced by the Statutory Rule Against Perpetuities (Statutory Rule) set forth in this section and by the other provisions in this Act.

Subsidiary Doctrines Continue in Force Except to the Extent the Provisions of Act Conflict with Them. The courts in interpreting the Common-law Rule developed several subsidiary doctrines. In accordance with the general principle of statutory construction that statutes in derogation of the common law are to be construed narrowly, a subsidiary doctrine is superseded by this Act only to the extent the provisions of the Act conflict with it. A listing and discussion of such subsidiary doctrines, such as the constructional preference for validity, the all-or-nothing rule for class gifts, and the doctrine of infectious invalidity, appears later, in Part G of this Comment.

Application. Unless excluded by Section 4, the Statutory Rule Against Perpetuities (Statutory Rule) applies to nonvested property interests and to powers of appointment over property or property interests that are nongeneral powers, general testamentary powers, or general powers not presently exercisable because of a condition precedent.

The Statutory Rule does not apply to vested property interests (e.g., X's interest in Example (23) of this Comment) or to presently exercisable general powers of appointment (e.g., G's power in Example (19) of this Comment; G's power in Example (1) in the Comment to Section 2; A's power in Example (2) in the Comment to Section 2; X's power in Example (3) in the Comment to Section 2; A's noncumulative power of withdrawal in Example (4) in the Comment to Section 2).

A. GENERAL PURPOSE

Section 1 sets forth the Statutory Rule Against Perpetuities (Statutory Rule). As explained above, the Statutory Rule supersedes the Common-law Rule Against Perpetuities (Common-law Rule) or any statutory version or variation thereof.

The Common-law Rule's Validating and Invalidating Sides. The Common-law Rule Against Perpetuities is a rule of *initial* validity or invalidity. At common law, a nonvested property interest is either valid or invalid *as of its creation*. Like most rules of property law, the Common-law Rule has both a validating and an invalidating side. Both sides are derived from John Chipman Gray's formulation of the Common-law Rule:

> No [nonvested property] interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.

J. Gray, The Rule Against Perpetuities § 201

(4th ed. 1942). From this formulation, the validating and invalidating sides of the Common-law Rule are derived as follows:

Validating Side of the Common-law Rule. A nonvested property interest is valid when it is created (initially valid) if it is then *certain* to vest or terminate (fail to vest) — one or the other — no later than 21 years after the death of an individual then alive.

Invalidating Side of the Common-law Rule. A nonvested property interest is invalid when it is created (initially invalid) if there is no such certainty.

Notice that the invalidating side focuses on a lack of *certainty*, which means that invalidity under the Common-law Rule is *not* dependent on *actual* post-creation events but only on *possible* post-creation events. *Actual* post-creation events are irrelevant, even those that are known at the time of the lawsuit. It is generally recognized that the *invalidating* side of the Common-law Rule is harsh because it can invalidate interests on the ground of possible post-creation events that are extremely unlikely to happen and that in actuality almost never do happen, if ever.

The Statutory Rule Against Perpetuities. The essential difference between the Common-law Rule and its statutory replacement is that the Statutory Rule preserves the Common-law Rule's overall policy of preventing property from being tied up in unreasonably long or even perpetual family trusts or other property arrangements, while eliminating the harsh potential of the Common-law Rule. The Statutory Rule achieves this result by codifying (in slightly revised form) the validating side of the Common-law Rule and modifying the invalidating side by adopting a wait-and-see element. Under the Statutory Rule, interests that would have been initially valid at common law continue to be initially valid, but interests that would have been initially invalid at common law are invalid only if they do not actually vest or terminate within the permissible vesting period set forth in Section 1(a)(2). Thus, the Uniform Act recasts the validating and invalidating sides of the Rule Against Perpetuities as follows:

Validating Side of the Statutory Rule: A nonvested property interest is initially valid if, when it is created, it is then *certain* to vest or terminate (fail to vest) — one or the other — no later than 21 years after the death of an individual then alive. The validity of a nonvested property interest that is not *initially* valid is in abeyance. Such an interest is valid if it vests within the permissible vesting period after its creation.

Invalidating Side of the Statutory Rule: A nonvested property interest that is not *initially* valid becomes invalid (and subject to reformation under Section 3) if it neither vests nor terminates within the permissible vesting period after its creation.

As indicated, this modification of the invalidating side of the Common-law Rule is generally known as the wait-and-see method of perpetuity reform. The wait-and-see method of perpetuity reform was approved by the American Law Institute as part of the Restatement (Second) of Property (Donative Transfers) §§ 1.1-1.6 (1983). For a discussion of the various methods of perpetuity reform, including the wait-and-see method and the Restatement (Second)'s version of wait-and-see, see Waggoner, Perpetuity Reform, 81 Mich.L.Rev. 1718 (1983).

B. SECTION 1(a)(1): NONVESTED PROPERTY INTERESTS THAT ARE INITIALLY VALID

Nonvested Property Interest. Section 1(a) sets forth the Statutory Rule Against Perpetuities with respect to nonvested property interests. A nonvested property interest (also called a contingent property interest) is a future interest in property that is subject to an unsatisfied condition precedent. In the case of a class gift, the interests of all the unborn members of the class are nonvested because they are subject to the unsatisfied condition precedent of being born. At common law, the interests of all potential class members must be valid or the class gift is invalid. As pointed out in more detail later in this Comment, this so-called all-or-nothing rule with respect to class gifts is not superseded by this Act, and so remains in effect under the Statutory Rule. Consequently, all class gifts that are subject to open are to be regarded as nonvested property interests for the purposes of this Act.

Section 1(a)(1) Codifies the Validating Side of the Common-law Rule. The validating side of the Common-law Rule is codified in Section 1(a)(1) (and, with respect to powers of appointment, in Sections 1(b)(1) and 1(c)(1)).

A nonvested property interest that satisfies the requirement of Section 1(a)(1) is initially valid. That is, it is valid as of the time of its creation. There is no need to subject such an interest to the waiting period set forth in Section 1(a)(2), nor would it be desirable to do so.

For a nonvested property interest to be valid as of the time of its creation under Section 1(a)(1), there must then be a *certainty* that the interest will either vest or terminate — an interest terminates when vesting becomes impossible — no later than 21 years after the death of an individual then alive. To satisfy this requirement, it must be established that there is no possible chain of events that might arise after the interest was created that would allow the interest to vest or terminate after the expiration of the 21-year period following the death of an individual in being at the creation of the interest. Consequently, initial validity under Section 1(a)(1) can be established only if there is an individual for whom there is a causal connection between the individual's death and the interest's vesting or terminating no later than 21 years thereafter. *The individual described in subsection (a)(1) (and subsections (b)(1) and (c)(1) as well) is often referred to as the "validating life," the term used throughout the Comments to this Act.*

Determining Whether There is a Validating Life. The process for determining whether a validating life exists is to postulate the death of each individual connected in some way to the transaction, and ask the question: Is there with respect to this individual an invalidating chain of possible events? If one individual can be found for whom the answer is No, that individual can serve as the validating life. As to that individual there will be the requisite causal connection between his or her death and the questioned interest's vesting or terminating no later than 21 years thereafter.

In searching for a validating life, only individuals who are connected in some way to the transaction need to be considered, for they are the only ones who have a chance of supplying the requisite causal connection. Such individuals vary from situation to situation, but typically include the beneficiaries of the disposition, including the taker or takers of the nonvested property interest, and individuals related to them by blood or adoption, especially in the ascending and descending lines. There is no point in even considering the life of an individual unconnected to the transaction — an individual from the world at large who happens to be in being at the creation of the interest. No such individual can be a validating life because there will be an invalidating chain of possible events as to every unconnected individual who might be proposed: Any such individual can immediately die after the creation of the nonvested property interest without causing any acceleration of the interest's vesting or termination. (The life expectancy of any unconnected individual, or even the probability that one of a number of new-born babies will live a long life, is irrelevant.)

Example (1) — Parent of Devisees as the Validating Life. G devised property "to A for life, remainder to A's children who attain 21." G was survived by his son (A), by his daughter (B), by A's wife (W), and by A's two children (X and Y).

The nonvested property interest in favor of A's children who reach 21 satisfies Section 1(a)(1)'s requirement, and the interest is initially valid. When the interest was created (at G's death), the interest was then certain to vest or terminate no later than 21 years after A's death.

The process by which A is determined to be the validating life is one of testing various candidates to see if any of them have the requisite causal connection. As noted above, no one from the world at large can have the requisite causal connection, and so such individuals are disregarded. Once the inquiry is narrowed to the appropriate candidates, the first possible validating life that comes to mind is A, who does in fact fulfill the requirement: Since A's death cuts off the possibility of any more children being born to him, it is impossible, no matter when A dies, for any of A's children to be alive and under the age of 21 beyond 21 years after A's death. (See the discussion of subsection (d), below.)

A is therefore the validating life for the nonvested property interest in favor of A's children who attain 21. None of the other individuals who is connected to this transaction could serve as the validating life because an invalidating chain of possible post-creation events exists as to each one of them. The other individuals who might be considered include W, X, Y, and B. In the case of W, an invalidating chain of events is that she might predecease A, A might remarry and have a child by his new wife, and such child might be alive and under the age of 21 beyond the 21-year period following W's death. With respect to X and Y, an invalidating chain of events is that they might predecease A, A might later have another child, and that child might be alive and under 21 beyond the 21-year period following the death of the survivor of X and Y. As to B, she suffers from the same invalidating chain of events as exists with respect to X and Y. The fact that none of these other individuals can serve as the validating life is of no consequence, however, because only one such individual is required for the validity of a nonvested interest to be established, and that individual is A.

The Rule of Subsection (d). The rule established in subsection (d) plays a significant role in the search for a validating life. Subsection (d) declares that the possibility that a child will be born to an individual after the individual's death is to be disregarded. It is important to note that this rule applies only for the purposes of determining the validity of an interest (or power of appointment) under paragraph (1) of subsection (a), (b), or (c). The rule of subsection (d) does not apply, for example, to questions such as whether or not a child who is born to an individual after the individual's death qualifies as a taker of a beneficial interest — as a member of a class or otherwise. Neither subsection (d), nor any other provision of this Act, supersedes the widely accepted common-law principle, sometimes codified, that a child in gestation (a child sometimes described as a child *en ventre sa mere*) who is later born alive is regarded as alive at the commencement of gestation.

The limited purpose of subsection (d) is to solve a perpetuity problem caused by advances in medical science. The problem is illustrated by a case such as Example (1), above — "to A for life, remainder to A's children who reach 21." When the Common-law Rule was developing, the possibility was recognized, strictly speaking, that one or more of A's children might reach 21 more than 21 years after A's death. The possibility existed because A's wife (who might not be a life in being) might be pregnant when A died. If she was, and if the child was born viable a few months after A's death, the child could not reach his or her 21st birthday within 21 years after A's death. The device then invented to validate the interest of A's children was to "extend" the allowable perpetuity period by tacking on a period of gestation, if needed. As a result, the common-law perpetuity period was comprised of three components: (1) a life in being (2) plus 21 years (3) plus a period of gestation, when needed. Today, thanks to sperm banks, frozen embryos, and even the possibility of artificially maintaining the body functions of deceased pregnant women long enough to develop the fetus to viability (see Detroit Free Press, July 31, 1986, at 5A; Ann Arbor News, Oct. 30, 1978, at C5 (AP story); N.Y. Times, Dec. 6, 1977, at 30; N.Y. Times, Dec. 2, 1977, at B16) — advances in medical science unanticipated when the Common-law Rule was in its developmental stages — having a pregnant wife at death is no longer the only way of having children after death. These medical developments, and undoubtedly others to come, make the mere addition of a period of gestation inadequate as a device to confer initial validity under Section 1(a)(1) on the interest of A's children in the above example. The rule of subsection (d), however, *does* insure the initial validity of the children's interest. Disregarding the possibility that children of A will be born after his death allows A to be the validating life. None of his children, under this assumption, can reach 21 more than 21 years after his death.

Note that subsection (d) subsumes not only the case of children conceived after death, but also the more conventional case of children in gestation at death. With subsection (d) in place, the third component of the common-law perpetuity period is unnecessary and has been jettisoned. The perpetuity period recognized in paragraph (1) of subsections (a), (b), and (c) has only two components: (1) a life in being (2) plus 21 years.

As to the legal status of conceived-after-death children, that question has not yet been resolved. For example, if in Example (1) it in fact turns out that A does leave sperm on deposit at a sperm bank and if in fact A's wife does become pregnant as a result of artificial insemination, the child or children produced thereby might not be included at all in the class gift. Cf. Restatement (Second) of Property (Donative Transfers) Introductory Note to Ch. 26 at pp. 2-3 (Tent. Draft No. 9, 1986). Without trying to predict how that matter will be settled in the future, the best way to handle the problem from the perpetuity perspective is subsection (d)'s rule requiring the possibility of post-death children to be disregarded.

Recipients as Their Own Validating Lives. It is well established at common law that, in appropriate cases, the recipient of an interest can be his or her own validating life. See, e.g., Rand v. Bank of California, 236 Or. 619, 388 P.2d 437 (1964). Given the right circumstances, this principle can validate interests that are contingent on the recipient's reaching an age in excess of 21, or are contingent on the recipient's surviving a particular point in time that is or might turn out to be in excess of 21 years after the interest was created or after the death of a person in being at the date of creation.

> *Example (2) — Devisees as Their Own Validating Lives*. G devised real property "to A's children who attain 25." A predeceased G. At G's death, A had three living children, all of whom were under 25.
>
> The nonvested property interest in favor of A's children who attain 25 is validated by Section 1(a)(1). Under subsection (d), the possibility that A will have a child born to him after his death (and since A predeceased G, after G's death) must be disregarded. Consequently, even if A's wife survived G, and even if she was pregnant at G's death or even if A had deposited sperm in a sperm bank prior to his death, it must be assumed that all of A's children are in being at G's death. A's children are, therefore, their own validating lives. (Note that subsection (d) requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual after the individual's death must be disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual.) Each one of A's children, all of whom under subsection (d) are regarded as alive at G's death, will either reach the age of 25 or fail to do so within his or her own lifetime. To say this another way, it is certain to be known no later than at the time of the death of each child whether or not that child survived to the required age.

Validating Life Can Be Survivor of Group. In appropriate cases, the validating life need not be individualized at first. Rather the validating life can initially (i.e., when the interest was created) be the unidentified survivor of a group of individuals. It is common in such cases to say that the members of the group are the validating *lives*, but the true meaning of the statement is that the validating *life* is the member of the group who turns out to live the longest. As the court said in Skatterwood v. Edge, 1 Salk. 229, 91 Eng. Rep. 203 (K.B. 1697), "for let the lives be never so many, there must be a survivor, and so it is but the length of that life; for Twisden used to say, the candles were all lighted at once."

Example (3) — Case of Validating Life Being the Survivor of a Group. G devised real property "to such of my grandchildren as attain 21." Some of G's children are living at G's death.

The nonvested property interest in favor of G's grandchildren who attain 21 is valid under Section 1(a)(1). The validating life is that one of G's children who turns out to live the longest. Since under subsection (d), it must be assumed that none of G's children will have post-death children, it is regarded as impossible for any of G's grandchildren to be alive and under 21 beyond the 21-year period following the death of G's last surviving child.

Example (4) — Sperm Bank Case. G devised property in trust, directing the income to be paid to G's children for the life of the survivor, then to G's grandchildren for the life of the survivor, and on the death of G's last surviving grandchild, to pay the corpus to G's great-grandchildren then living. G's children all predeceased him, but several grandchildren were living at G's death. One of G's predeceased children (his son, A) had deposited sperm in a sperm bank. A's widow was living at G's death.

The nonvested property interest in favor of G's great-grandchildren is valid under Section 1(a)(1). The validating life is the last surviving grandchild among the grandchildren living at G's death. Under subsection (d), the possibility that A will have a child conceived after G's death must be disregarded. Note that subsection (d) requires that in determining whether an individual is a validating life, the possibility that a child will be born to "an" individual after the individual's death is disregarded. The validating life and the individual whose having a post-death child is disregarded need not be the same individual. Thus in this example, by disregarding the possibility that *A* will have a conceived-after-death child, G's *last surviving grandchild* becomes the validating life because G's last surviving grandchild is deemed to have been alive at G's death, when the great-grandchildren's interests were created.

Example (5) — Child in Gestation Case. G devised property in trust, to pay the income equally among G's living children; on the death of G's last surviving child, to accumulate the income for 21 years; on the 21st anniversary of the death of G's last surviving child, to pay the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to X Charity. At G's death his child (A) was 6 years old, and G's wife (W) was pregnant. After G's death, W gave birth to their second child (B).

The nonvested property interests in favor of G's descendants and in favor of X Charity are valid under Section 1(a)(1). The validating life is A. Under subsection (d), the possibility that a child will be born to an individual after the individual's death must be disregarded *for the purposes of determining validity under Section 1(a)(1)*. Consequently, the possibility that a child will be born to G after his death must be disregarded; and the possibility that a child will be born to any of G's descendants after their deaths must also be disregarded. Note, however, that the rule of subsection (d) does *not* apply to the question of the entitlement of an after-born child to take a beneficial interest in the trust. The common-law rule (sometimes codified) that a child in gestation is treated as alive, if the child is subsequently born viable, applies to this question. Thus, subsection (d) does *not* prevent B from being an income beneficiary under G's trust, nor does it prevent a descendant in gestation on the 21st anniversary of the death of G's last surviving child from being a member of the class of G's "then-living descendants," as long as such descendant has no then-living ancestor who takes instead.

Different Validating Lives Can and in Some Cases Must Be Used. Dispositions of property sometimes create more than one nonvested property interest. In such cases, the validity of each interest is treated individually. A validating life that validates one interest might or might not validate the other interests. Since it is not necessary that the same validating life be used for all interests created by a disposition, the search for a validating life for each of the other interests must be undertaken separately.

Perpetuity Saving Clauses and Similar Provisions. Knowledgeable lawyers almost routinely insert perpetuity saving clauses into instruments they draft. Saving clauses contain two components, the first of which is the *perpetuity-period component*. This component typically requires the trust or other arrangement to terminate no later than 21 years after the death of the last survivor of a group of individuals designated therein by name or class. (The lives of corporations, animals, or sequoia trees cannot be used.) The second component of saving clauses is the *gift-over component*. This component expressly creates a gift over that is guaranteed to vest at the termination of the period set forth in the perpetuity-period component, but only if the trust or other arrangement has not terminated earlier in accordance with its other terms.

It is important to note that regardless of what group of individuals is designated in the perpetuity-period component of a saving clause, the surviving member of the group is not necessarily the individual who would be the validating life for the nonvested property interest or power of appointment in the absence of the saving clause. Without the saving clause, one or more interests or powers may in fact fail to satisfy the requirement of paragraph (1) of subsections (a), (b), or (c) for initial validity. By being designated in the saving clause, however, the survivor of the group becomes the validating life for all interests and powers in the trust or other arrangement: The saving clause confers on the last surviving member of the designated group the requisite causal connection between his or her death and the impossibility of any interest or power in the trust or other arrangement remaining in existence beyond the 21-year period following such individual's death.

Example (6) — Valid Saving Clause Case. A testamentary trust directs income to be paid to the testator's children for the life of the survivor, then to the testator's grandchildren for the life of the survivor, corpus on the death of the testator's last living grandchild to such of the testator's descendants as the last living grandchild shall by will appoint; in default of appointment, to the testator's then-living descendants, per stirpes. A saving clause in the will terminates the trust, if it has not previously terminated, 21 years after the death of the testator's last surviving descendant who was living at the testator's death. The testator was survived by children. In the absence of the saving clause, the nongeneral power of appointment in the last living grandchild and the nonvested property interest in the gift-in-default clause in favor of the testator's descendants fail the test of Sections 1(a)(1) and 1(c)(1) for initial validity. That is, were it not for the saving clause, there is no validating life. However, the surviving member of the designated group becomes the validating life, so that the saving clause does confer initial validity on the nongeneral power of appointment and on the nonvested property interest under Sections 1(a)(1) and 1(c)(1).

If the governing instrument designates a group of individuals that would cause it to be impracticable to determine the death of the survivor, the common-law courts have developed the doctrine that the validity of the nonvested property interest or power of appointment is determined as if the provision in the governing instrument did not exist. See cases cited in Restatement (Second) of Property (Donative Transfers) (1983), Reporter's Note No. 3 at p. 45. See also Restatement (Second) of Property (Donative Transfers) § 1.3(1) Comment a (1983); Restatement of Property § 374 and Comment 1 (1944); 6 American Law of Property § 24.13 (A. Casner ed. 1952); 5A R. Powell, The Law of Real Property Para. 766[5] (1985); L. Simes & A. Smith, The Law of Future Interests § 1223 (2d ed. 1956). If, for example, the designated group in Example (6) were the residents of X City (or the members of Y Country Club) living at the time of the testator's death, the saving clause would not validate the power of appointment or the nonvested property interest. Instead, the validity of the power of appointment and the nonvested property interest would be determined as if the provision in the governing instrument did not exist. Since without the saving clause the power of appointment and the nonvested property interest would fail to satisfy the requirements of Sections 1(a)(1) and 1(c)(1) for initial validity, their validity would be governed by Sections 1(a)(2) and 1(c)(2).

The application of the above common-law doctrine, which is not superseded by this Act and so remains in full force, is not limited to saving clauses. It also applies to trusts or other arrangements where the period thereof is directly linked to the life of the survivor of a designated group of individuals. An example is a trust to pay the income to the grantor's descendants from time to time living, per stirpes, for the period of the life of the survivor of a designated group of individuals living when the nonvested property interest or power of appointment in question was created, plus the 21-year period following the survivor's death; at the end of the 21-year period, the corpus is to be divided among the grantor's then-living descendants, per stirpes, and if none, to the XYZ Charity. If the group of individuals so designated is such that it would be impracticable to determine the death of the survivor, the validity of the disposition is determined as if the provision in the governing instrument did not exist. The term of the trust is therefore governed by the 90- year permissible vesting period of paragraph (2) of subsections (a), (b), or (c) of the Statutory Rule.

Additional references. Restatement (Second) of Property (Donative Transfers) § 1.3(1) (1983), and the Comments thereto; Waggoner, *Perpetuity Reform*, 81 Mich.L.Rev. 1718, 1720-1726 (1983).

C. SECTION 1(a)(2): WAIT-AND-SEE — NONVESTED PROPERTY INTERESTS WHOSE VALIDITY IS INITIALLY IN ABEYANCE

Unlike the Common-Law Rule, the Statutory Rule Against Perpetuities does not automatically invalidate nonvested property interests for which there is no validating life. A nonvested property interest that does not meet the requirements for validity under Section 1(a)(1) might still be valid under the wait-and-see provisions of Section 1(a)(2). Such an interest is invalid under Section 1(a)(2) only if in actuality it does not vest (or terminate) during the permissible vesting period. Such an interest becomes invalid, in other words, only if it is still in existence and nonvested when the permissible vesting period expires.

1. *The 90-Year Permissible Vesting Period*

Since a wait-and-see rule against perpetuities, unlike the Common-law Rule, makes validity or invalidity turn on *actual* post-creation events, it requires that an actual period of time be measured off during which the contingencies attached to an interest are allowed to work themselves out to a final resolution. The Statutory Rule Against Perpetuities establishes a permissible vesting period of 90 years. Nonvested property interests that have neither vested nor terminated at the expiration of the 90-year permissible vesting period become invalid.

As explained in the Prefatory Note, the permissible vesting period of 90 years is *not* an arbitrarily selected period of time. On the contrary, the 90-year period represents a reasonable approximation of — a proxy for — the period of time that would, *on average,* be produced through the use of an actual set of measuring lives identified by statute and then adding the traditional 21-year tack-on period after the death of the survivor.

2. *Technical Violations of the Common-Law Rule*

One of the harsh aspects of the invalidating side of the Common-Law Rule, against which the adoption of the wait-and-see element in Section 1(a)(2) is designed to relieve, is that nonvested property interests at common law are invalid even though the invalidating chain of possible events *almost* certainly will *not* happen. In such cases, the violation of the Common-law Rule could be said to be merely technical. Nevertheless, at common law, the nonvested property interest is invalid.

Cases of technical violation fall generally into discrete categories, identified and named by Professor Leach in *Perpetuities in a Nutshell*, 51 Harv.L.Rev. 638 (1938), as the fertile octogenarian, the administrative contingency, and the unborn widow. The following three examples illustrate how Section 1(a)(2) affects these categories.

Example (7) — Fertile Octogenarian Case. G devised property in trust, directing the trustee to pay the net income therefrom "to A for life, then to A's children for the life of the survivor, and upon the death of A's last surviving child to pay the corpus of the trust to A's grandchildren." G was survived by A (a female who had passed menopause) and by A's two adult children (X and Y).

The remainder interest in favor of G's grandchildren would be invalid at common law, and consequently is not validated by Section 1(a)(1). There is no validating life because, under the common law's conclusive presumption of lifetime fertility, which is not superseded by this Act (see Part H, below), A *might* have a third child (Z), conceived and born after G's death, who will have a child conceived and born more than 21 years after the death of the survivor of A, X, and Y.

Under Section 1(a)(2), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren's interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. The chance that the grandchildren's remainder interest will become invalid under Section 1(a)(2) is negligible.

Example (8) — Administrative Contingency Case. G devised property "to such of my grandchildren, born before or after my death, as may be living upon final distribution of my estate." G was survived by children and grandchildren.

The remainder interest in favor of A's grandchildren would be invalid at common law, and consequently is not validated by Section 1(a)(1). The final distribution of G's estate *might* not occur within 21 years of G's death, and after G's death grandchildren might be conceived and born who might survive or fail to survive the final distribution of G's estate more than 21 years after the death of the survivor of G's children and grandchildren who were living at G's death.

Under Section 1(a)(2), however, the remote possibility of the occurrence of this chain of events does not invalidate the grandchildren's remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. Since it is almost certain that the final distribution of G's estate will occur well within this 90-year period, the chance that the grandchildren's interest will be invalid is negligible.

Example (9) — Unborn Widow Case. G devised property in trust, the income to be paid "to my son A for life, then to A's spouse for her life, and upon the death of the survivor of A and his spouse, the corpus to be delivered to A's then living descendants." G was survived by A, by A's wife (W), and by their adult children (X and Y).

Unless the interest in favor of A's "spouse" is construed to refer only to W, rather than to whoever is A's spouse when he dies, if anyone, the remainder interest in favor of A's descendants would be invalid at common law, and consequently is not validated by Section 1(a)(1). There is no validating life because A's spouse *might* not be W; A's spouse might be someone who was conceived and born after G's death; she might outlive the death of the survivor of A, W, X, and Y by more than 21 years; and descendants of A might be born or die before the death of A's spouse but after the 21-year period following the death of the survivor of A, W, X, and Y.

Under Section 1(a)(2), however, the remote possibility of the occurrence of this chain of events does not invalidate the descendants' remainder interest. The interest becomes invalid only if it remains in existence and nonvested 90 years after G's death. The chance that the descendants' remainder interest will become invalid under the Statutory Rule is small.

Age Contingencies in Excess of 21. Another category of technical violation of the Common-Law Rule arises in cases of age contingencies in excess of 21 where the takers cannot be their own validating lives (unlike Example (2), above). The violation of the Common-law Rule falls into the technical category because the insertion of a saving clause would in almost all cases allow the disposition to be carried out as written. In effect, the Statutory Rule operates like the perpetuity-period component of a saving clause.

Example (10) — Age Contingency in Excess of 21 Case. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who reach the age of 30." G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died.

The remainder interest in favor of A's children who reach 30 is a class gift. At common law, the interests of *all* potential class members must be valid or the class gift is totally invalid. Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817). This Act does not supersede the all-or-nothing rule for class gifts (see Part G, below), and so the all-or-nothing rule continues to apply under this Act. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at G's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. The class gift would be invalid at common law and consequently is not validated by Section 1(a)(1).

Under Section 1(a)(2), however, the possibility of the occurrence of this chain of events does not invalidate the children's remainder interest. The interest becomes invalid only if an interest of a class member remains nonvested 90 years after G's death.

Although unlikely, suppose that at A's death Z's age is such that he could be alive and under the age of 30 at the expiration of the allowable waiting period. Suppose further that at A's death X or Y or both is over the age of 30. The court, upon the petition of an interested person, must under Section 3 reform G's disposition. See Example (3) in the Comment to Section 3.

D. SECTIONS 1(b)(1) AND 1(c)(1): POWERS OF APPOINTMENT THAT ARE INITIALLY VALID

Powers of Appointment. Sections 1(b) and 1(c) set forth the Statutory Rule Against Perpetuities with respect to powers of appointment. A power of appointment is the authority, other than as an incident of the beneficial ownership of property, to designate recipients of beneficial interests in or powers of appointment over property. Restatement (Second) of Property (Donative Transfers) § 11.1 (1986). The property or property interest subject to a power of appointment is called the "appointive property."

The various persons connected to a power of appointment are identified by a special terminology. The "donor" is the person who created the power of appointment. The "donee" is the person who holds the power of appointment, i.e., the powerholder. The "objects" are the persons to whom an appointment can be made. The "appointees" are the persons to whom an appointment has been made. The "takers in default" are the persons whose property interests are subject to being defeated by the exercise of the power of appointment and who take the property to the extent the power is not effectively exercised. Restatement (Second) of Property (Donative Transfers) § 11.2 (1986).

A power of appointment is "general" if it is exercisable in favor of the donee of the power, the donee's creditors, the donee's estate, or the creditors of the donee's estate. A power of appointment that is not general is a "nongeneral" power of appointment. Restatement (Second) of Property (Donative Transfers) § 11.4 (1986).

A power of appointment is "presently exercisable" if, at the time in question, the donee can by an exercise of the power create an interest in or a power of appointment over the appointive property. Restatement (Second) of Property (Donative Transfers) § 11.5 (1986). A power of appointment is "testamentary" if the donee can exercise it only in the donee's will. Restatement of Property § 321 (1940). A power of appointment is "not presently exercisable because of a condition precedent" if the only impediment to its present exercisability is a condition precedent, i.e., the occurrence of some uncertain event. Since a power of appointment terminates on the donee's death, a deferral of a power's present exercisability until a future time (even a time certain) imposes a condition precedent that the donee be alive at that future time.

A power of appointment is a "fiduciary" power if it is held by a fiduciary and is exercisable by the fiduciary in a fiduciary capacity. A power of appointment that is exercisable in an individual capacity is a "nonfiduciary" power. As used in this Act, the term "power of appointment" refers to "fiduciary" and to "nonfiduciary" powers, unless the context indicates otherwise.

Although Gray's formulation of the Common-law Rule Against Perpetuities does not speak directly of powers of appointment, the Common-law Rule *is* applicable to powers of appointment (other than presently exercisable general powers of appointment). The principle of subsections (b)(1) and (c)(1) is that a power of appointment that satisfies the Common-law Rule Against Perpetuities is valid under the Statutory Rule Against Perpetuities, and consequently it can be validly exercised, without being subjected to a waiting period during which the power's validity is in abeyance.

Two different tests for validity are employed at common law, depending on what type of power is at issue. In the case of a *nongeneral power* (whether or not presently exercisable) and in the case of a *general testamentary power*, the power is initially valid if, when the power was created, it is certain that the latest possible time that the power can be exercised is no later than 21 years after the death of an individual then in being. In the case of a *general power not presently exercisable because of a condition precedent*, the power is initially valid if it is then certain that the condition precedent to its exercise will either be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then in being. Subsections (b)(1) and (c)(1) codify these rules. Under either test, initial validity depends on the existence of a validating life. The procedure for determining whether a validating life exists is essentially the same procedure explained in Part B, above, pertaining to nonvested property interests.

Example (11) — Initially Valid General Testamentary Power Case. G devised property "to A for life, remainder to such persons, including A's estate or the creditors of A's estate, as A shall by will appoint." G was survived by his daughter (A).

A's power, which is a general testamentary power, is valid as of its creation under Section 1(c)(1). The test is whether or not the power can be exercised beyond 21 years after the death of an individual in being when the power was created (G's death). Since A's power cannot be exercised after A's death, the validating life is A, who was in being at G's death.

Example (12) — Initially Valid Nongeneral Power Case. G devised property "to A for life, remainder to such of A's descendants as A shall appoint." G was survived by his daughter (A).

A's power, which is a nongeneral power, is valid as of its creation under Section 1(c)(1). The validating life is A; the analysis leading to validity is the same as applied in Example (11), above.

Example (13) — Case of Initially Valid General Power Not Presently Exercisable Because of a Condition Precedent. G devised property "to A for life, then to A's first born child for life, then to such persons, including A's first born child or such child's estate or creditors, as A's first born child shall appoint." G was survived by his daughter (A), who was then childless.

The power in A's first born child, which is a general power not presently exercisable because of a condition precedent, is valid as of its creation under Section 1(b)(1). The power is subject to a condition precedent — that A have a child — but this is a contingency that under subsection (d) is deemed certain to be resolved one way or the other within A's lifetime. A is therefore the validating life: The power cannot remain subject to the condition precedent after A's death. Note that the latest possible time that the power can be exercised is at the death of A's first born child, which might occur beyond 21 years after the death of A (and anyone else who was alive when G died). Consequently, if the power conferred on A's first born child had been a nongeneral power or a general testamentary power, the power could not be validated by Section 1(c)(1); instead, the power's validity would be governed by Section 1(c)(2).

E. SECTIONS 1(b)(2) AND 1(c)(2): WAIT-AND-SEE — POWERS OF APPOINTMENT WHOSE VALIDITY IS INITIALLY IN ABEYANCE

Under the Common-law Rule, a *general power not presently exercisable because of a condition precedent* is invalid as of the time of its creation if the condition *might* neither be satisfied nor become impossible to satisfy within a life in being plus 21 years. A *nongeneral power* (whether or not presently exercisable) or a *general testamentary power* is invalid as of the time of its creation if it might not terminate (by irrevocable exercise or otherwise) within a life in being plus 21 years.

Sections 1(b)(2) and 1(c)(2), by adopting the wait-and-see method of perpetuity reform, shift the ground of invalidity from possible to actual post-creation events. Under these subsections, a power of appointment that would have violated the Common-law Rule, and therefore fails the subsection (b)(1) or (c)(1) tests for *initial* validity, is nevertheless not invalid as of the time of its creation. Instead, its validity is in abeyance. A general power not presently exercisable because of a condition precedent is invalid only if *in actuality* the condition neither is satisfied nor becomes impossible to satisfy within the 90-year permissible vesting period. A nongeneral power or a general testamentary power is invalid only if *in actuality* it does not terminate (by irrevocable exercise or otherwise) within the 90-year permissible period.

Example (14) — General Testamentary Power Case. G devised property "to A for life, then to A's first born child for life, then to such persons, including the estate or the creditors of the estate of A's first born child, as A's first born child shall by will appoint; in default of appointment, to G's grandchildren in equal shares." G was survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

Since the general testamentary power conferred on A's first born child fails the test of Section 1(c)(1) for *initial* validity, its validity is governed by Section 1(c)(2). If A has a child, such child's death must occur within 90 years of G's death for any provision in the child's will purporting to exercise the power to be valid.

Example (15) — Nongeneral Power Case. G devised property "to A for life, then to A's first born child for life, then to such of G's grandchildren as A's first born child shall appoint; in default of appointment, to the children of G's late nephew, Q." G was survived by his daughter (A), who was then childless, by his son (B), who had two children (X and Y), and by Q's two children (R and S).

Since the nongeneral power conferred on A's first born child fails the test of Section 1(c)(1) for *initial* validity, its validity is governed by Section 1(c)(2). If A has a child, such child must exercise the power within 90 years after G's death or the power becomes invalid.

Example (16) — General Power Not Presently Exercisable Because of a Condition Precedent. G devised property "to A for life, then to A's first born child for life, then to such persons, including A's first born child or such child's estate or creditors, as A's first born child shall appoint after reaching the age of 25; in default of appointment, to G's grandchildren." G was survived by his daughter (A), who was then childless, and by his son (B), who had two children (X and Y).

The power conferred on A's first born child is a general power not presently exercisable because of a condition precedent. Since the power fails the test of Section 1(b)(1) for *initial* validity, its validity is governed by Section 1(b)(2). If A has a child, such child must reach the age of 25 (or die under 25) within 90 years after G's death or the power is invalid.

Fiduciary Powers. Purely administrative fiduciary powers are excluded from the Statutory Rule under Sections 4(2) and (3), but the only distributive fiduciary power that is excluded is the power described in Section 4(4). Otherwise, distributive fiduciary powers are subject to the Statutory Rule. Such powers are usually nongeneral powers.

Example (17) — Trustee's Discretionary Powers Over Income and Corpus. G devised property in trust, the terms of which were that the trustee was authorized to accumulate the income or pay it or a portion of it out to A during A's lifetime; after A's death, the trustee was authorized to accumulate the income or to distribute it in equal or unequal shares among A's children until the death of the survivor; and on the death of A's last surviving child to pay the corpus and accumulated income (if any) to B. The trustee was also granted the discretionary power to invade the corpus on behalf of the permissible recipient or recipients of the income.

The trustee's nongeneral powers to invade corpus and to accumulate or spray income among A's children are not excluded by Section 4(4), nor are they initially valid under Section 1(c)(1). Their validity is, therefore, governed by Section 1(c)(2). Both powers become invalid thereunder, and hence no longer exercisable, 90 years after G's death.

It is doubtful that the powers will become invalid, because the trust will probably terminate by its own terms earlier than the expiration of the permissible 90-year period. But if the powers do become invalid, and hence no longer exercisable, they become invalid as of the time the permissible 90-year period expires. Any exercises of either power that took place before the expiration of the permissible 90-year period are not invalidated retroactively. In addition, if the powers do become invalid, a court in an appropriate proceeding must reform the instrument in accordance with the provisions of Section 3.

F. THE VALIDITY OF THE DONEE'S EXERCISE OF A VALID POWER

The fact that a power of appointment is valid, either because it (i) was not subject to the Statutory Rule to begin with, (ii) is initially valid under Sections 1(b)(1) or 1(c)(1), or (iii) becomes valid under Sections 1(b)(2) or 1(c)(2), means merely that the power can be validly exercised. It does not mean that any exercise that the donee decides to make is valid. The validity of the interests or powers created by the exercise of a valid power is a separate matter, governed by the provisions of this Act. A key factor in deciding the validity of such appointed interests or appointed powers is determining when they were created for purposes of this Act. Under Section 2, as explained in the Comment thereto, the time of creation is when the power was exercised if it was a presently exercisable general power; and if it was a nongeneral power or a general testamentary power, the time of creation is when the power was created. This is the rule generally accepted at common law (see Restatement (Second) of Property (Donative Transfers) § 1.2, Comment d (1983); Restatement of Property § 392 (1944)), and it is the rule adopted under this Act (except for purposes of Section 5 only, as explained in the Comment to Section 5).

Example (18) — Exercise of a Nongeneral Power of Appointment. G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of M's descendants (except G). The trust was created by the will of G's mother, M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his brother B's children for the life of the survivor, and upon the death of B's last surviving child, to pay the corpus of the trust to B's grandchildren. B predeceased M; B was survived by his two children, X and Y, who also survived M and G.

G's power and his appointment are valid. The power and the appointed interests were created at M's death when the power was created, not on G's death when it was exercised. See Section 2. G's power passes Section 1(c)(1)'s test for initial validity: G himself is the validating life. G's appointment also passes Section 1(a)(1)'s test for initial validity: Since B was dead at M's death, the validating life is the survivor of B's children, X and Y.

Suppose that G's power was exercisable only in favor of G's own descendants, and that G appointed the identical interests in favor of his own children and grandchildren. Suppose further that at M's death, G had two children, X and Y, and that a third child, Z, was born later. X, Y, and Z survived G. In this case, the remainder interest in favor of G's grandchildren would not pass Section 1(a)(1)'s test for initial validity. Its validity would be governed by Section 1(a)(2), under which it would be valid if G's last surviving child died within 90 years after M's death.

If G's power were a general testamentary power of appointment, rather than a nongeneral power, the solution would be the same. The period of the Statutory Rule with respect to interests created by the exercise of a general testamentary power starts to run when the power was created (at M's death, in this example), not when the power was exercised (at G's death).

Example (19) — Exercise of a Presently Exercisable General Power of Appointment. G was the life income beneficiary of a trust and the donee of a presently exercisable general power of appointment over the succeeding remainder interest. G exercised the power by deed, directing the trustee after his death to pay the income to G's children in equal shares for the life of the survivor, and upon the death of his last surviving child to pay the corpus of the trust to his grandchildren.

The validity of G's power is not in question: A presently exercisable general power of appointment is not subject to the Statutory Rule Against Perpetuities. G's appointment, however, is subject to the Statutory Rule. If G reserved a power to revoke his appointment, the remainder interest in favor of G's grandchildren passes Section 1(a)(1)'s test for initial validity. Under Section 2, the appointed remainder interest was created at G's death. The validating life for his grandchildren's remainder interest is G's last surviving child. If G's appointment were irrevocable, however, the grandchildren's remainder interest fails the test of Section 1(a)(1) for initial validity. Under Section 2, the appointed remainder interest was created upon delivery of the deed exercising G's power (or when the exercise otherwise became effective). Since the validity of the grandchildren's remainder interest is governed by Section 1(a)(2), the remainder interest becomes invalid, and the disposition becomes subject to reformation under Section 3, if G's last surviving child lives beyond 90 years after the effective date of G's appointment.

Example (20) — Exercises of Successively Created Nongeneral Powers of Appointment. G devised property to A for life, remainder to such of A's descendants as A shall appoint. At his death, A exercised his nongeneral power by appointing to his child B for life, remainder to such of B's descendants as B shall appoint. At his death, B exercised his nongeneral power by appointing to his child C for life, remainder to C's children. A and B were living at G's death. Thereafter, C was born. A later died, survived by B and C. B then died survived by C.

A's nongeneral power passes Section 1(c)(1)'s test for initial validity. A is the validating life. B's nongeneral power, created by A's appointment, also passes Sections 1(c)(1)'s test for initial validity. Since under Section 2 the appointed interests and powers are created at G's death, and since B was then alive, B is the validating life for his nongeneral power. (If B had been born after G's death, however, his power would have failed Section 1(c)(1)'s test for initial validity; its validity would be governed by Section 1(c)(2), and would turn on whether or not it was exercised by B within 90 years after G's death.)

Although B's power is valid, his exercise may be partly invalid. The remainder interest in favor of C's children fails the test of Section 1(a)(1) for initial validity. The period of the Statutory Rule begins to run at G's death, under Section 2. (Since B's power was a nongeneral power, B's appointment under the common-law relation back doctrine of powers of appointment is treated as having been made by A. If B's appointment related back no further than that, of course, it would have been validated by Section 1(a)(1) because C was alive at A's death. However, A's power was also a nongeneral power, so relation back goes another step. A's appointment — which now includes B's appointment — is treated as having been made by G.) Since C was not alive at G's death, he cannot be the validating life. And, since C might have more children more than 21 years after the deaths of A and B and any other individual who was alive at G's death, the remainder interest in favor of his children is not initially validated by Section 1(a)(1). Instead, its validity is governed by Section 1(a)(2), and turns on whether or not C dies within 90 years after G's death.

Note that if either A's power or B's power (or both) had been a general testamentary power rather than a nongeneral power, the above solution would not change. However, if either A's power or B's power (or both) had been a presently exercisable general power, B's appointment would have passed Sections 1(a)(1)'s test for initial validity. (If A had the presently exercisable general power, the appointed interests and power would be created at A's death, not G's; and if the presently exercisable general power were held by B, the appointed interests and power would be created at B's death.)

Common-Law "Second-look" Doctrine. As indicated above, both at common law and under this Act (except for purposes of Section 5 only, as explained in the Comment to Section 5), appointed interests and powers established by the exercise of a general testamentary power or a nongeneral power are created when the power was created, not when the power was exercised. In applying this principle, the common law recognizes a so-called doctrine of second look, under which the facts existing on the date of the exercise are taken into account in determining the validity of appointed interests and appointed powers. E.g., *Warren's Estate*, 320 Pa. 112, 182 A. 396 (1930); *In re Estate of Bird*, 225 Cal.App.2d 196, 37 Cal.Rptr. 288 (1964). The common-law's second-look doctrine in effect constitutes a limited wait-and-see doctrine, and is therefore subsumed under but not totally superseded by this Act. The following example, which is a variation of Example (18) above, illustrates how the second-look doctrine operates at common law and how the situation would be analyzed under this Act.

Example (21) — Second-look Case. G was the life income beneficiary of a trust and the donee of a nongeneral power of appointment over the succeeding remainder interest, exercisable in favor of G's descendants. The trust was created by the will of his mother, M, who predeceased him. G exercised his power by his will, directing the income to be paid after his death to his children for the life of the survivor, and upon the death of his last surviving child, to pay the corpus of the trust to his grandchildren. At M's death, G had two children, X and Y. No further children were born to G, and at his death X and Y were still living.

The common-law solution of this example is as follows: G's appointment is valid under the Common-law Rule. Although the period of the Rule begins to run at M's death, the facts existing at G's death can be taken into account. This second look at the facts discloses that G had no additional children. Thus the possibility of additional children, which existed at M's death when the period of the Rule began to run, is disregarded. The survivor of X and Y, therefore, becomes the validating life for the remainder interest in favor of G's grandchildren, and G's appointment is valid. The common-law's second-look doctrine would not, however, save G's appointment if he actually had one or more children after M's death and if at least one of these afterborn children survived G.

Under this Act, if no additional children are born to G after M's death, the common-law second-look doctrine can be invoked as of G's death to declare G's appointment then to be valid under Section 1(a)(1); no further waiting is necessary. However, if additional children *are* born to G and one or more of them survives G, Section 1(a)(2) applies and the validity of G's appointment depends on G's last surviving child dying within 90 years after M's death.

Additional References. Restatement (Second) of Property (Donative Transfers) § 1.2, Comments d, f, g, and h; § 1.3, Comment g; § 1.4, Comment l (1983).

G. SECTION 1(e): EFFECT OF CERTAIN "LATER-OF" TYPE LANGUAGE; COORDINATION OF GENERATION-SKIPPING TRANSFER TAX REGULATIONS WITH UNIFORM ACT

Effect of Certain "Later-of" Type Language. Section 1(e) was added to the Uniform Act in 1990. It primarily applies to a non-traditional type of "later-of" clause (described below). Use of that type of clause might have produced unintended consequences, which are now rectified by the addition of Section 1(e).

In general, perpetuity saving or termination clauses can be used in either of two ways. The predominant use of such clauses is as an override clause. That is, the clause is not an integral part of the dispositive terms of the trust, but operates independently of the dispositive terms; the clause provides that all interests must vest no later than at a specified time in the future, and sometimes also provides that the trust must then terminate, but only if any interest has not previously vested or if the trust has not previously terminated. The other use of such a clause is as an integral part of the dispositive terms of the trust; that is, the clause is the provision that directly regulates the duration of the trust. Traditional perpetuity saving or termination clauses do not use a "later-of" approach; they mark off the maximum time of vesting or termination only by reference to a 21-year period following the death of the survivor of specified lives in being at the creation of the trust.

Section 1(e) applies to a non-traditional clause called a "later-of" (or "longer-of") clause. Such a clause might provide that the maximum time of vesting or termination of any interest or trust must occur no later than the later of (A) 21 years after the death of the survivor of specified lives in being at the creation of the trust or (B) 90 years after the creation of the trust.

Under the Uniform Act as originally promulgated, this type of "later-of" clause would not achieve a "later-of" result. If used as an override clause in conjunction with a trust whose terms were, by themselves, valid under the Common-law Rule, the "later-of" clause did no harm. The trust would be valid under the Common-law Rule as codified in Section 1(a)(1) because the clause itself would neither postpone the vesting of any interest nor extend the duration of the trust. But, if used either (1) as an override clause in conjunction with a trust whose terms were not valid under the Common-law Rule or (2) as the provision that directly regulated the duration of the trust, the "later-of" clause would not cure the perpetuity violation in case (1) and would create a perpetuity violation in case (2). In neither case would the clause qualify the trust for validity at common law under Section 1(a)(1) because the clause would not guarantee that all interests will be certain to vest or terminate no later than 21 years after the death of an individual then alive.** In any given case, 90 years can turn out to be longer than the period produced by the specified-lives-in-being-plus-21-years language.

Because the clause would fail to qualify the trust for validity under the Common-law Rule of Section 1(a)(1), the nonvested interests in the trust would be subject to the wait-and-see element of Section 1(a)(2) and vulnerable to a reformation suit under Section 3. Under Section 1(a)(2), an interest that is not valid at common law is invalid unless it actually vests or terminates within 90 years after its creation. Section 1(a)(2) does not grant such nonvested interests a permissible vesting period of either 90 years or a period of 21 years after the death of the survivor of specified lives in being. Section 1(a)(2) only grants such interests a period of 90 years in which to vest.

The operation of Section 1(a), as outlined above, is also supported by perpetuity policy. If Section 1(a) allowed a "later-of" clause to achieve a "later-of" result, it would authorize an improper use of the 90-year permissible vesting period of Section 1(a)(2). The 90-year period of Section 1(a)(2) is designed to approximate the period that, *on average*, would be produced by using actual lives in being plus 21 years. Because in any given case the period actually produced by lives in being plus 21 years can be shorter or longer than 90 years, an attempt to utilize a 90-year period in a "later-of" clause improperly seeks to turn the 90-year average into a minimum.

Set against this background, the addition of Section 1(e) is quite beneficial. Section 1(e) limits the effect of this type of "later-of" language to 21 years after the death of the survivor of the specified lives, in effect transforming the clause into a traditional perpetuity saving/termination clause. By doing so, Section 1(e) grants initial validity to the trust under the Common-law Rule as codified in Section 1(a)(1) and precludes a reformation suit under Section 3.

Note that Section 1(e) covers variations of the "later-of" clause described above, such as a clause that postpones vesting until the later of (A) 20 years after the death of the survivor of specified lives in being or (B) 89 years. Section 1(e) does not, however, apply to all dispositions that incorporate a "later-of" approach. To come under Section 1(e), the specified-lives prong must include a tack-on period of up to 21 years.

**By substantial analogous authority, the specified-lives-in-being-plus-21-years prong of the "later-of" clause under discussion is not sustained by the separability doctrine (described in Part H of the Comment to Section 1). See, e.g., Restatement of Property § 376 Comments e and f and illustration 3 (1944); Easton v. Hall, 323 Ill. 397, 154 N.E. 216 (1926); Thorne v. Continental Nat'l Bank & Trust Co., 305 Ill. App. 222, 27 N.E.2d 302 (1940). The inapplicability of the separability doctrine is also supported by perpetuity policy, as described in the text above.

Without a tack-on period, a "later-of" disposition, unless valid at common law, comes under Section 1(a)(2) and is given 90 years in which to vest. An example would be a disposition that creates an interest that is to vest upon "the later of the death of my widow or 30 years after my death."

Coordination of the Federal Generation-Skipping Transfer Tax with the Uniform Statutory Rule. In 1990, the Treasury Department announced a decision to coordinate the tax regulations under the "grandfathering" provisions of the federal generation-skipping transfer tax with the Uniform Act. Letter from Michael J. Graetz, Deputy Assistant Secretary of the Treasury (Tax Policy), to Lawrence J. Bugge, President, National Conference of Commissioners on Uniform State Laws (Nov. 16, 1990) (hereinafter *Treasury Letter*).

Section 1433(b)(2) of the Tax Reform Act of 1986 generally exempts ("grandfathers") trusts from the federal generation-skipping transfer tax that were irrevocable on September 25, 1985. This section adds, however, that the exemption shall apply "only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985." The provisions of Section 1433(b)(2) were first implemented by Temp. Treas. Reg. § 26.2601-1, promulgated by T.D. 8187 on March 14, 1988. Insofar as the Uniform Act is concerned, a key feature of that temporary regulation is the concept that the statutory reference to "corpus added to the trust after September 25, 1985" not only covers actual post-9/25/85 transfers of new property or corpus to a grandfathered trust but "constructive" additions as well. Under the temporary regulation as first promulgated, a "constructive" addition occurs if, after 9/25/85, the donee of a nongeneral power of appointment exercises that power "in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years. If a power is exercised by creating another power it will be deemed to be exercised to whatever extent the second power may be exercised." Temp. Treas. Reg. § 26.2601- 1(b)(1)(v)(B)(2) (1988).

Because the Uniform Act was promulgated in 1986 and applies only prospectively, any "grandfathered" trust would have become irrevocable prior to the enactment of the Uniform Act in any state. Nevertheless, the second sentence of Section 5(a) extends the wait-and-see approach to post-effective-date exercises of nongeneral powers even if the power itself was created prior to the effective date of the Uniform Act in any state. Consequently, a post-effective-date exercise of a nongeneral power of appointment created in a "grandfathered" trust could come under the provisions of the Uniform Act.

The literal wording, then, of Temp. Treas. Reg. § 26.2601-1(b)(1)(v)(B)(2) (1988), as first promulgated, could have jeopardized the grandfathered status of an exempt trust if (1) the trust created a nongeneral power of appointment, (2) the donee exercised that nongeneral power, and (3) the Uniform Act is the perpetuity law applicable to the donee's exercise. This possibility arose not only because the donee's exercise itself might come under the 90-year permissible vesting period of Section 1(a)(2) if it otherwise violated the Common-law Rule and hence was not validated under Section 1(a)(1). The possibility also arose in a less obvious way if the donee's exercise created another nongeneral power. The last sentence of the temporary regulation states that "if a power is exercised by creating another power it will be deemed to be exercised to whatever extent the second power may be exercised."

In late March 1990, the National Conference of Commissioners on Uniform State Laws (NCCUSL) filed a formal request with the Treasury Department asking that measures be taken to coordinate the regulation with the Uniform Act. By the Treasury Letter referred to above, the Treasury Department responded by stating that it "will amend the temporary regulations to accommodate the 90-year period under USRAP as originally promulgated [in 1986] or as amended [in 1990 by the addition of subsection (e)]." This should effectively remove the possibility of loss of grandfathered status under the Uniform Act merely because the donee of a nongeneral power created in a grandfathered trust inadvertently exercises that power in violation of the Common-law Rule or merely because the donee exercises that power by creating a second nongeneral power that might, in the future, be inadvertently exercised in violation of the Common-law Rule.

The Treasury Letter states, however, that any effort by the donee of a nongeneral power in a grandfathered trust to obtain a "later-of" specified-lives-in-being-plus-21-years or 90-years approach will be treated as a constructive addition, unless that effort is nullified by state law. As explained above, the Uniform Act, as originally promulgated in 1986 or as amended in 1990 by the addition of Section 1(e), nullifies any direct effort to obtain a "later-of" approach by the use of a "later-of" clause.

The Treasury Letter states that an indirect effort to obtain a "later-of" approach would also be treated as a constructive addition that would bring grandfathered status to an end, unless the attempt to obtain the later-of approach is nullified by state law. The Treasury Letter indicates that an indirect effort to obtain a "later-of" approach could arise if the donee of a nongeneral power successfully attempts to prolong the duration of a grandfathered trust by switching from a specified-lives-in-being-plus-21-years perpetuity period to a 90-year perpetuity period, or vice versa. Donees of nongeneral powers in grandfathered trusts would therefore be well advised to resist any temptation to wait until it becomes clear or reasonably predictable which perpetuity period will be longer and then make a switch to the longer period if the governing instrument creating the power utilized the shorter period. No such attempted switch and no constructive addition will occur if in each instance a traditional specified-lives-in-being-plus-21-years perpetuity saving clause is used.

Any such attempted switch is likely in any event to be nullified by state law and, if so, the attempted switch will not be treated as a constructive addition. For example, suppose that the original grandfathered trust contained a standard perpetuity saving clause declaring that all interests in the trust must vest no later than 21 years after the death of the survivor of specified lives in being. In exercising a nongeneral power created in that trust, any indirect effort by the donee to obtain a "later-of" approach by adopting a 90-year perpetuity saving clause will likely be nullified by Section 1(e). If that exercise occurs at a time when it has become clear or reasonably predictable that the 90-year period will prove longer, the donee's exercise would constitute language in a governing instrument that seeks to operate in effect to postpone the vesting of any interest until the later of the specified-lives-in-being-plus-21-years period or 90 years. Under Section 1(e), "that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives."

Quite apart from Section 1(e), the relation-back doctrine generally recognized in the exercise of nongeneral powers stands as a doctrine that could potentially be invoked to nullify an attempted switch from one perpetuity period to the other perpetuity period. Under that doctrine, interests created by the exercise of a nongeneral power are considered created by the donor of that power. See, e.g., Restatement (Second) of Property, Donative Transfers § 11.1 comment b (1986). As such, the maximum vesting period applicable to interests created by the exercise of a nongeneral power would apparently be covered by the perpetuity saving clause in the document that created the power, notwithstanding any different period the donee purports to adopt.

H. SUBSIDIARY COMMON-LAW DOCTRINES: WHETHER SUPERSEDED BY THIS ACT

As noted at the beginning of this Comment, the courts in interpreting the Common-law Rule developed several subsidiary doctrines. This Act does not supersede those subsidiary doctrines except to the extent the provisions of this Act conflict with them. As explained below, most of these common-law doctrines remain in full force or in force in modified form.

Constructional Preference for Validity. Professor Gray in his treatise on the Common-law Rule Against Perpetuities declared that a will or deed is to be construed without regard to the Rule, and then the Rule is to be "remorselessly" applied to the provisions so construed. J. Gray, The Rule Against Perpetuities § 629 (4th ed. 1942). Some courts may still adhere to this proposition. Colorado Nat'l Bank v. McCabe, 143 Colo. 21, 353 P.2d 385 (1960). Most courts, it is believed, would today be inclined to adopt the proposition put by the Restatement of Property § 375 (1944), which is that where an instrument is ambiguous — that is, where it is fairly susceptible to two or more constructions, one of which causes a Rule violation and the other of which does not — the construction that does not result in a Rule violation should be adopted. Cases supporting this view include Southern Bank & Trust Co. v. Brown, 271 S.C. 260, 246 S.E.2d 598 (1978); Davis v. Rossi, 326 Mo. 911, 34 S.W.2d 8 (1930); Watson v. Goldthwaite, 184 N.E.2d 340, 343 (Mass. 1962); Walker v. Bogle, 244 Ga. 439, 260 S.E.2d 338 (1979); Drach v. Ely, 703 P.2d 746 (Kan. 1985).

The constructional preference for validity is not superseded by this Act, but its role is likely to be different. The situation is likely to be that one of the constructions to which the ambiguous instrument is fairly susceptible would result in validity under Section 1(a)(1), 1(b)(1), or 1(c)(1), but the other construction does not necessarily result in invalidity; rather it results in the interest's validity being governed by Section 1(a)(2), 1(b)(2), or 1(c)(2). Nevertheless, even though the result of adopting the other construction is not as harsh as it is at common law, it is expected that the courts will incline toward the construction that validates the disposition under Section 1(a)(1), 1(b)(1), or 1(c)(1).

Conclusive Presumption of Lifetime Fertility. At common law, all individuals — regardless of age, sex, or physical condition — are *conclusively* presumed to be able to have children throughout their entire lifetimes. This principle is not superseded by this Act, and in view of new advances in medical science that allow women to become pregnant after menopause by way of test-tube fertilization (see Sauer, Paulson & Lobo, *A Preliminary Report on Oocyte Donation Extending Reproductive Potential to Women Over 40*, 323 N.Eng.J.Med. 1157 (1990)) and the widely accepted rule of construction that adopted children are presumptively included in class gifts, the conclusive presumption of lifetime fertility is not unrealistic. Since even elderly individuals probably cannot be excluded from adopting children based on their ages alone, the possibility of having children by adoption is seldom extinct. See, generally, Waggoner *In re Lattouf's Will and the Presumption of Lifetime Fertility in Perpetuity Law*, 20 San Diego L.Rev. 763 (1983). Under this Act, the main force of this principle is felt in Example (7), above, where it prevents a nonvested property interest from passing the test for initial validity under Section 1(a)(1).

Act Supersedes Doctrine of Infectious Invalidity. At common law, the invalidity of an interest can, under the doctrine of infectious invalidity, be held to invalidate one or more otherwise valid interests created by the disposition or even invalidate the entire disposition. The question turns on whether the general dispositive scheme of the transferor will be better carried out by eliminating only the invalid interest or by eliminating other interests as well. This is a question that is answered on a case-by-case basis. Several items are relevant to the question, including who takes the stricken interests in place of those the transferor designated to take.

The doctrine of infectious invalidity is superseded by this Act by Section 3, under which courts, upon the petition of an interested person, are required to *reform* the disposition to approximate as closely as possible the transferor's manifested plan of distribution when an invalidity under the Statutory Rule occurs.

Separability. The common law's separability doctrine is that when an interest is *expressly* subject to alternative contingencies, the situation is treated as if two interests were created in the same person or class. Each interest is judged separately; the invalidity of one of the interests does not necessarily cause the other one to be invalid. This common-law principle was established in Longhead v. Phelps, 2 Wm.Bl. 704, 96 Eng. Rep. 414 (K.B. 1770), and is followed in this country. L. Simes & A. Smith, The Law of Future Interests § 1257 (2d ed. 1956); 6 American Law of Property § 24.54 (A. Casner ed. 1952); Restatement of Property § 376 (1944). Under this doctrine, if property is devised "to B if X-event or Y-event happens," B in effect has two interests, one contingent on X-event happening and the other contingent on Y-event happening. If the interest contingent on X-event but not the one contingent on Y-event is invalid, the consequence of separating B's interest into two is that only one of them, the one contingent on X-event, is invalid. B still has a valid interest — the one contingent on the occurrence of Y-event.

The separability principle is not superseded by this Act. As illustrated in the following example, its invocation will usually result in one of the interests being initially validated by Section 1(a)(1) and the validity of the other interests being governed by Section 1(a)(2).

Example (22) — Separability Case. G devised real property "to A for life, then to A's children who survive A and reach 25, but if none of A's children survives A or if none of A's children who survives A reaches 25, then to B." G was survived by his brother (B), by his daughter (A), by A's husband (H), and by A's two minor children (X and Y).

The remainder interest in favor of A's children who reach 25 fails the test of Section 1(a)(1) for initial validity. Its validity is, therefore, governed by Section 1(a)(2) and depends on each of A's children doing any one of the following things within 90 years after G's death: predeceasing A, surviving A and failing to reach 25, or surviving A and reaching 25.

Under the separability doctrine, B has two interests. One of them is contingent on none of A's children surviving A. That interest passes Section 1(a)(1)'s test for initial validity; the validating life is A. B's other interest, which is contingent on none of A's surviving children reaching 25, fails Section 1(a)(1)'s test for initial validity. Its validity is governed by Section 1(a)(2) and depends on each of A's surviving children either reaching 25 or dying under 25 within 90 years after G's death.

Suppose that after G's death, A has a third child (Z). A subsequently dies, survived by her husband (H) and by X, Y, and Z. This, of course, causes B's interest that was contingent on none of A's children surviving A to terminate. If X, Y, and Z had all reached the age of 25 by the time of A's death, their interest would vest at A's death, and that would end the matter. If one or two, but not all three of them, had reached the age of 25 at A's death, B's other interest — the one that was contingent on none of A's surviving children reaching 25 — would also terminate. As for the children's interest, if the after- born child Z's age was such at A's death that Z could not be alive and under the age of 25 at the expiration of the allowable waiting period, the class gift in favor of the children would be valid under Section 1(a)(2), because none of those then under 25 could fail either to reach 25 or die under 25 after the expiration of the allowable 90-year waiting period. If, however, Z's age at A's death was such that Z could be alive and under the age of 25 at the expiration of the 90-year permissible vesting period, the circumstances requisite to reformation under Section 3(2) would arise, and the court would be justified in reforming G's disposition by reducing the age contingency with respect to Z to the age he would reach on the date when the permissible vesting period is due to expire. See Example (3) in the

Comment to Section 3. So reformed, the class gift in favor of A's children could not become invalid under Section 1(a)(2), and the children of A who had already reached 25 by the time of A's death could receive their shares immediately.

The "All-or-Nothing" Rule with Respect to Class Gifts; the Specific Sum and Sub-Class Doctrines. The common law applies an "all-or-nothing" rule with respect to class gifts, under which a class gift stands or falls as a whole. The all-or-nothing rule, usually attributed to Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817), is commonly stated as follows: If the interest of any potential class member *might* vest too remotely, the entire class gift violates the Rule. Although this Act does not supersede the basic idea of the much-maligned "all-or-nothing" rule, the evils sometimes attributed to it are substantially if not entirely eliminated by the wait-and-see feature of the Statutory Rule and by the availability of reformation under Section 3, especially in the circumstances described in Sections 3(2) and (3). For illustrations of the application of the all-or-nothing rule under this Act, see Examples (3), (4), and (6) in the Comment to Section 3.

The common law also recognizes a doctrine called the specific-sum doctrine, which is derived from Storrs v. Benbow, 3 De G.M. & G. 390, 43 Eng. Rep. 153 (Ch. 1853), and states: If a specified sum of money is to be paid to each member of a class, the interest of each class member is entitled to separate treatment and is valid or invalid under the Rule on its own. The common law also recognizes a doctrine called the sub-class doctrine, which is derived from Cattlin v. Brown, 11 Hare 372, 68 Eng. Rep. 1318 (Ch. 1853), and states: If the ultimate takers are not described as a single class but rather as a group of subclasses, and if the share to which each separate subclass is entitled will finally be determined within the period of the Rule, the gifts to the different subclasses are separable for the purpose of the Rule. American Security & Trust Co. v. Cramer, 175 F.Supp. 367 (D.D.C. 1959); Restatement of Property § 389 (1944). The specific-sum and sub-class doctrines are not superseded by this Act. The operation of the specific-sum doctrine under this Act is illustrated in the following example.

Example (23) — Specific-Sum Case. G bequeathed "$10,000 to each child of A, born before or after my death, who attains 25." G was survived by A and by A's two children (X and Y). X but not Y had already reached 25 at G's death. After G's death a third child (Z) was born to A.

If the phrase "born before or after my death" had been omitted, the class would close as of G's death under the common-law's rule of construction known as the rule of convenience: The after-born child, Z, would not be entitled to a $10,000 bequest, and the interests of both X and Y would be valid upon their creation at G's death. X's interest would be valid because it was initially vested; neither the Common-law Rule nor the Statutory Rule applies to interests that are vested upon their creation. Although the interest of Y was not vested upon its creation, it would be initially valid under Section 1(a)(1) because Y would be his own validating life; Y will either reach 25 or die under 25 within his own lifetime.

The inclusion of the phrase "before or after my death," however, would probably be construed to mean that G intended after-born children to receive a $10,000 bequest. See *Earle Estate*, 369 Pa. 52, 85 A.2d 90 (1951). Assuming that this construction were adopted, the specific-sum doctrine allows the interest of each child of A to be treated separately from the others for purposes of the Statutory Rule. For the reasons cited above, the interests of X and Y are initially valid under Section 1(a)(1). The nonvested interest of Z, however, fails Section 1(a)(1)'s test for initial validity; there is no validating life because Z, who was not alive when the interest was created, could reach 25 or die under 25 more than 21 years after the death of the survivor of A, X, and Y. Under Section 1(a)(2), the validity of Z's interest depends on Z's reaching (or failing to reach) 25 within 90 years after G's death.

The operation of the sub-class doctrine under this Act is illustrated in the following example.

Example (24) — Sub-Class Case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to the children of such child." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. A now has died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the children of a child of A is treated separately from the others. This allows the remainder interest in favor of X's children and the remainder interest in favor of Y's children to be validated under Section 1(a)(1). X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the children of Z fails Section 1(a)(1)'s test for initial validity; there is no validating life because Z, who was not alive when the interest was created, could have children more than 21 years after the death of the survivor of A, X, and Y. Under Section 1(a)(2), the validity of the remainder interest in favor of Z's children depends on Z's dying within 90 years after G's death.

Note why both of the requirements of the sub-class rule are met. The ultimate takers are described as a group of sub-classes rather than as a single class: "children of the child so dying," as opposed to "grandchildren." The share to which each separate sub-class is entitled is certain to be finally determined within a life in being plus 21 years: As of A's death, who is a life in being, it is certain to be known how many children he had surviving him; since in fact there were three, we know that each sub-class will ultimately be entitled to one-third of the corpus, neither more nor less. The possible failure of the one-third share of Z's children does not increase to one-half the share going to X's and Y's children; they still are entitled to only one-third shares. Indeed, should it turn out that X has children but Y does not, this would not increase the one-third share to which X's children are entitled.

Example (25) — General Testamentary Powers — Sub-Class Case. G devised property in trust, directing the trustee to pay income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child, the proportionate share of corpus of the one so dying shall go to such persons as the one so dying shall by will appoint; in default of appointment, to G's grandchildren in equal shares." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A.

The general testamentary powers conferred on each of A's children are entitled to separate treatment under the principles of the sub-class doctrine. See above. Consequently, the powers conferred on X and Y, A's children who were living at G's death, are initially valid under Section 1(c)(1). But the general testamentary power conferred on Z, A's child who was born after G's death, fails the test of Section 1(c)(1) for *initial* validity. The validity of Z's power is governed by Section 1(c)(2). Z's death must occur within 90 years after G's death if any provision in Z's will purporting to exercise his power is to be valid.

Duration of Indestructible Trusts — Termination of Trusts by Beneficiaries. The widely accepted view in American law is that the beneficiaries of a trust other than a charitable trust can compel its premature termination if all beneficiaries consent *and* if such termination is not expressly restrained or impliedly restrained by the existence of a "material purpose" of the settlor in establishing the trust. Restatement (Second) of Trusts § 337 (1959); IV A. Scott, The Law of Trusts § 337 (3d ed. 1967). A trust that cannot be terminated by its beneficiaries is called an indestructible trust.

It is generally accepted that the duration of the indestructibility of a trust, other than a charitable trust, is limited to the applicable perpetuity period. See Restatement (Second) of Trusts § 62, Comment o (1959); Restatement (Second) of Property (Donative Transfers) § 2.1 and Legislative Note and Reporter's Note (1983); I A. Scott, The Law of Trusts § 62.10(2) (3d ed. 1967); J. Gray, The Rule Against Perpetuities § 121 (4th ed. 1942); L. Simes & A. Smith, The Law of Future Interests § 1391-93 (2d ed. 1956).

Nothing in this Act supersedes this principle. One modification, however, is necessary: As to trusts that contain a nonvested property interest or power of appointment whose validity is governed by the wait-and-see element adopted in Section 1(a)(2), 1(b)(2), or 1(c)(2), the courts can be expected to determine that the applicable perpetuity period is 90 years.

Effect of Amendments. — Session Laws 2007-390, s. 2, effective August 19, 2007, and applicable to all trusts created before, on, or after that date, inserted "Except as otherwise provided in G.S. 41-23" in the introductory paragraph of subsection (a); deleted "trust or other" preceding "property arrangement" throughout subsection (e); and deleted "or trust" following "of any interest" in subdivisions (e)(1) and (2).

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

CASE NOTES

Cited in Arundel Corp. v. Marie, 383 Md. 489, 860 A.2d 886, 2004 Md. LEXIS 714 (2004).

§ 41-16. When nonvested property interest or power of appointment created.

(a) Except as provided in subsections (b) and (c) of this section and in G.S.

41-19(a), the time for creation of a nonvested property interest or a power of appointment is determined under general principles of property law.

(b) For purposes of this Article, if there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of (i) a nonvested property interest or (ii) a property interest subject to a power of appointment described in G.S. 41-15(b) or (c), the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates.

(c) For purposes of this Article, a nonvested property interest or a power of appointment arising from a transfer of property to a previously funded trust or other existing property arrangement is created when the nonvested property interest or power of appointment in the original contribution was created. (1995, c. 190, s. 1.)

OFFICIAL COMMENT

Subsection (a): General Principles of Property Law; When Nonvested Property Interests and Powers of Appointment are Created. Under Section 1, the period of time allowed by the Statutory Rule Against Perpetuities is marked off from the time of creation of the nonvested property interest or power of appointment in question. Section 5, with certain exceptions, provides that the Act applies only to nonvested property interests and powers of appointment created on or after the effective date of the Act.

Except as provided in subsections (b) and (c), and in the second sentence of Section 5(a) for purposes of that section only, the time of creation of nonvested property interests and powers of appointment is determined under general principles of property law.

Since a will becomes effective as a dispositive instrument upon the decedent's death, not upon the execution of the will, general principles of property law determine that the time when a nonvested property interest or a power of appointment created by will is created is at the decedent's death.

With respect to a nonvested property interest or a power of appointment created by inter vivos transfer, the time when the interest or power is created is the date the transfer becomes effective for purposes of property law generally, normally the date of delivery of the deed.

With respect to a nonvested property interest or a power of appointment created by the testamentary or inter vivos exercise of a power of appointment, general principles of property law adopt the "relation back" doctrine. Under that doctrine, the appointed interests or powers are created when the power was *created* not when it was exercised, if the exercised power was a nongeneral power or a general testamentary power. If the exercised power was a general power presently exercisable, the relation back doctrine is not followed; the time of creation of the appointed property interests or appointed powers is regarded as the time when the power was irrevocably *exercised*, not when the power was created.

Subsection (b): Postponement, for Purposes of this Act, of the Time when a Nonvested Property Interest or a Power of Appointment is Created in Certain Cases. The reason that the significant date for purposes of this Act is the date of creation is that the unilateral control of the interest (or the interest subject to the power) by one person is then relinquished. In certain cases, all beneficial rights in a property interest (including an interest subject to a power of appointment) remain under the unilateral control of one person even after the delivery of the deed or even after the decedent's death. In such cases, under this subsection, the interest or power is created, for purposes of this Act, when no person, acting alone, has a power presently exercisable to become the unqualified beneficial owner of the property interest (or the property interest subject to the power of appointment).

> *Example (1) — Revocable Inter-Vivos Trust Case.* G conveyed property to a trustee, directing the trustee to pay the net income therefrom to himself (G) for life, then to G's son A for his life, then to A's children for the life of the survivor of A's children who are living at G's death, and upon the death of such last surviving child, the corpus of the trust is to be distributed among A's then-living descendants, per stirpes. G retained the power to revoke the trust.
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> Because of G's reservation of the power to revoke the trust, the creation for purposes of this Act of the nonvested property interests in this case occurs at G's death, not when the trust was established. This is in accordance with common law, for purposes of the Common-law Rule Against Perpetuities. Cook v. Horn, 214 Ga. 289, 104 S.E.2d 461 (1958).

The rationale that justifies the postponement of the time of creation in such cases is as follows. A person, such as G in the above example, who alone can exercise a power to become the unqualified beneficial owner of a nonvested property interest is in effect the owner of that property interest. Thus, any nonvested property interest subject to such a power is not created for purposes of this Act until the power terminates (by release, expiration at the death of the donee, or otherwise). Similarly, as noted above, any property interest or power of appointment created in an appointee by the irrevocable exercise of such a power is created at the time of the donee's irrevocable exercise.

For the date of creation to be postponed under subsection (b), the power need not be a power to revoke, and it need not be held by the settlor or transferor. A *presently exercisable* power held by *any* person *acting alone* to make himself the unqualified beneficial owner of the nonvested property interest or the property interest subject to a power of appointment is sufficient. If such a power exists, the time when the interest or power is created, for purposes of this Act, is postponed until the termination of the power (by irrevocable exercise, release, contract to exercise or not to exercise, expiration at the death of the donee, or otherwise). An example of such a power that might not be held by the settlor or transferor is a power, held by any person who can act alone, fully to invade the corpus of a trust.

An important consequence of the idea that a power need not be held by the settlor for the time of creation to be postponed under this section is that it makes postponement possible even in cases of testamentary transfers.

> *Example (2) — Testamentary Trust Case.* G devised property in trust, directing the trustee to pay the income "to A for life, remainder to such persons (including A, his creditors, his estate, and the creditors of his estate) as A shall appoint; in default of appointment, the property to remain in trust to pay the income to A's children for the life of the survivor, and upon the death of A's last surviving child, to pay the corpus to A's grandchildren." A survived G.
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> If A exercises his presently exercisable general power, any nonvested property interest or power of appointment created by A's appointment is created for purposes of this Act when the power is exercised. If A does not exercise the power, the nonvested property interests in G's gift-in-default clause are created when A's power terminates (at A's death). In either case, the postponement is justified because the transaction is the equivalent of G's having devised the full remainder interest (following A's income interest) to A and of A's having in turn transferred that interest in accordance with his exercise of the power or, in the event the power is not exercised, devised that interest at his death in accordance with G's gift-in-default clause. Note, however, that if G had conferred on A a *nongeneral* power or a general *testamentary* power, A's power of appointment, any nonvested property interest or power of appointment created by A's appointment, if any, and the nonvested property interests in G's gift-in-default clause would be created at G's death.

Unqualified Beneficial Owner of the Nonvested Property Interest or the Property Interest Subject to a Power of Appointment. For the date of creation to be postponed under subsection (b), the presently exercisable power must be one that entitles the donee of the power to become the unqualified beneficial owner of the *nonvested property interest (or the property interest subject to a nongeneral power of appointment, a general testamentary power of appointment, or a general power of appointment not presently exercisable because of a condition precedent).* This requirement was met in Example (2), above, because A could by appointing the remainder interest to himself become the unqualified beneficial owner of all the nonvested property interests in G's gift-in-default clause. In Example (2) it is not revealed whether A, if he exercised the power in his own favor, also had the right as sole beneficiary of the trust to compel the termination of the trust and possess himself as unqualified beneficial owner of the property that was the subject of the trust. Having the power to compel termination of the trust is not necessary. If, for example, the trust in Example (2) was a spendthrift trust or contained any other feature that under the relevant local law (see Claflin v. Claflin, 149 Mass. 19, 20 N.E. 454 (1889); Restatement (Second) of Trusts § 337 (1959)) would prevent A as sole beneficiary from compelling termination of the trust, A's presently exercisable general power over the remainder interest would still postpone the time of creation of the nonvested property interests in G's gift-in-default clause because the power enables A to become the unqualified beneficial owner of such interests.

Furthermore, it is not necessary that the donee of the power have the power to become the unqualified beneficial owner of *all beneficial* rights *in the trust*. In Example (2), the property interests in G's gift-in-default clause are not created for purposes of this Act until A's power expires (or on A's appointment, until the power's exercise) even if someone other than A was the income beneficiary of the trust.

Presently Exercisable Power. For the date of creation to be postponed under subsection (b), the power must be presently exercisable. A testamentary power does not qualify. A power not presently exercisable because of a condition precedent does not qualify. If the condition precedent later becomes satisfied, however, so that the power becomes presently exercisable, the interests or powers subject thereto are not created, for purposes of this Act, until the termination of the power. The common-law decision of Fitzpatrick v. Mercantile Safe Deposit Co., 220 Md. 534, 155 A.2d 702 (1959), appears to be in accord with this proposition.

Example (3) — General Power in Unborn Child Case. G devised property "to A for life, then to A's first-born child for life, then to such persons, including A's first-born child or such child's estate or creditors, as A's first-born child shall appoint." There was a further provision that in default of appointment, the trust would continue for the benefit of G's descendants. G was survived by his daughter (A), who was then childless. After G's death, A had a child, X. A then died, survived by X. As of G's death, the power of appointment in favor of A's first-born child and the property interests in G's gift-in-default clause would be regarded as having been created at G's death because the power in A's first-born child was then a general power not presently exercisable because of a condition precedent. At X's birth, X's general power became presently exercisable and excluded from the Statutory Rule. X's power also qualifies as a power exercisable by one person alone to become the unqualified beneficial owner of the property interests in G's gift-in-default clause. Consequently, the nonvested property interests in G's gift-in-default clause are not created, for purposes of this Act, until the termination of X's power. If X exercises his presently exercisable general power, before or after A's death, the appointed interests or powers are created, for purposes of this Act, as of X's exercise of the power.

Partial Powers. For the date of creation to be postponed under subsection (b), the person must have a presently exercisable power to become the unqualified beneficial owner of the full nonvested property interest or the property interest subject to a power of appointment described in Section 1(b) or 1(c). If, for example, the subject of the transfer was an undivided interest such as a one-third tenancy in common, the power qualifies even though it relates only to the undivided one-third interest in the tenancy in common; it need not relate to the whole property. A power to become the unqualified beneficial owner of only part of the nonvested property interest or the property interest subject to a power of appointment, however, does not postpone the time of creation of the interests or powers subject thereto, unless the power is actually exercised.

Example (4) — "5 and 5" Power Case. G devised property in trust, directing the trustee to pay the income "to A for life, remainder to such persons (including A, his creditors, his estate, and the creditors of his estate) as A shall by will appoint;" in default of appointment, the governing instrument provided for the property to continue in trust. A was given a noncumulative power to withdraw the greater of $5,000 or 5% of the corpus of the trust annually. A survived G. A never exercised his noncumulative power of withdrawal.

G's death marks the time of creation of: A's testamentary power of appointment; any nonvested property interest or power of appointment created in G's gift-in-default clause; and any appointed interest or power created by a testamentary exercise of A's power of appointment over the remainder interest. A's general power of appointment over the remainder interest does not postpone the time of creation because it is not a presently exercisable power. A's noncumulative power to withdraw a portion of the trust each year does not postpone the time of creation as to all or the portion of the trust with respect to which A allowed his power to lapse each year because A's power is a power over only part of any nonvested property interest or property interest subject to a power of appointment in G's gift-in-default clause and over only part of any appointed interest or power created by a testamentary exercise of A's general power of appointment over the remainder interest. The same conclusion has been reached at common law. See Ryan v. Ward, 192 Md. 342, 64 A.2d 258 (1949).

If, however, in any year A exercised his noncumulative power of withdrawal in a way that created a nonvested property interest (or power of appointment) in the withdrawn amount (for example, if A directed the trustee to transfer the amount withdrawn directly into a trust created by A), the appointed interests (or powers) would be created when the power was exercised, not when G died.

Incapacity of the Donee of the Power. The fact that the donee of a power lacks the capacity to exercise it, by reason of minority, mental incompetency, or any other reason, does not prevent the power held by such person from postponing the time of creation under subsection (b), unless the governing instrument extinguishes the power (or prevents it from coming into existence) for that reason.

Joint Powers — Community Property; Marital Property. For the date of creation to be postponed under subsection (b), the power must be exercisable by one person alone. A joint power does not qualify, except that, if the bracketed sentence of subsection (b) is enacted, a joint power over community property or over marital property under the Uniform Marital Property Act held by individuals married to each other is, for purposes of this Act, treated as a power exercisable by one person acting alone.

See Restatement (Second) of Property (Donative Transfers) § 1.2, Comment b and illustrations 5, 6, and 7 (1983), for the rationale supporting the enactment of the bracketed sentence and examples illustrating its principle.

Subsection (c): No Staggered Periods. For purposes of this Act, subsection (c) in effect treats a transfer of property to a previously funded trust or other existing property arrangement as having been made when the nonvested property interest or power of appointment in the original contribution was created. The purpose of subsection (c) is to avoid the administrative difficulties that would otherwise result where subsequent transfers are made to an existing irrevocable trust. Without subsection (c), the allowable period under the Statutory Rule would be marked off in such cases from different times with respect to different portions of the same trust.

> *Example (5) — Series of Transfers Case.* In Year One, G created an irrevocable inter vivos trust, funding it with $20,000 cash. In Year Five, when the value of the investments in which the original $20,000 contribution was placed had risen to a value of $30,000, G added $10,000 cash to the trust. G died in Year Ten. G's will poured the residuary of his estate into the trust. G's residuary estate consisted of Blackacre (worth $20,000) and securities (worth $80,000). At G's death, the value of the investments in which the original $20,000 contribution and the subsequent $10,000 contribution were placed had risen to a value of $50,000.
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> Were it not for subsection (c), the permissible vesting period under the Statutory Rule would be marked off from three different times: Year One, Year Five, and Year Ten. The effect of subsection (c) is that the permissible vesting period under the Statutory Rule starts running only once — in Year One — with respect to the entire trust. This result is defensible not only to prevent the administrative difficulties inherent in recognizing staggered periods. It also is defensible because if G's inter vivos trust had contained a perpetuity saving clause, the perpetuity-period component of the clause would be geared to the time when the original contribution to the trust was made; this clause would cover the subsequent contributions as well. Since the major justification for the adoption by this Act of the wait-and-see method of perpetuity reform is that it amounts to a statutory insertion of a saving clause (see the Prefatory Note), subsection (c) is consistent with the theory of this Act.

Additional References. Restatement (Second) of Property (Donative Transfers) §§ 1.1, 1.2 (1983) and the Comments thereto.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-17. Reformation.

Upon the petition of an interested person, a court shall reform a disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by G.S. 41-15(a)(2), 41-15(b)(2), or 41-15(c)(2) if:

(1) A nonvested property interest or a power of appointment becomes invalid under G.S. 41-15;

(2) A class gift is not invalid under G.S. 41-15, but might become invalid under G.S. 41-15, and the time has arrived when the share of any class is to take effect in possession or enjoyment; or

(3) A nonvested property interest that is not validated by G.S. 41-15(a)(1) can vest but not within 90 years after its creation. (1995, c. 190, s. 1.)

OFFICIAL COMMENT

Reformation. This section requires a court, upon the petition of an interested person, to reform a disposition *whose validity is governed by the wait-and-see element of Section 1(a)(2), 1(b)(2), or 1(c)(2)* so that the reformed disposition is within the limits of the 90-year period allowed by those subsections, in the manner deemed by the court most closely to approximate the transferor's manifested plan of distribution, in three circumstances: First, when (after the application of the Statutory Rule) a nonvested property interest or a power of appointment becomes invalid under the Statutory Rule; second, when a class gift has not but still might become invalid under the Statutory Rule and the time has arrived when the share of one or more class members is to take effect in possession or enjoyment; and third, when a nonvested property interest can vest, but cannot do so within the allowable 90-year period under the Statutory Rule.

It is anticipated that the circumstances requisite to reformation will seldom arise, and consequently that this section will be applied infrequently. If, however, one of the three circumstances arises, the court in reforming is authorized to alter existing interests or powers and to create new interests or powers by implication or construction based on the transferor's manifested plan of distribution as a whole. In reforming, the court is urged not to invalidate any vested interest retroactively (the doctrine of infectious invalidity having been superseded by this Act, as indicated in the Comment to Section 1). The court is also urged not to reduce an age contingency in excess of 21 unless it is absolutely necessary, and if it is deemed necessary to reduce such an age contingency, not to reduce it automatically to 21 but rather to reduce it no lower than absolutely necessary. See Example (3), below; Waggoner, *Perpetuity Reform*, 81 Mich.L.Rev. 1718, 1755-1759 (1983); Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U.Pa.L.Rev. 521, 546-49 (1982).

Judicial Sale of Land Affected by Future Interests. Although this section — except for cases that fall under subsections (2) or (3) — defers the time when a court is directed to reform a disposition until the expiration of the 90-year permissible vesting period, this section is not to be understood as preventing an earlier application of other remedies. In particular, in the case of interests in land not in trust, the principle, codified in many states, is widely recognized that there is judicial authority, under specified circumstances, to order a sale of land in which there are future interests. See 1 American Law of Property §§ 4.98-.99 (A. Casner ed. 1952); L. Simes & A. Smith, The Law of Future Interests § 1941-1946 (2d ed. 1956); see also Restatement of Property § 179 at pp. 485-95 (1936); L. Simes & C. Taylor, Improvement of Conveyancing by Legislation 235-38 (1960). Nothing in Section 3 of this Act should be taken as precluding this type of remedy, if appropriate, before the expiration of the 90-year permissible vesting period.

Duration of the Indestructibility of Trusts — Termination of Trusts by Beneficiaries. As noted in Part G of the Comment to Section 1, it is generally accepted that a trust cannot remain indestructible beyond the period of the rule against perpetuities. Under this Act, the period of the rule against perpetuities applicable to a trust whose validity is governed by the wait-and-see element of Section 1(a)(2), 1(b)(2), or 1(c)(2) is 90 years. The result of any reformation under Section 3 is that all nonvested property interests in the trust will vest in interest (or terminate) no later than the 90th anniversary of their creation. In the case of trusts containing a nonvested property interest or a power of appointment whose validity is governed by Section 1(a)(2), 1(b)(2), or 1(c)(2), courts can therefore be expected to adopt the rule that no purpose of the settlor, expressed in or implied from the governing instrument, can prevent the beneficiaries of a trust other than a charitable trust from compelling its termination after 90 years after every nonvested property interest and power of appointment in the trust was created.

Subsection (1): Invalid Property Interest or Power of Appointment. Subsection (1) is illustrated by the following examples.

> *Example (1) — Multiple Generation Trust.* G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children for the life of the survivor, then to A's grandchildren for the life of the survivor, and on the death of A's last surviving grandchild, the corpus of the trust is to be divided among A's then living descendants per stirpes; if none, to" a specified charity. G was survived by his child (A) and by A's two minor children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by his children (X, Y, and Z) and by three grandchildren (M, N, and O).
>
> There are four interests subject to the Statutory Rule in this example: (1) the income interest in favor of A's children, (2) the income interest in favor of A's grandchildren, (3) the remainder interest in the corpus in favor of A's descendants who survive the death of A's last surviving grandchild, and (4) the alternative remainder interest in the corpus in favor of the specified charity. The first interest is initially valid under Section 1(a)(1); A is the validating life for that interest. There is no validating life for the other three interests, and so their validity is governed by Section 1(a)(2).
>
> If, as is likely, A and A's children all die before the 90th anniversary of G's death, the income interest in favor of A's grandchildren is valid under Section 1(a)(2).
>
> If, as is also likely, some of A's grandchildren are alive on the 90th anniversary of G's death, the alternative remainder interests in the corpus of the trust then become invalid under Section 1(a)(2), giving rise to Section 3(1)'s prerequisite to reformation. A court would be justified in reforming G's disposition by closing the class in favor of A's descendants as of the 90th anniversary of G's death

(precluding new entrants thereafter), by moving back the condition of survivorship on the class so that the remainder interest is in favor of G's descendants who survive the 90th anniversary of G's death (rather than in favor of those who survive the death of A's last surviving grandchild), and by redefining the class so that its makeup is formed as if A's last surviving grandchild died on the 90th anniversary of G's death.

Example (2) — Sub-Class Case. G devised property in trust, directing the trustee to pay the income "to A for life, then in equal shares to A's children for their respective lives; on the death of each child the proportionate share of corpus of the one so dying shall go to the descendants of such child surviving at such child's death, per stirpes." G was survived by A and by A's two children (X and Y). After G's death, another child (Z) was born to A. Subsequently, A died, survived by X, Y, and Z.

Under the sub-class doctrine, each remainder interest in favor of the descendants of a child of A is treated separately from the others. Consequently, the remainder interest in favor of X's descendants and the remainder interest in favor of Y's descendants are valid under Section 1(a)(1): X is the validating life for the one, and Y is the validating life for the other.

The remainder interest in favor of the descendants of Z is not validated by Section 1(a)(1) because Z, who was not alive when the interest was created, could have descendants more than 21 years after the death of the survivor of A, X, and Y. Instead, the validity of the remainder interest in favor of Z's descendants is governed by Section 1(a)(2), under which its validity depends on Z's dying within 90 years after G's death.

Although unlikely, suppose that Z is still living 90 years after G's death. The remainder interest in favor of Z's descendants will then become invalid under the Statutory Rule, giving rise to subsection (1)'s prerequisite to reformation. In such circumstances, a court would be justified in reforming the remainder interest in favor of Z's descendants by making it indefeasibly vested as of the 90th anniversary of G's death. To do this, the court would reform the disposition by eliminating the condition of survivorship of Z and closing the class to new entrants after the 90th anniversary of G's death.

Subsection (2): Class Gifts Not Yet Invalid. Subsection (2), which, upon the petition of an interested person, requires reformation in certain cases where a class gift has not but still might become invalid under the Statutory Rule, is illustrated by the following examples.

Example (3) — Age Contingency in Excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who reach the age of 30." G was survived by A, by A's spouse (H), and by A's two children (X and Y), both of whom were under the age of 30 when G died.

Since the remainder interest in favor of A's children who reach 30 is a class gift, at common law (Leake v. Robinson, 2 Mer. 363, 35 Eng. Rep. 979 (Ch. 1817)) and under this Act (see Part G of the Comment to Section 1) the interests of *all* potential class members must be valid or the class gift is totally invalid. Although X and Y will either reach 30 or die under 30 within their own lifetimes, there is at G's death the possibility that A will have an afterborn child (Z) who will reach 30 or die under 30 more than 21 years after the death of the survivor of A, H, X, and Y. There is no validating life, and the class gift is therefore not validated by Section 1(a)(1).

Under Section 1(a)(2), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death. If in fact there is an afterborn child (Z), and if upon A's death, Z has at least reached an age such that he cannot be alive and under the age of 30 on the 90th anniversary of G's death, the class gift is valid. (Note that at Z's *birth* it would have been known whether or not Z could be alive and under the age of 30 on the 90th anniversary of G's death; nevertheless, even if it was *then* certain that Z could *not* be alive and under the age of 30 on the 90th anniversary of G's death, the class gift could not *then* have been declared valid because, A being alive, it was *then* possible for one or more additional children to have later been born to or adopted by A.)

Although unlikely, suppose that at A's death (prior to the expiration of the 90-year period), Z's age was such that he *could* be alive and under the age of 30 on the 90th anniversary of G's death. Suppose further that at A's death X and Y were over the age of 30. Z's interest and hence the class gift as a whole is not yet invalid under the Statutory Rule because Z might die under the age of 30 within the remaining part of the 90-year period following G's death; but the class gift might become invalid because Z might be alive and under the age of 30, 90 years after G's death. Consequently, the prerequisites to reformation set forth in subsection (2) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on reaching the age he can reach if he lives to the 90th anniversary of G's death. This would render Z's interest valid so far as the Statutory Rule Against Perpetuities is concerned, and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to reach the required age under the reformed disposition, the remaining one-third share would be divided equally between X and Y or their successors in interest.

Example (4) — Case Where Subsection (2) Applies, Not Involving an Age Contingency in Excess of 21. G devised property in trust, directing the trustee to pay the income "to A for life, then to A's children; the corpus of the trust is to be equally divided among A's children who graduate from an accredited medical school or law school." G was survived by A, by A's spouse (H), and by A's two minor children (X and Y).

As in Example (3), the remainder interest in favor of A's children is a class gift, and the common-law principle is not superseded by this Act by which the interests of *all* potential class members must be valid or the class gift is totally invalid. Although X and Y will either graduate from an accredited medical or law school, or fail to do so, within their own lifetimes, there is at G's death the possibility that A will have an after-born child (Z), who will graduate from an accredited medical or law school (or die without having done either) more than 21 years after the death of the survivor of A, H, X, and Y. The class gift would not be valid under the Common-law Rule and is, therefore, not validated by Section 1(a)(1).

Under Section 1(a)(2), the children's remainder interest becomes invalid only if an interest of a class member neither vests nor terminates within 90 years after G's death.

Suppose in fact that there is an afterborn child (Z), and that at A's death Z was a freshman in college. Suppose further that at A's death X had graduated from an accredited law school and that Y had graduated from an accredited medical school. Z's interest and hence the class gift as a whole is not yet invalid under Section 1(a)(2) because the 90-year period following G's death has not yet expired; but the class gift might become invalid because Z might be alive but not a graduate of an accredited medical or law school 90 years after G's death. Consequently, the prerequisites to reformation set forth in Section 3(2) are satisfied, and a court would be justified in reforming G's disposition to provide that Z's interest is contingent on graduating from an accredited medical or law school within 90 years after G's death. This would render Z's interest valid so far as the Section 1(a)(2) is concerned and allow the class gift as a whole to be declared valid. X and Y would thus be entitled immediately to their one-third shares each. If Z's interest later vested, Z would receive the remaining one-third share. If Z failed to graduate from an accredited medical or law school within the allowed time under the disposition as so reformed, the remaining one-third share would be divided equally between X and Y or their successors in interest.

Subsection (3): Interests that Can Vest But Not Within the 90-Year Permissible Vesting Period. In exceedingly rare cases, an interest might be created that can vest, but not within the 90-year permissible vesting period of the Statutory Rule. This may be the situation when the interest was created (See Example (5)), or it may become the situation at some time thereafter (see Example (6)). Whenever the situation occurs, the court, upon the petition of an interested person, is required by subsection (3) to reform the disposition within the limits of the 90-year permissible vesting period.

Example (5) — Case of an Interest, as of its Creation, being Impossible to Vest Within the 90-Year Period. G devised property in trust, directing the trustee to divide the income, per stirpes, among G's descendants from time to time living, for 100 years. At the end of the 100-year period following G's death, the trustee is to distribute the corpus and accumulated income to G's then-living descendants, per stirpes; if none, to the XYZ Charity.

The nonvested property interest in favor of G's descendants who are living 100 years after G's death can vest, but not within the 90-year period of Section 1(a)(2). The interest would violate the Common-law Rule, and hence is not validated by Section 1(a)(1), because there is no validating life. In these circumstances, a court is required by Section 3(3) to reform G's disposition within the limits of the 90-year period. An appropriate result would be for the court to lower the period following G's death from a 100-year period to a 90-year period.

Note that the circumstance that triggers the direction to reform the disposition under this subsection is that the nonvested property interest still can vest, but cannot vest within the 90-year period of Section 1(a)(2). It is not necessary that the interest be certain to become *invalid* under that subsection. For the interest to be certain to become invalid under Section 1(a)(2), it would have to be certain that it can neither vest *nor terminate* within the 90-year period. In this example, the interest of G's descendants might *terminate* within the period (by all of G's descendants dying within 90 years of G's death). If this were to happen, the interest of XYZ Charity would be valid because it would have vested within the allowable period. However, it was thought desirable to require reformation without waiting to see if this would happen: The only way that G's *descendants*, who are G's *primary* set of beneficiaries, would have a chance to take the property is to reform the disposition within the limits of the 90-year period on the ground that their interest cannot *vest* within the allowable period and subsection (3) so provides.

Example (6) — Case of an Interest after its Creation Becoming Impossible to Vest Within the 90-Year Period. G devised property in trust, with the income to be paid to A. The corpus of the trust was to be divided among A's children who reach 30, each child's share to be paid on the child's 30th birthday; if none reaches 30, to the XYZ Charity. G was survived by A and by A's two children (X and Y). Neither X nor Y had reached 30 at G's death. The class gift in favor of A's children who reach 30 would violate the Common-law Rule Against Perpetuities and, thus, is not validated by Section 1(a)(1). Its validity is therefore governed by Section 1(a)(2).

Suppose that after G's death, and during A's lifetime, X and Y die and a third child (Z) is born to or adopted by A. At A's death, Z is living but her age is such that she cannot reach 30 within the remaining part of the 90-year period following G's death. As of A's death, it has become the situation that Z's interest cannot vest within the allowable period. The circumstances requisite to reformation under subsection (3) have arisen. An appropriate result would be for the court to lower the age contingency to the age Z can reach 90 years after G's death.

Additional References. For additional discussion and illustrations of the application of some of the principles of this section, see the Comments to Restatement (Second) of Property (Donative Transfers) § 1.5 (1983).

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-18. Exclusions from statutory rule against perpetuities.

G.S. 41-15 does not apply to:

(1) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of:
  a. A premarital or postmarital agreement;
  b. A separation or divorce settlement;
  c. A spouse's election;
  d. A similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties;
  e. A contract to make or not to revoke a will or trust;
  f. A contract to exercise or not to exercise a power of appointment;
  g. A transfer in satisfaction of a duty of support; or
  h. A reciprocal transfer;

(2) A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and income;

(3) A power to appoint a fiduciary;

(4) A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and principal;

(5) A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or subdivision;

(6) A nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit,

income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or spouse;

(7) A property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this State;

(8) A property interest or arrangement subjected to a time limit under Article 14 of Chapter 36A, "Honorary Trusts; Trusts for Pets; Trusts for Cemetery Lots"; or

(9) A property interest or arrangement subjected to a time limit under Article 3 of this Chapter, "Time Limits on Options in Gross and Certain Other Interests in Land". (1995, c. 190, ss. 1-3.)

OFFICIAL COMMENT

Section 4 lists seven exclusions from the Statutory Rule Against Perpetuities (Statutory Rule). Some are declaratory of existing law; others are contrary to existing law. Since the Common-law Rule Against Perpetuities is superseded by this Act (or a statutory version or variation thereof is repealed by this Act), a nonvested property interest, power of appointment, or other arrangement excluded from the Statutory Rule by this section is not subject to any rule against perpetuities, statutory or otherwise.

A. SUBSECTION (1): NONDONATIVE TRANSFERS EXCLUDED

Rationale. In line with long-standing scholarly commentary, subsection (1) excludes (with certain enumerated exceptions) nonvested property interests and powers of appointment arising out of a nondonative transfer. The rationale for this exclusion is that the Rule Against Perpetuities is a wholly inappropriate instrument of social policy to use as a control over such arrangements. The period of the rule — a life in being plus 21 years — is not suitable for nondonative transfers, and this point applies with equal force to the 90-year allowable waiting period under the wait-and-see element of Section 1 because that period represents an approximation of the period of time that would be produced, on average, by using a statutory list identifying actual measuring lives and adding a 21-year period following the death of the survivor.

No general exclusion from the Common-law Rule Against Perpetuities is recognized for nondonative transfers, and so subsection (1) is contrary to existing common law. (But see Metropolitan Transportation Authority v. Bruken Realty Corp., 67 N.Y.2d 156, 492 N.E.2d 379, 384 (1986), pointing out the inappropriateness of the period of a life in being plus 21 years to cases of commercial and governmental transactions and noting that the Rule Against Perpetuities can invalidate legitimate transactions in such cases.)

Subsection (1) is therefore inconsistent with decisions holding the Common-law Rule to be applicable to the following types of property interests or arrangements when created in a nondonative, commercial-type transaction, as they almost always are: options (e.g., Milner v. Bivens, 335 S.E.2d 288 (Ga. 1985)); preemptive rights in the nature of a right of first refusal (e.g., Atchison v. City of Englewood, 170 Colo. 295, 463 P.2d 297 (1969); Robroy Land Co., Inc. v. Prather, 24 Wash. App. 511, 601 P.2d 297 (1969)); leases to commence in the future, at a time certain or on the happening of a future event such as the completion of a building (e.g., Southern Airways Co. v. DeKalb County, 101 Ga. App. 689, 115 S.E.2d 207 (1960)); nonvested easements; top leases and top deeds with respect to interests in minerals (e.g., Peveto v. Starkey, 645 S.W.2d 770 (Tex. 1982)); and so on.

Consideration Does Not Necessarily Make the Transfer Nondonative. A transfer can be supported by consideration and still be donative in character and hence not excluded from the Statutory Rule. A transaction that is essentially gratuitous in nature, accompanied by donative intent on the part of at least one party to the transaction, is not to be regarded as nondonative simply because it is for consideration. Thus, for example, the exclusion would not apply if a parent purchases a parcel of land for full and adequate consideration, and directs the seller to make out the deed in favor of the purchaser's daughter for life, remainder to such of the daughter's children as reach 25. The nonvested property interest of the daughter's children is subject to the Statutory Rule.

Some Transactions Not Excluded Even if Considered Nondonative. Some types of transactions — although in some sense supported by consideration and hence arguably nondonative — arise out of a domestic situation, and should not be excluded from the Statutory Rule. To avoid uncertainty with respect to such transactions, subsection (1) specifies that nonvested property interests or powers of appointment arising out of any of the following transactions are not excluded by subsection (1)'s nondonative-transfers exclusion: a premarital or postmarital agreement; a separation or divorce settlement; a spouse's election, such as the "widow's election" in community property states; an arrangement similar to any of the foregoing arising out of a prospective, existing, or previous marital relationship between the parties; a contract to make or not to revoke a will or trust; a contract to exercise or not to exercise a power of appointment; a transfer in full or partial satisfaction of a duty of support; or a reciprocal transfer. The term "reciprocal transfer" is to be interpreted in accordance with the reciprocal transfer doctrine in the tax law (see United States v. Estate of Grace, 395 U.S. 316 (1969)).

Other Means of Controlling Some Nondonative Transfers Desirable. Some commercial transactions respecting land or mineral interests, such as options in gross (including rights of first refusal), leases to commence in the future, nonvested easements, and top leases and top deeds in commercial use in the oil and gas industry, directly or indirectly restrain the alienability of property or provide a disincentive to improve the property. Although controlling the duration of such interests is desirable, they are excluded by subsection (1) from the Statutory Rule because, as noted above, the period of a life in being plus 21 years — actual or by the 90-year proxy — is inappropriate for them; that period is appropriate for family-oriented, donative transfers.

The Committee was aware that a few states have adopted statutes on perpetuities that include special limits on certain commercial transactions (e.g., Fla. Stat. § 689.22(3)(a); Ill. Rev. Stat. ch. 30, § 194(a)), and in fact the Committee itself drafted a comprehensive version of Section 4 that would have imposed a 40-year period-in-gross limitation in specified cases. In the end, however, the Committee did not present that version to the National Conference for approval because it was of the opinion that the control of these interests is better left to other types of statutes, such as marketable title acts (e.g., the Uniform Simplification of Land Transfers Act) and the Uniform Dormant Mineral Interests Act, backed up by the potential application of the common-law rules regarding unreasonable restraints on alienation.

B. SUBSECTIONS (2)-(7): OTHER EXCLUSIONS

Subsection (2) — Administrative Fiduciary Powers. Fiduciary powers are subject to the Statutory Rule Against Perpetuities, unless specifically excluded. Purely administrative fiduciary powers are excluded by subsections (2) and (3), but distributive fiduciary powers are generally speaking not excluded. The only distributive fiduciary power excluded is the one described in subsection (4).

The application of subsection (2) to fiduciary powers can be illustrated by the following example.

> *Example (1).* G devised property in trust, directing the trustee (a bank) to pay the income to A for life, then to A's children for the life of the survivor, and on the death of A's last surviving child to pay the corpus to B. The trustee is granted the discretionary power to sell and to reinvest the trust assets and to invade the corpus on behalf of the income beneficiary or beneficiaries.
>
> The trustee's fiduciary power to sell and reinvest the trust assets is a purely administrative power, and under subsection (2) of this section is not subject to the Statutory Rule.
>
> The trustee's fiduciary power to invade corpus, however, is a nongeneral power of appointment that is not excluded from the Statutory Rule. Its validity, and hence its exercisability, is governed by Section 1. Under that section, since the power is not initially valid under Section 1(c)(1), Section 1(c)(2) applies and the power ceases to be exercisable 90 years after G's death.

Subsection (3) — Powers to Appoint a Fiduciary. Subsection (3) excludes from the Statutory Rule Against Perpetuities powers to appoint a fiduciary (a trustee, successor trustee, or co-trustee, a personal representative, successor personal representative, or co-personal representative, an executor, successor executor, or co-executor, etc.). Sometimes such a power is held by a fiduciary and sometimes not. In either case, the power is excluded from the Statutory Rule.

Subsection (4) — Certain Distributive Fiduciary Power. The only distributive fiduciary power excluded from the Statutory Rule Against Perpetuities is the one described in subsection (4); the excluded power is a discretionary power of a trustee to distribute principal before the termination of a trust to a beneficiary who has an indefeasibly vested interest in the income and principal.

> *Example (2).* G devised property in trust, directing the trustee (a bank) to pay the

income to A for life, then to A's children; each child's share of principal is to be paid to the child when he or she reaches 40; if any child dies under 40, the child's share is to be paid to the child's estate as a property interest owned by such child. The trustee is given the discretionary power to advance all or a portion of a child's share before the child reaches 40. G was survived by A, who was then childless.

The trustee's discretionary power to distribute principal to a child before the child's 40th birthday is excluded from the Statutory Rule Against Perpetuities. (The trustee's *duty* to pay the income to A and after A's death to A's children is not subject to the Statutory Rule because it is a duty, not a power.)

Subsection (5) — Charitable or Governmental Gifts. Subsection (5) codifies the common-law principle that a nonvested property interest held by a charity, a government, or a governmental agency or subdivision is excluded from the Rule Against Perpetuities if the interest was preceded by an interest that is held by another charity, government, or governmental agency or subdivision. See L. Simes & A. Smith, The Law of Future Interests § 1278-87 (2d ed. 1956); Restatement (Second) of Property (Donative Transfers) § 1.6 (1983); Restatement of Property § 397 (1944).

Example (3). G devised real property "to the X School District so long as the premises are used for school purposes, and upon the cessation of such use, to Y City."

The nonvested property interest held by Y City (an executory interest) is excluded from the Statutory Rule under subsection (5) because it was preceded by a property interest (a fee simple determinable) held by a governmental subdivision, X School District.

The exclusion of charitable and governmental gifts applies only in the circumstances described. If a nonvested property interest held by a charity is preceded by a property interest that is held by a noncharity, the exclusion does not apply; rather, the validity of the nonvested property interest held by the charity is governed by the other sections of this Act.

Example (4). G devised real property "to A for life, then to such of A's children as reach 25, but if none of A's children reaches 25, to X Charity."

The nonvested property interest held by X Charity is not excluded from the Statutory Rule.

If a nonvested property interest held by a noncharity is preceded by a property interest that is held by a charity, the exclusion does not apply; rather, the validity of the nonvested property interest in favor of the noncharity is governed by the other sections of this Act.

Example (5). G devised real property "to the City of Sidney so long as the premises are used for a public park, and upon the cessation of such use, to my brother, B."

The nonvested property interest held by B is not excluded from the Statutory Rule by subsection (5).

Subsection (6) — Trusts for Employees and Others; Trusts for Self-Employed Individuals. Subsection (6) excludes from the Statutory Rule Against Perpetuities nonvested property interests and powers of appointment with respect to a trust or other property arrangement, whether part of a "qualified" or "unqualified" plan under the federal income tax law, forming part of a bona fide benefit plan for employees (including owner- employees), independent contractors, or their beneficiaries or spouses. The exclusion granted by this subsection does not, however, extend to a nonvested property interest or a power of appointment created by an election of a participant or beneficiary or spouse.

Subsection (7) — Pre-existing Exclusions from the Common-law Rule Against Perpetuities. Subsection (7) assures that all property interests, powers of appointment, or arrangements that were excluded from the Common-law Rule Against Perpetuities or are excluded by another statute of this state are also excluded from the Statutory Rule Against Perpetuities.

Possibilities of reverter and rights of entry (also known as rights of re-entry, rights of entry for condition broken, and powers of termination) are not subject to the Common-law Rule Against Perpetuities, and so are excluded from the Statutory Rule. By statute in some states, possibilities of reverter and rights of entry expire if they do not vest within a specified period of years (such as 40 years). See Fratcher, A Modest Proposal for Trimming the Claws of Legal Future Interests, 1972 Duke L.J. 517, 527-31. See also Uniform Simplification of Land Transfers Act § 3-409. States adopting the Uniform Statutory Rule Against Perpetuities may wish to consider the enactment of some such limit on these interests, if they have not already done so.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-19. Prospective application.

(a) Except as extended by subsection (b) of this section, this Article applies to a nonvested property interest or a power of appointment that is created on or after October 1, 1995. For purposes of this section, a nonvested property interest or a power of appointment created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise becomes irrevocable.

(b) If a nonvested property interest or a power of appointment was created prior to October 1, 1995, and is determined in a judicial proceeding, commenced on or after October 1, 1995, to violate this State's rule against perpetuities as that rule existed before October 1, 1995, a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created. (1995, c. 190, s. 1; 1997, c. 456, s. 8.)

OFFICIAL COMMENT

Subsection (a): Act Not Retroactive. This section provides that, except as provided in subsection (b), the Statutory Rule Against Perpetuities and the other provisions of this Act apply only to nonvested property interests or powers of appointment created on or after the Act's effective date. With one exception, in determining when a nonvested property interest or a power of appointment is created, the principles of Section 2 are applicable. Thus, for example, a property interest (or a power of appointment) created in a revocable inter vivos trust is created when the power to revoke terminates. See Example (1) in the Comment to Section 2.

The second sentence of subsection (a) establishes a special rule for nonvested property interests (and powers of appointment) created by the exercise of a power of appointment. For purposes of this section only, a nonvested property interest (or a power of appointment) created by the exercise of a power of appointment is created when the power is irrevocably exercised or when a revocable exercise of the power becomes irrevocable. Consequently, all the provisions of this Act except Section 5(b) apply to a nonvested property interest (or power of appointment) created by a donee's exercise of a power of appointment where the donee's exercise, whether revocable or irrevocable, occurs on or after the effective date of this Act. All the provisions of this Act except Section 5(b) also apply where the donee's exercise occurred before the effective date of this Act if: (i) that pre-effective-date exercise was revocable *and* (ii) that revocable exercise becomes irrevocable on or after the effective date of this Act. This special rule applies to the exercise of all types of powers of appointment — presently exercisable general powers, general testamentary powers, and nongeneral powers.

If the application of this special rule determines that the provisions of this Act (except Section 5(b)) apply, then for all such purposes, the time of creation of the appointed nonvested property interest (or appointed power of appointment) is determined by reference to Section 2, without regard to the special rule contained in the second sentence of Section 5(a).

If the application of this special rule of Section 5(a) determines that the provisions of this Act (except Section 5(b)) do not apply, then Section 5(b) is the only potentially applicable provision of this Act.

Example (1) — Testamentary Power Created Before but Exercised After the Effective Date of this Act. G was the donee of a general testamentary power of appointment created by the will of his mother, M. M died in 1980. Assume that the effective date of this Act in the jurisdiction is January 1, 1987. G died in 1988, leaving a will that exercised his general testamentary power of appointment.

Under the special rule in the second sentence of Section 5(a), any nonvested property interest (or power of appointment) created by G in his will in exercising his general testamentary power was created (for purposes of Section 5) at G's death in 1988, which was *after* the effective date of this Act.

Consequently, all the provisions of this Act apply (except Section 5(b)). That point having been settled, the next step is to determine whether the nonvested property interests or powers of appointment created by G's testamentary appointment are initially valid under Section 1(a)(1), 1(b)(1), or 1(c)(1), or whether the wait-and-see element established in Section 1(a)(2), 1(b)(2), or 1(c)(2) apply. If the wait-and-see element does apply, it must also be determined when the allowable 90-year waiting period starts to run. In making these determinations, the principles of Section 2 control the time of creation of the nonvested property interests (or powers of appointment); under Section 2, since G's power was a general testamentary power of appointment, the common-law relation-back doctrine applies and the appointed nonvested property interests (and appointed powers of appointment) are created at M's death in 1980.

If G's testamentary power of appointment had been a nongeneral power rather than a general power, the same results as described above would apply.

Example (2) — Presently Exercisable Nongeneral Power Created Before but Exercised After the Effective Date of this Act. Assume the same facts as in Example (1), except that G's power of appointment was a presently exercisable nongeneral power. If G exercised the power in 1988, after the effective date of this Act (or, if a pre-effective-date revocable exercise of his power became irrevocable in 1988, after the effective date of this Act), the same results as described above in Example (1) would apply.

Example (3) — Presently Exercisable General Power Created Before but Exercised After the Effective Date of this Act. Assume the same facts as in Example (1), except that G's power of appointment was a presently exercisable general power. If G exercised the power in 1988, after the effective date of this Act (or, if a pre-effective-date revocable exercise of his power became irrevocable in 1988, after the effective date of this Act), all the provisions of this Act (except Section 5(b)) apply; for such purposes, Section 2 controls the date of creation of the appointed nonvested property interests (or appointed powers of appointment), without regard to the special rule of the second sentence of Section 5(a). With respect to the exercise of a presently exercisable general power, it is possible — indeed, probable — that the special rule of the second sentence of Section 5(a) and the rules of Section 2 agree on the same date of creation for their respective purposes, that date being the date the power was irrevocably exercised (or a revocable exercise thereof became irrevocable).

Subsection (b): Reformation of Pre-existing Instruments. Although the Statutory Rule Against Perpetuities and the other provisions of this Act do not apply retroactively, subsection (b) recognizes a court's authority to exercise its equitable power to reform instruments that contain a violation of the Common-law Rule Against Perpetuities (or of a statutory version or variation thereof) and to which the Statutory Rule does not apply because the offending nonvested property interest or power of appointment in question was created before the effective date of this Act. This equitable power to reform is recognized only where the violation of the former rule against perpetuities is determined in a judicial proceeding that is commenced on or after the effective date of this Act. See below.

Without legislative authorization or direction, the courts in four states — Hawaii, Mississippi, New Hampshire, and West Virginia — have held that they have the power to reform instruments that contain a violation of the Common-law Rule Against Perpetuities. *In re Estate of Chun Quan Yee Hop*, 52 Hawaii 40, 469 P.2d 183 (1970); Carter v. Berry, 243 Miss. 321, 140 So.2d 843 (1962); Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891); Berry v. Union Natl. Bank, 262 S.E.2d 766 (W.Va. 1980). In four other states — California, Missouri, Oklahoma, and Texas — the legislatures have enacted statutes conferring this power on the courts or directing the courts to reform defective instruments. Cal. Civ. Code § 715.5 (West 1982); Mo. Rev. Stat. § 442.555 (1978); Okla. Stat. tit. 60, § 75-78 (1981); Tex. Property Code § 5.043 (Vernon 1984). See also Idaho Code § 55-111 (1948). The California statute is silent as to whether or not it applies to nonvested property interests and powers of appointment created prior to the effective date of the Act; the only significant California appellate decision to apply the statute, *Estate of Ghiglia*, 42 Cal.App.3d 433, 116 Cal. Rptr. 827 (1974), involved a will where the testator died after the Act's effective date. The Missouri, Oklahoma, and Texas statutes explicitly do not apply retroactively. The Hawaii, Mississippi, New Hampshire, and West Virginia decisions, however, invoked the court's equitable power (sometimes called the cy pres power, and sometimes called the doctrine of equitable approximation or equitable modification) to reform pre-existing instruments that contained a violation of the Common-law Rule. Subsection (b) constitutes statutory authority for a court to exercise its equitable reformation power.

Reformation Experience So Far. The existing judicial opinions and legislative provisions purport to adopt a principle of reformation that is consistent with the theme that the technique of reform should be shaped to grant every appropriate opportunity for the property to go to the intended beneficiaries. The New Hampshire court, for example, said that "where there is a general and a particular intent, and the particular one cannot take effect, the words shall be so construed as to give effect to the general intent." Edgerly v. Barker, 66 N.H. 434, 467, 31 A. 900, 912 (1891) (citation omitted). The Hawaii court held that "any interest which would violate the Rule Against Perpetuities shall be reformed within the limits of that rule to approximate most closely the intention of the creator of the interest." *In re Estate of Chun Quan Yee Hop*, 52 Hawaii 40, 46, 469 P.2d 183, 187 (1970). The Mississippi court described the reformation principle as "a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the intention of the donor." Carter v. Berry, 243 Miss. 321, 370, 140 So.2d 843, 852 (1962). The California statute provides that the authority to reform "shall be liberally construed and applied to validate [the] interest to the fullest extent consistent with [the] ascertained intent." Cal. Civ. Code § 715.5.

Unfortunately, all the cases that have arisen so far have been of one general type — contingencies in excess of 21 years — and all of the courts have simply ordered a reduction of the age or period in gross to 21.

Guidance as to How to Reform. The above reformation efforts are unduly narrow. Subsection (b) is to be understood as authorizing a more appropriate technique — judicial insertion of a saving clause into the instrument. See Browder, *Construction, Reformation, and the Rule Against Perpetuities*, 62 Mich.L.Rev. 1 (1963); Waggoner, *Perpetuity Reform*, 81 Mich.L.Rev. 1718, 1755-1759 (1983); Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U.Pa.L.Rev. 521, 546-49 (1982). This method of reformation allows reformation to achieve an after-the-fact duplication of a professionally competent product. Such a technique would have been especially suitable in the cases that have already arisen, for it probably would have allowed the dispositions in all of them to have been rendered valid without disturbing the transferor's intent at all. See Waggoner, *Perpetuity Reform*, 81 Mich.L.Rev. 1718, 1756 n. 103 (1983). The insertion of a saving clause grants a more appropriate opportunity for the property to go to the intended beneficiaries. Furthermore, it would also be a suitable technique in fertile octogenarian, unborn widow, and administrative contingency cases. A saving clause is one of the formalistic devices that a professionally competent lawyer would have used before the fact to assure initial validity in these cases. Insofar as other violations are concerned, the saving clause technique also grants every appropriate opportunity for the property to go to the intended beneficiaries.

In selecting the lives to be used for the perpetuity-period component of the saving clause that in a given case is to be inserted after the fact, the principle to be adopted is the same one that ought to guide lawyers in drafting such a clause before the fact: The group selected should be appropriate to the facts and the disposition. While the exact make-up of the group in each case would be settled by litigation, the individuals designated in Section 1.3(2) of the Restatement (Second) of Property (Donative Transfers) (1983) as the measuring lives would be an appropriate referent for the court to consider. Care should be taken in formulating the gift-over component, so that it is appropriate to the dispositive scheme. Among possible recipients that the court might consider designating are: (i) the persons entitled to the income on the 21st anniversary of the death of the last surviving individual designated by the court for the perpetuity-period component and in the proportions thereof to which they are then so entitled; if no proportions are specified, in equal shares to the permissible recipients of income; or (ii) the grantor's descendants per stirpes who are living 21 years after the death of the last surviving individual designated by the court for the perpetuity-period component; if none, to the grantor's heirs at law determined as if the grantor died 21 years after the death of the last surviving individual designated in the perpetuity-period component.

Violation Must be Determined in a Judicial Proceeding Commenced On or After the Effective Date of this Act. The equitable power to reform is recognized by Section 5(b) only in situations where the violation of the former rule against perpetuities is determined in a judicial proceeding commenced on or after the effective date of this Act. The equitable power to reform would typically be exercised in the same judicial proceeding in which the invalidity is determined.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-20. Short title.

This Article may be cited as the Uniform Statutory Rule Against Perpetuities. (1995, c. 190, s. 1.)

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-21. Uniformity of application and construction.

This Article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Article among states enacting it. (1995, c. 190, s. 1.)

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-22. Supersession.

This Article supersedes the rule of the common law known as the rule against perpetuities. (1995, c. 190, s. 1.)

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

CASE NOTES

Cited in Arundel Corp. v. Marie, 383 Md. 489, 860 A.2d 886, 2004 Md. LEXIS 714 (2004).

§ 41-23. Perpetuities and suspension of power of alienation for trusts.

(a) A trust is void if it suspends the power of alienation of trust property, as that term is defined in G.S. 36C-1-103, for longer than the permissible period. The permissible period is no later than 21 years after the death of an individual then alive or lives then in being plus a period of 21 years.

(b) If the settlor of a revocable trust, as those terms are defined in G.S. 36C-1-103, has an unlimited power to revoke or amend the trust, the permissible period under subsection (a) of this section is computed from the termination of that power.

(c) If a trust is created by exercise of a power of appointment, the permissible period under subsection (a) of this section is computed from the time the power is exercised if the power is a general power even if the power is only exercisable as a testamentary power. In the case of other powers, the permissible period is computed from the time the power is created, but facts at the time the power is exercised shall be considered in determining whether the power of alienation is suspended beyond a life or lives in being at the time of the creation of the power plus 21 years.

(d) The power of alienation is suspended only when there are no persons in being who, alone or in combination with others, can convey an absolute fee in possession of land, or full ownership of personal property.

(e) Notwithstanding subsection (a) of this section, there is no suspension of the power of alienability by a trust or by equitable interests under a trust if the trustee has the power to sell, either expressed or implied, or if there exists an unlimited power to terminate the trust in one or more persons in being.

(f) This section does not apply to a transfer in trust (i) for charitable purposes, as defined in G.S. 36C-4-405; (ii) to a literary or charitable organization; (iii) to a veterans' memorial organization; (iv) to a cemetery corporation, society, or association; or (v) as part of a pension, retirement, insurance, savings, stock bonus, profit sharing, death, disability, or similar plan established by an employer for the benefit of some or all of its employees for the purpose of accumulating and distributing to such employees the earnings or the principal, or both earnings and principal, of the trust.

(g) This section does not apply to a future interest other than a future interest in trust and, other than as set forth in this section, this section does not modify the common law of the State regarding the power of alienation in this State.

(h) The provisions of G.S. 41-15 and the common law rule against perpetuities do not apply to trusts created or administered in this State. (2007-390, s. 1.)

Editor's Note. — Session Laws 2007-390, s. 3, made this section effective on August 19, 2007, and applicable to all trusts created before, on, or after that date.

§§ 41-24 through 41-27: Reserved for future codification purposes.

ARTICLE 3.

Time Limits on Options in Gross and Certain Other Interests in Land.

COMMENTARY

Article 3 is based upon a proposed Uniform Act that is under consideration by the Joint Editorial Board for the Uniform Probate Code. G.S. 41-28 and 41-33 have no counterpart in the proposed Uniform Act.

The following comments were prepared to accompany the proposed Uniform Act. The drafters of the North Carolina Act believe that these comments provide a useful guide to the Act. Minor changes have been made to correspond to the North Carolina Act.

Some transactions respecting land, such as options in gross (including rights of first refusal), leases to commence in the future, and nonvested easements, directly or indirectly restrain the alienability of property or provide a disincentive to improve the property.

Article 3 contains sections that generally impose a 30-year time limit on such interests. To prevent an overlap with Article 2 of this Chapter, G.S. 41-18(9) excludes such interests from the Statutory Rule Against Perpetuities. (Many but not all such interests are also excluded by other subdivisions of G.S. 41-18.) The 90-year permissible vesting period of the Statutory Rule Against Perpetuities is an inappropriate limit on these interests. As an approximation of the period of a life in being plus 21 years, the 90-year period is an appropriate limit on interests arising out of family-oriented donative transfers. A shorter period is a more appropriate limit on the interests covered in Article 3, whether those interests arise out of a donative or a nondonative transfer.

The sections in this Article contain language exempting arrangements relating solely to interests in oil, gas, or minerals. The purpose is to assure that these sections do not interfere with bona fide commercial arrangements in the oil, gas, and mining industries.

Editor's Note. — Permission to include the Official Comments was granted by the National Conference of Commissioners on Uniform State Laws and The American Law Institute. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Chapter.

§ 41-28. Definitions.

As used in this Article:

(1) "Nonvested easement in gross" means a nonvested easement which is not created to benefit or which does not benefit the possessor of any tract of land in his or her use of it as the possessor.

(2) "Option in gross with respect to an interest in land" means an option in which the holder of the option does not own any leasehold or other interest in the land which is the subject of the option.

(3) "Preemptive right in the nature of a right of first refusal in gross with respect to an interest in land" means a preemptive right in which the holder of the preemptive right does not own any leasehold or other interest in the land which is the subject of the preemptive right. (1995, c. 525, s. 1.)

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-29. Options in gross, etc.

An option in gross with respect to an interest in land or a preemptive right in the nature of a right of first refusal in gross with respect to an interest in land becomes invalid if it is not actually exercised within 30 years after its creation. For purposes of this section, the term "interest in land" does not include arrangements relating solely to an interest in oil, gas, or minerals. (1995, c. 525, s. 1.)

COMMENTARY

This section imposes a 30-year time limit on the duration of options in gross and preemptive rights in gross with respect to an interest in land. The appellation "in gross" refers to the fact that the optionee or preemptioner has no possessory interest in the property.

If an option or preemptive right pertains to an interest in land, the option or preemptive right becomes invalid if it remains unexercised 30 years after its creation.

Example. A, the owner of Blackacre, sells an option to B under which A obligates himself, his heirs, and assigns at any time in the future to convey Blackacre to B, his heirs, and assigns for $X.00. Or, A, the owner of Blackacre, sells Blackacre to B. As part of the transaction, B obligates himself, his heirs, and assigns at any time in the future to reconvey Blackacre to A, his heirs, and assigns for $X.00. If either option remains unexercised 30 years after its creation, it ceases to be valid. (Both options are excluded from the Statutory Rule Against Perpetuities by G.S. 41-18(1) and (9).)

Options Held by a Lessee Not Affected by this Section. This section does not apply to an option or right of first refusal (preemptive right) that is not in gross. Thus, this section does not apply to an option or preemptive right held by a lessee to renew, extend, or enter into a new lease of or to purchase the leased premises. Such options or rights of first refusal do not deter the lessee from making improvements on the property, and so public policy is not viewed as requiring controls on their duration.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-30. Leases to commence in the future.

A lease to commence at a time certain or upon the occurrence or nonoccurrence of a future event becomes invalid if its term does not actually commence in possession within 30 years after its execution. For purposes of this section, the term "lease" does not include an oil, gas, or mineral lease. (1995, c. 525, s. 1.)

COMMENTARY

G.S. 41-30 provides that a lease to commence at a time certain or upon the happening of a future event becomes invalid if the term does not actually commence in possession within 30 years after the lease's execution.

Such leases are excluded from the Statutory Rule Against Perpetuities by G.S. 41-18(1) and (9). Excluding such leases from the Rule Against Perpetuities removes a source of considerable litigation under the common-law Rule Against Perpetuities concerning the validity of so-called "on completion" leases — leases to commence on the completion of a building.

Such leases would be clearly valid at common law if the lessor was obligated to complete the building within 21 years, but in the absence of an explicit obligation of this sort, some courts have held the lease to be invalid. E.g., Southern Airways Co. v. DeKalb County, 101 Ga. App. 689, 115 S.E.2d 207 (1960); others, though, have upheld such leases on the theory that the lessee's interest was vested from the beginning (Isen v. Giant Food, Inc., 295 F.2d 136 (D.C. Cir. 1960)); or that there was an implicit obligation to complete the building within a reasonable time (Wong v. DiGrazia, 60 Cal.2d 525, 386 P.2d 817 (1963); Singer Co. v. Makad, Inc., 213 Kan. 725, 518 P.2d 493 (1974); see also Read v. GHDC, Inc., 334 S.E.2d 165 (Ga. 1985); Ryland Group, Inc. v. Wills, 331 S.E.2d 399 (Va. 1985)).

Although the risk under the common-law Rule Against Perpetuities that such leases would be declared invalid from the beginning would be removed by the wait-and-see feature of the Statutory Rule Against Perpetuities, such leases are excluded from the Statutory Rule entirely. A shorter period than the 90 years allowed by the Statutory Rule is more appropriate to commercial transactions that impinge upon the marketability of land, and the 30-year period selected should give reasonable time for such leases to commence in possession.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-31. Nonvested easements.

A nonvested easement in gross becomes invalid if it does not actually vest within 30 years after its creation. (1995, c. 525, s. 1.)

COMMENTARY

This section places a 30-year limit on the time during which a nonvested easement in gross can remain nonvested. An easement is nonvested if the right of utilization is subject to a condition precedent, i.e., if the right of utilization is conditioned upon the happening of a specified future event. An easement is in gross if it has a servient estate but no dominant estate; an easement in gross is a personal interest in the land of another. The difficulty of locating the owner of a nonvested easement in gross as time goes along is the principal reason for limiting to 30 years the time during which the easement can remain nonvested.

Whether or not an easement is vested depends on whether the holder has the current right to utilize it. Thus, an easement can be vested even if the holder has not actually utilized it. If, however, the easement holder has actually utilized the easement, the easement is vested by definition. For example, an easement to transmit electric power across land from a power plant would be vested, if it had not previously vested, when the holder of the easement commenced to install power transmission lines on the land; vesting would not be delayed until power is actually transmitted through those lines.

This section does not limit the duration of a vested easement, nor does it affect an easement that is vested subject to a defeasance clause that may cause it to terminate. Nor does this section affect multiple floating easements, which are also called single expansible easements with multiple potential routes, because they are vested. E.g., Kleinheider v. Phillips Pipe Line Co., 528 F.2d 837, 843-44 (8th Cir. 1975).

Exemption from Rule Against Perpetuities. Because nonvested easements in gross are governed by a 30-year time limit, they are exempted from the Statutory Rule Against Perpetuities by G.S. 41-18(9). This reverses the rule at common law, under which nonvested easements were subjected to the common-law Rule Against Perpetuities and rendered invalid ab initio if they were not certain to vest or terminate within a life in being plus 21 years. J. Gray, The Rule Against Perpetuities §§ 314-16 (4th ed. 1942); L. Simes & A. Smith, The Law of Future Interests § 1248 (2d ed. 1956).

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-32. Possibilities of reverter, etc.

(a) Except as otherwise provided in this section:

(1) A possibility of reverter preceded by a fee simple determinable;

(2) A right of entry preceded by a fee simple subject to a condition subsequent; or

(3) An executory interest preceded by either a fee simple determinable or a fee simple subject to an executory limitation;

becomes invalid, and the preceding fee simple becomes a fee simple absolute, if the right to vest in possession of the possibility of reverter, right of entry, or executory interest depends on an event or events affecting the use of land and if the possibility of reverter, right of entry, or executory interest does not actually vest in possession within 60 years after its creation.

(b) This section does not apply to a possibility of reverter, right of entry, or executory interest held by a charity, a government or governmental agency or subdivision excluded from the Uniform Statutory Rule Against Perpetuities by G.S. 41-18(5) or to an arrangement relating solely to an interest in oil, gas, or minerals. (1995, c. 525, s. 1.)

COMMENTARY

With certain exceptions, this section imposes a 60-year time limit on the duration of certain possibilities of reverter, rights of entry (also known as rights of re-entry, rights of entry for condition broken, and powers of termination), and executory interests.

Possibilities of reverter and rights of entry are generally exempt from the common-law Rule Against Perpetuities. But their nonreversionary counterpart — the executory interest that follows either a fee simple determinable or a fee simple subject to an executory limitation — is subject to the common-law Rule. By statute in some states, possibilities of reverter and rights of entry expire if they do not vest within a specified period of years (such as 30 or 40 years). These statutes, however, do not apply to the type of executory interest described above, which is the nonreversionary counterpart of the possibility of reverter and/or right of entry.

G.S. 41-32 treats all three future interests alike by limiting their duration to 60 years and by excluding them from the Statutory Rule. Unless the possibility of reverter, right of entry, or executory interest is an interest in favor of a charity, government, or governmental agency or subdivision that is excluded from the Statutory Rule by G.S. 41-18(5) [or is an arrangement relating solely to an interest in oil, gas, or minerals], the maximum period any of the three can exist is limited to 60 years; if it has not vested by the 60th anniversary of its creation, it ceases to exist and the preceding fee simple becomes a fee simple absolute.

Example 1. G deeded real property: [Alternative 1] "to the City of Sidney for as long as the property is used for a public park, and upon the property ceasing to be used for that purpose, the property is to go to B and his heirs."

[Alternative 2] "to the City of Sidney for as long as the property is used for a public park, and upon the property ceasing to be used for that purpose, the property is to revert to G and his heirs."

In both alternatives, the City of Sidney has a fee simple determinable. In Alternative 1, B has an executory interest. In Alternative 2, G has a possibility of reverter. Both B's and G's future interests are excluded from the Statutory Rule by G.S. 41-18(9). Both are subject to the 60-year limit on their existence imposed by G.S. 41-32. If the property is still being used for a public park on the 60th anniversary of the date of delivery of G's deed, the City of Sidney's fee simple becomes a fee simple absolute.

Example 2. G deeded real property: [Alternative 1] "to A and his heirs on condition that the property be used for residential purposes, and if the property is not used for residential purposes, G is to have the right to re-enter and take possession of the premises."

[Alternative 2] "to A and his heirs, but if the property is not used for residential purposes, to B and his heirs." In Alternative 1, A has a fee simple subject to a condition subsequent; G has a right of entry that is excluded from the Statutory Rule Against Perpetuities. In Alternative 2, A has a fee simple subject to an executory limitation; B has an executory interest that is excluded from the Statutory Rule Against Perpetuities.

In both alternatives, A's fee simple becomes a fee simple absolute on the 60th anniversary of the date of delivery of G's deed, unless the property was used for nonresidential purposes on or before that date and, in Alternative 1, unless G has properly exercised his right of entry on or before that date.

Event or Events Affecting the Use of Land. G.S. 41-32 only applies to possibilities of reverter, rights of entry, and executory interests if the vesting depends on an event or events affecting the use of land. The purpose of this restriction is to exempt family-oriented dispositions from the 60-year time limit in cases where the Statutory Rule Against Perpetuities is a more appropriate measure for controlling the interest.

Example 3. G's will devised real property "to my daughter A and her heirs, but if she should die without descendants, to my son B and his heirs."

Although B has an executory interest preceded by a fee simple subject to an executory limitation, B's executory interest is not controlled by G.S. 41-32 because the event on which its vesting depends does not relate to the use of land. Instead, B's executory interest is governed by the Statutory Rule Against Perpetuities, under which it is valid from creation because it complies with G.S. 41-15(a)(1).

The phrase "event or events affecting the use of land" is to be given an interpretation appropriate to its purpose. Thus, a devise to a church "so long as the church shall maintain and promulgate its present religious belief and faith and continue as a church" is not a family-oriented disposition and should be found to describe an event affecting the use of the land.

Exception for Certain Charitable and Governmental Interest. The last sentence of G.S. 41-32 exempts certain interests held by a charity, a government, or governmental agency or subdivision from the 60-year time limit. The excluded interests are those excluded from the Statutory Rule Against Perpetuities by G.S. 41-18(5). That section codifies the common-law principle that a nonvested property interest held by a charity, a government, or a governmental agency or subdivision is excluded from the Rule Against Perpetuities if the interest was preceded by an interest held by another charity, government, or governmental agency or subdivision.

Example 4. G devised real property "to the X School District so long as the premises are used for school purposes, and upon the cessation of such use, to Y City." The nonvested property interest in favor of Y City (an executory interest) is excluded from the Statutory Rule under G.S. 41-18(5) because it was preceded by a property interest (a fee simple determinable) held by a governmental subdivision, X School District. The fact that the interest of Y City is excluded from the Statutory Rule Against Perpetuities by G.S. 41-18(5) means that the 60-year limit imposed on certain executory interests by G.S. 41-32 does not apply.

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§ 41-33. Prospective application.

This Article applies only to a property interest or arrangement that is created on or after October 1, 1995. (1995, c. 525, s. 1.)

Legal Periodicals. — For article, "Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts," see 74 N.C.L. Rev. 1783 (1996).

§§ 41-34 through 41-39: Reserved for future codification purposes.

Article 4.

The Uniform Transfer on Death (TOD) Security Registration Act.

§ 41-40. Definitions.

In this Article, unless the context otherwise requires:

(1) "Beneficiary form" means a registration of a security that indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(2) "Devisee" means any person designated in a will to receive a disposition of real or personal property.

(3) "Heirs" means those persons, including the surviving spouse, who are entitled under Chapter 29 of the General Statutes or the statutes of intestate succession of other states to take the property of a decedent by intestate succession.

(4) "Person" means an individual, a corporation, an organization, or other legal entity.

(5) "Personal representative" includes executor, administrator, collector, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status.

(6) "Property" includes both real and personal property or any interest in real or personal property and means anything that may be the subject of ownership.

(7) "Register", including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(8) "Registering entity" means a person who originates or transfers a security title by registration and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(9) "Security" means a share, participation, or other interest in property, a business, or an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, a security account, and a security entitlement as defined in G.S. 25-8-102.

(10) "Security account" means (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death, or (ii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

(11) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States. (2005-411, s. 1.)

OFFICIAL COMMENT

The definition of "security" is derived from UCC § 8-102 and includes shares of mutual funds and other investment companies. The defined term "security account" is not intended to include securities held in the name of a bank or similar institution as nominee for the benefit of a trust. *Comment amended* in 1997.

"Survive" is not defined. No effort is made in this Act to define survival as it is for purposes of intestate succession in UPC § 2-104 which requires survival by an heir of the ancestor for 120 hours. For purposes of this Act, survive is used in its common law sense of outliving another for any time interval no matter how brief. The drafting committee sought to avoid imposition of a new and unfamiliar meaning of the term on intermediaries familiar with the meaning of "survive" in joint tenancy registrations.

The definitions of "devisee," "heirs," "person," "personal representative," "property," and "state" are taken from Section 1-201 of the Uniform Probate Code which, as revised in 1989, includes this Act as Part 3 of Article VI.

NORTH CAROLINA COMMENT

This section differs from the Uniform Act in the following respects. In the definition of "beneficiary form," the word "which" was replaced with the word "that." In the definition of "heirs," the phrase "who are entitled under the statutes of intestate succession to the property of a decedent" was replaced with the phrase "who are entitled under Chapter 29 of the General Statutes or the statutes of intestate succession of other states to take the property of a decedent by intestate succession." In the definition of "personal representative," the word "collector" was inserted. In the definition of "property," the word "therein" was replaced with the phrase "in real or personal property." In the definition of "security," the phrase "in property, in a business, or in an obligation" was replaced with the phrase "in property, a business, or an obligation" to clarify that the phrase "of an enterprise or other issuer" applies to "property" and "business" as well as "obligation." Also, in the definition of "security," the phrase "and a security entitlement as defined in G.S. 25-8-102" was inserted.

Editor's Note. — Session Laws 2005-411, s. 4, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the Official Commentary to the Uniform TOD Security Registration Act and all explanatory comments of the drafters of this act as the Revisor may deem appropriate."

Official Comments, copyright © 2005, are reprinted in this Article with the permission of the National Conference of Commissioners on Uniform State Laws. It is believed that the Official Comments will prove of value to the practictioner in understanding and applying the text of this Article.

§ 41-41. Registration in beneficiary form; sole or joint tenancy ownership.

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more individuals with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entireties, or as owners of community property held in survivorship form, and not as tenants in common. (2005-411, s. 1.)

OFFICIAL COMMENT

This section is designed to prevent co-owners from designating any death beneficiary other than one who is to take only upon survival of all co-owners. It coerces co-owning registrants to signal whether they hold as joint tenants with right of survivorship (JT TEN), as tenants by the entireties (T ENT), or as owners of community property. Also, it imposes survivorship on co-owners holding in a beneficiary form that fails to specify a survivorship form of holding. Tenancy in common and community property otherwise than in a survivorship setting is negated for registration in beneficiary form because persons desiring to signal independent death beneficiaries for each individual's fractional interest in a co-owned security normally will split their holding into separate registrations of the number of units previously constituting their fractional share. Once divided, each can name his or her own choice of death beneficiary.

The term "individuals," as used in this section, limits those who may register as owner or co-owner of a security in beneficiary form to natural persons. However, the section does not restrict individuals using this ownership form as to their choice of death beneficiary. The definition of "beneficiary form" in Section 1 indicates that any "person" may be designated beneficiary in a registration in beneficiary form. "Person" is defined so that a church, trust company, family corporation, or other entity, as well as any individual, may be designated as a beneficiary.

NORTH CAROLINA COMMENT

In the first sentence of this section, the word "individuals" was inserted (second occurrence).

In this State, the usual abbreviation for joint tenants with right of survivorship is "JT TEN WROS."

§ 41-42. Registration in beneficiary form; applicable law.

A security may be registered in beneficiary form if the form is authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law. (2005-411, s. 1.)

OFFICIAL COMMENT

This section encourages registrations in beneficiary form to be made whenever a state with which either of the parties to a registration has contact has enacted this or a similar statute. Thus, a registration in beneficiary form of X Company shares might rely on an enactment of this Act in X Company's state of incorporation, or in the state of incorporation of X Company's transfer agent. Or, an enactment by the state of the issuer's principal office, the transfer agent's principal office, or of the issuer's office making the registration also would validate the registration. An enactment of the state of the registering owner's address at time of registration also might be used for validation purposes.

The last sentence of this section is designed, as is UPC § 6-101 (Rev. 1989), to establish a statutory presumption that a general principle of law is available to achieve a result like that made possible by this Act.

§ 41-43. Origination of registration in beneficiary form.

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners. (2005-411, s. 1.)

OFFICIAL COMMENT

As noted above in commentary to Section 2, this Act places no restriction on who may be designated beneficiary in a registration in beneficiary form.

§ 41-44. Form of registration in beneficiary form.

Registration in beneficiary form may be shown by the words "transfer on death" or the abbreviation "TOD", or by the words "pay on death" or the abbreviation "POD", after the name of the registered owner or owners and before the name of a beneficiary. (2005-411, s. 1.)

OFFICIAL COMMENT

The abbreviation POD is included for use without regard for whether the subject is a money claim against an issuer, such as its own note or bond for money loaned, or is a claim to securities evidenced by conventional title documentation. The use of POD in a registration in beneficiary form of shares in an investment company should not be taken as a signal that the investment is to be sold or redeemed on the owner's death so that the sums realized may be "paid" to the death beneficiary. Rather, only a transfer on death, not a liquidation on death, is indicated. The committee would have used only the abbreviation TOD except for the familiarity, rooted in experience with certificates of deposit and other deposit accounts in banks, with the abbreviation POD as signalling a valid nonprobate death benefit or transfer on death.

NORTH CAROLINA COMMENT

In this section, the words "or owners" were inserted.

§ 41-45. Effect of registration in beneficiary form.

The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership of the security until the owner's death. A registration of a security in beneficiary form may be cancelled or changed at any time by the sole owner or all then-surviving owners, without the consent of the beneficiary. (2005-411, s. 1.)

OFFICIAL COMMENT

This section simply affirms the right of a sole owner, or the right of all multiple owners, to end a TOD beneficiary registration without the assent of the beneficiary. The section says nothing about how a TOD beneficiary designation may be canceled, meaning that the registering entity's terms and conditions, if any, may be relevant. See Section 10. If the terms and conditions have nothing on the point, cancellation of a beneficiary designation presumably would be effected by a reregistration showing a different beneficiary or omitting reference to a TOD beneficiary.

NORTH CAROLINA COMMENT

In the first sentence of this section, the words "of the security" were inserted. In the second sentence of this section, the phrase "then surviving owners" was replaced with the phrase "then-surviving owners,".

§ 41-46. Ownership on death of owner.

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survive the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners. (2005-411, s. 1.)

OFFICIAL COMMENT

Even though multiple owners holding in the beneficiary form here authorized hold with right of survivorship, no survivorship rights attend the positions of multiple beneficiaries who become entitled to securities by reason of having survived the sole owner or the last to die of multiple owners. Issuers (and registering entities) who decide to accept registrations in beneficiary form involving more than one primary beneficiary also should provide by rule whether fractional shares will be registered in the names of surviving beneficiaries where the number of shares held by the deceased owner does not divide without remnant among the survivors. If fractional shares are not desired, the issuer may wish to provide for sale of odd shares and division of proceeds, for an uneven distribution with the first or last named to receive the odd share, or for other resolution. Section 8 deals with whether intermediaries have any obligation to offer beneficiary registrations of any sort; Section 10 enables issuers to adopt terms and conditions controlling the details of applications for registrations they decide to accept and procedures for implementing such registrations after an owner's death.

The reference to surviving, multiple TOD beneficiaries as tenants in common is not intended to suggest that a registration form specifying unequal shares, such as "TOD A (20%), B (30%), C (50%)," would be improper. Though not included in the beneficiary forms described for illustrative purposes in Section 10, the Act enables a registering entity to accept and implement a TOD beneficiary designation like the one just suggested. If offered, such a registration form should be implemented by registering entity terms and conditions providing for disposition of the share of a beneficiary who predeceases the owner when two or more of a group of multiple beneficiaries survive the owner. For example, the terms might direct the share of the predeceased beneficiary to the survivors in the proportion that their original shares bore to each other. Unless unequal shares are specified in a registration in beneficiary form designating multiple beneficiaries, the shares of the beneficiaries would, of course, be equal.

The statement that a security registered in beneficiary form is in the deceased owner's estate when no beneficiary survives the owner is not intended to prevent application of any anti-lapse statute that might direct a nonprobate transfer on death to the surviving issue of a beneficiary who failed to survive the owner. Rather, the statement is intended only to indicate that the registering entity involved should transfer or reregister the security as directed by the decedent's personal representative.

See the Comment to Section 1 regarding the meaning of "survive" for purposes of this Act.

NORTH CAROLINA COMMENT

In the second sentence of this section, the word "survived" was replaced with the word "survive."

§ 41-47. Protection of registering entity.

(a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this Article.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this Article.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, heirs, or devisees of a deceased owner if it registers a transfer of a security in accordance with G.S. 41-46 and does so in good faith reliance (i) on the registration, (ii) on this Article, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this Article do not extend to a reregistration or payment made after a registering entity has received written notice, addressed to the registering entity, from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this Article.

(d) The protection provided by this Article to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds. (2005-411, s. 1; 2006-226, s. 11.)

OFFICIAL COMMENT

It is to be noted that the "request" for a registration in beneficiary form may be in any form chosen by a registering entity. The Act does not prescribe a particular form and does not impose record-keeping requirements. Registering entities' business practices, including any industry standards or rules of transfer agent associations, will control.

The written notice referred to in subsection (c) would qualify as a notice under UCC § 8-403.

"Good faith" as used in this section is intended to mean "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade," as specified in UCC § 2-103(1)(b).

The protections described in this section are designed to meet any questions regarding registering entity protection that may not be foreclosed by issuer protections provided in the Uniform Commercial Code. Because persons interested in this Act may wish to be reminded of relevant UCC provisions, a brief summary follows.

"U.C.C. § 8-403, 'Issuer's Duty as to Adverse Claims' contains detailed provisions regarding duties of inquiry by an issuer of a certificated or uncertificated security who is requested to effect a transfer, and the availability and use of 30 day notices to force adverse claimants to start litigation if further delay in transfer is desired. U.C.C. § 8-201's definition of 'issuer' for purposes of 'registration of transfer…' is simply 'a person on whose behalf transfer books are maintained'. U.C.C. § 8-403 is among the sections dealing with registration of transfers.

"U.C.C. sections 8-308 and 8-404(1) appear to exonerate an issuer who acts in response to transfer directions signalled by the 'necessary indorsement' on or with a certificated security or in response to 'an instruction originated by an appropriate person' in the case of an uncertificated security. Section 8-308 describes the meaning of 'appropriate person' in the case of a certificated security as 'the person specified by the certificated security… to be entitled to the security.' U.C.C. § 8-308(6) (1978). In the case of an uncertificated security, 'appropriate person' means the 'registered owner.' *Id.* § 8-308(7). The survivor of owners listed as joint tenants with right of survivorship is specifically defined as an authorized person. *Id.* § 8-308(8)(d). The U.C.C. aspect of the problem could be met by an additional sub-paragraph to section 8-308(8) that would include a TOD beneficiary as an 'appropriate person' when the beneficiary has survived the owner.

"No U.C.C. addition would be necessary if a TOD beneficiary designation were viewed as a contingent order for transfer at the owner's death that may be safely implemented as a direction from the owner as an 'authorized person.' The owner's death before completion of the transfer would not pose U.C.C. problems because section 8-308(10) provides: 'Whether the person signing is appropriate is determined as of the date of signing and an indorsement made by or an instruction originated by him does not become unauthorized for the purposes of this Article by virtue of any subsequent change of circumstances.'

"It might be questioned whether a TOD direction, which may be revoked before it is carried into effect and is also contingent on the beneficiary's survival of the registrant, is within the transfer directions contemplated by the U.C.C. framers for purposes of issuer protection. However, since section 8-202 explicitly protects issuers against problems arising because of restrictions or conditions on transfers, only the novelty of revocable directions for transfer on death gives pause.

"In general, article 8 of the U.C.C. reflects a careful attempt to protect implementation of a wide range of transfer instructions so long as the signatures are genuine and are those of owners acting in conformity with duly imposed rules of the issuer organization. … Hence, existing U.C.C. protections should be adequate, . . ." Wellman, Transfer-On-Death Securities Registration: A New Title Form, 21 Ga. L. Rev. 789, 823 n.90 (1987).

NORTH CAROLINA COMMENT

In the first sentence of subsection (c), the phrase "transfer of the security" was replaced with the phrase "transfer of a security."

Article 8 of the Uniform Commercial Code was revised in 1994. The references to Article 8 in the Official Comment to this section are references to former Article 8.

Effect of Amendments. — Session Laws 2006-226, s. 11, effective August 10, 2006, inserted "addressed to the registering entity," in the second sentence of subsection (c).

§ 41-48. Nontestamentary transfer on death.

(a) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this Article and is not testamentary.

(b) The interest of a deceased owner when there are one or more surviving owners remains liable for the debts of the decedent in the same manner as the personal property included in the decedent's estate, and recovery of that interest shall be made from the surviving owner or owners when the decedent's estate is insufficient to satisfy the debts. The interest of a deceased sole owner, or the last to die of several owners, remains liable for the debts of the decedent in the same manner as the personal property included in the decedent's estate, and recovery of that interest shall be made from the TOD beneficiary when the decedent's estate is insufficient to satisfy the debts.

(c) This Article does not repeal or modify any provision of law relating to estate taxes. (2005-411, s. 1.)

OFFICIAL COMMENT

[Omitted.]

NORTH CAROLINA COMMENT

Subsection (a) is identical to subsection (b) of the Uniform Act. Subsections (b) and (c) replace subsections (a) and (c) through (i) of the Uniform Act. Subsection (b) is derived from G.S. 41-2.2(c) and is consistent with other creditor's rights provisions in North Carolina statutory law. Subsection (c) has no counterpart in the Uniform Act and conforms to similar provisions in North Carolina statutory law.

§ 41-49. Terms, conditions, and forms for registration.

(a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions established may provide for proving death, avoiding or resolving any problems concerning fractional shares, and designating primary or contingent beneficiaries. Forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form that a registering entity may authorize:

(1) Sole owner-sole beneficiary: "John S. Brown TOD (or POD) John S. Brown, Jr."

(2) Multiple owners-sole beneficiary: "John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr."

(3) Multiple owners-primary and secondary (substituted) beneficiaries: "John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr. SUB BENE Peter O. Brown". (2005-411, s. 1.)

OFFICIAL COMMENT

Use of "and" or "or" between the names of persons registered as co-owners is unnecessary under the Act and should be discouraged. If used, the two words should have the same meaning insofar as concerns a title form; *i.e.*, that of "and" to indicate that both named persons own the asset.

Descendants of a named beneficiary who take by virtue of a "LDPS" designation appended to a beneficiary's name take as TOD beneficiaries rather than as intestate successors. If no descendant of a predeceased primary beneficiary survives the owner, the security passes as a part of the owner's estate as provided in Section 7.

NORTH CAROLINA COMMENT

In subsection (a), the Uniform Act's language relating to the "LDPS" (lineal descendants per stirpes) designation was omitted because the language defines "per stirpes" in a way different from the usual meaning in North Carolina.

In the introductory language of subsection (b), the word "which" was replaced with the word "that." In subdivisions (b)(2), the phrase "John S Brown Mary B Brown JT TEN TOD John S Brown Jr" was replaced with the phrase "John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr." In subdivision (b)(3), the phrase "John S Brown Mary B Brown JT TEN TOD John S Brown Jr LDPS" was replaced with the phrase "John S. Brown, Mary B. Brown JT TEN WROS TOD John S. Brown, Jr. SUB BENE Peter O. Brown."

§ 41-50. Short title; rules of construction.

(a) This Article shall be known as and may be cited as the "Uniform TOD Security Registration Act".

(b) This Article shall be applied and construed to effectuate its general purposes and to make uniform the laws with respect to the subject of this Article among states enacting it.

(c) This Article does not repeal G.S. 41-2.2. G.S. 41-2.2 applies in determining whether a right of survivorship exists among multiple owners of a security. (2005-411, s. 1.)

NORTH CAROLINA COMMENT

This section differs from the Uniform Act in several respects. In subsection (b), the phrase "liberally construed and applied to promote its underlying purposes and policy" was replaced with the phrase "applied and construed to effectuate its general purposes." Subsection (c) has no counterpart in the Uniform Act. The Uniform Act's subdivision (3), relating to the supplementation of the Act by principles of law and equity, was omitted.

§ 41-51. Application of Article.

This Article applies to registrations of securities in beneficiary form made before, on, or after October 1, 2005, by decedents dying on or after October 1, 2005. (2005-411, s. 1.)

NORTH CAROLINA COMMENT

In this section, the phrase “made before or after” was replaced with the phrase “made before, on, or after.”

Chapter 41A.

State Fair Housing Act.

Sec.
41A-1. Title.
41A-2. Purpose.
41A-3. Definitions.
41A-4. Unlawful discriminatory housing practices.
41A-5. Proof of violation.
Sec.
41A-6. Exemptions.
41A-7. Enforcement.
41A-8. Investigation; subpoenas.
41A-9. [Repealed.]
41A-10. Venue.

§ 41A-1. Title.

This Chapter shall be known and may be cited as the State Fair Housing Act. (1983, c. 522, s. 1.)

Legal Periodicals. — For comment, "The Broadened Dimensions and More Powerful Bite of the State Fair Housing Act," see 12 Campbell L. Rev. 267 (1990).

CASE NOTES

Caselaw Interpreting Federal Act. — In light of the similarity between the two acts, the body of federal cases interpreting the federal Fair Housing Act is useful, although not controlling, in interpreting the North Carolina State Fair Housing Act. North Carolina Human Relations Council ex rel. Leach v. Weaver Realty Co., 79 N.C. App. 710, 340 S.E.2d 766 (1986).

§ 41A-2. Purpose.

The purpose of this Chapter is to provide fair housing throughout the State of North Carolina. (1983, c. 522, s. 1.)

§ 41A-3. Definitions.

For the purposes of this Chapter, the following definitions apply:

(1) The "Commission" means the North Carolina Human Relations Commission;

(1a) "Covered multifamily dwellings" means:
- a. A building, including all units and common use areas, in which there are four or more units if the building has one or more elevators; or
- b. Ground floor units and ground floor common use areas in a building with four or more units.

(1b) "Familial status" means one or more persons who have not attained the age of 18 years being domiciled with:
- a. A parent or another person having legal custody of the person or persons; or
- b. The designee of the parent or other person having custody, provided the designee has the written permission of the parent or other person.

The protections against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any person who has not attained the age of 18 years.

(2) "Family" includes a single individual;

(3) "Financial institution" means any banking corporation or trust company, savings and loan association, credit union, insurance company,

or related corporation, partnership, foundation, or other institution engaged primarily in lending or investing funds;

(3a) "Handicapping condition" means (i) a physical or mental impairment which substantially limits one or more of a person's major life activities, (ii) a record of having such an impairment, or (iii) being regarded as having such an impairment. Handicapping condition does not include current, illegal use of or addiction to a controlled substance as defined in 21 U.S.C. § 802, the Controlled Substances Act. The protections against discrimination on the basis of handicapping condition shall apply to a buyer or renter of a dwelling, a person residing in or intending to reside in the dwelling after it is sold, rented, or made available, or any person associated with the buyer or renter.

(4) "Housing accommodation" means any improved or unimproved real property, or part thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home or residence of one or more individuals;

(5) "Person" means any individual, association, corporation, political subdivision, partnership, labor union, legal representative, mutual company, joint stock company, trust, trustee in bankruptcy, unincorporated organization, or other legal or commercial entity, the State, or governmental entity or agency;

(6) "Real estate broker or salesman" means a person, whether licensed or not, who, for or with the expectation of receiving a consideration, lists, sells, purchases, exchanges, rents, or leases real property, or who negotiates or attempts to negotiate any of these activities, or who holds himself out as engaged in these activities, or who negotiates or attempts to negotiate a loan secured or to be secured by mortgage or other encumbrance upon real property, or who is engaged in the business of listing real property in a publication; or a person employed by or acting on behalf of any of these persons;

(7) "Real estate transaction" means the sale, exchange, rental, or lease of real property;

(8) "Real property" means a building, structure, real estate, land, tenement, leasehold, interest in real estate cooperatives, condominium, and hereditament, corporeal and incorporeal, or any interest therein. (1983, c. 522, s. 1; 1989, c. 507, s. 1; 1989 (Reg. Sess., 1990), c. 979, s. 1(1).)

CASE NOTES

Cited in North Carolina Human Relations Council ex rel. Leach v. Weaver Realty Co., 79 N.C. App. 710, 340 S.E.2d 766 (1986).

§ 41A-4. Unlawful discriminatory housing practices.

(a) It is an unlawful discriminatory housing practice for any person in a real estate transaction, because of race, color, religion, sex, national origin, handicapping condition, or familial status to:

(1) Refuse to engage in a real estate transaction;

(2) Discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith;

(2a) Refuse to permit, at the expense of a handicapped person, reasonable modifications of existing premises occupied or to be occupied by the person if the modifications are necessary to the handicapped person's full enjoyment of the premises; except that, in the case of a rental unit, the landlord may, where it is reasonable to do so, condition permission for modifications on agreement by the renter to restore the interior of the premises to the condition that existed before the modifications, reasonable wear and tear excepted;

(2b) Refuse to make reasonable accommodations in rules, policies, practices, or services, when these accommodations may be necessary to a handicapped person's equal use and enjoyment of a dwelling;

(2c) Fail to design and construct covered multifamily dwellings available for first occupancy after March 13, 1991, so that:

a. The dwellings have at least one building entrance on an accessible route, unless it is impractical to do so because of terrain or unusual site characteristics; or

b. With respect to dwellings with a building entrance on an accessible route:

1. The public and common use portions are readily accessible to and usable by handicapped persons;
2. There is an accessible route into and through all dwellings and units;
3. All doors designed to allow passage into, within, and through these dwellings and individual units are wide enough for wheelchairs;
4. Light switches, electrical switches, electrical outlets, thermostats, and other environmental controls are in accessible locations;
5. Bathroom walls are reinforced to allow later installation of grab bars; and
6. Kitchens and bathrooms have space for an individual in a wheelchair to maneuver;

(3) Refuse to receive or fail to transmit a bona fide offer to engage in a real estate transaction;

(4) Refuse to negotiate for a real estate transaction;

(5) Represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or fail to bring a property listing to his attention, or refuse to permit him to inspect real property;

(6) Make, print, circulate, post, or mail or cause to be so published a statement, advertisement, or sign, or use a form or application for a real estate transaction, or make a record or inquiry in connection with a prospective real estate transaction, which indicates directly or indirectly, an intent to make a limitation, specification, or discrimination with respect thereto;

(7) Offer, solicit, accept, use, or retain a listing of real property with the understanding that any person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith; or

(8) Otherwise make unavailable or deny housing.

(b) Repealed by Session Laws 1989, c. 507, s. 2.

(b1) It is an unlawful discriminatory housing practice for any person or other entity whose business includes engaging in residential real estate related transactions to discriminate against any person in making available such a transaction, or in the terms and conditions of such a transaction, because of race, color, religion, sex, national origin, handicapping condition, or familial status. As used in this subsection, "residential real estate related transaction" means:

(1) The making or purchasing of loans or providing financial assistance (i) for purchasing, constructing, improving, repairing, or maintaining a dwelling, or (ii) where the security is residential real estate; or

(2) The selling, brokering, or appraising of residential real estate.

The provisions of this subsection shall not prohibit any financial institution from using a loan application which inquires into a person's financial and dependent obligations or from basing its actions on the income or financial abilities of any person.

(c) It is an unlawful discriminatory housing practice for a person to induce or attempt to induce another to enter into a real estate transaction from which such person may profit:

(1) By representing that a change has occurred, or may or will occur in the composition of the residents of the block, neighborhood, or area in which the real property is located with respect to race, color, religion, sex, national origin, handicapping condition, or familial status of the owners or occupants; or

(2) By representing that a change has resulted, or may or will result in the lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools in the block, neighborhood, or area in which the real property is located.

(d) It is an unlawful discriminatory housing practice to deny any person who is otherwise qualified by State law access to or membership or participation in any real estate brokers' organization, multiple listing service, or other service, organization, or facility relating to the business of engaging in real estate transactions, or to discriminate in the terms or conditions of such access, membership, or participation because of race, color, religion, sex, national origin, handicapping condition, or familial status.

(e) It is an unlawful discriminatory housing practice to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, on account of having exercised or enjoyed, or on account of having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by this Chapter. (1983, c. 522, s. 1; 1989, c. 507, s. 2; 1989 (Reg. Sess., 1990), c. 979, s. 3.)

Legal Periodicals. — For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

CASE NOTES

What Plaintiff Must Show. — To prevail under the State Fair Housing Act, plaintiff must show that defendant refused to engage in a real estate transaction with plaintiff due to the plaintiff's race, color, religion, sex or national origin. North Carolina Human Relations Council ex rel. Leach v. Weaver Realty Co., 79 N.C. App. 710, 340 S.E.2d 766 (1986).

In order for this Act to apply, the discriminatory housing practice must first: (1) occur in a "real estate transaction", and (2) discriminate "because of" one of the reasons listed in this section. Town of Newton Grove v. Sutton, 111 N.C. App. 376, 432 S.E.2d 441, cert. denied, 335 N.C. 181, 438 S.E.2d 208 (1993).

Under the Act, race, color, religion, sex or national origin must be more than a mere factor in a defendant's decision not to engage in a real estate transaction. North Carolina Human Relations Council ex rel. Leach v. Weaver Realty Co., 79 N.C. App. 710, 340 S.E.2d 766 (1986).

Statistics describing the disparate impact of practices or policies may be circumstantial evidence of prohibited biased conduct. However, if the finder of fact reasonably finds that a particular housing practice or policy is not motivated by considerations of race, color, religion, sex or national origin, then the particular housing practice or policy is not a violation of the State Fair Housing Act, no matter how "disparate" the impact of the practice or policy. North Carolina Human Relations Council ex rel. Leach v. Weaver Realty Co., 79 N.C. App. 710, 340 S.E.2d 766 (1986).

Family Composition Rules in Apartment

Complex. — In a proceeding under the State Fair Housing Act, plaintiff could meet her burden of proof by showing that the facially neutral family composition rules used to deny her application to rent an apartment were promulgated to discriminate against blacks; she could also meet her burden of proof by showing that she could have leased the apartment if she were of another race. North Carolina Human Relations Council ex rel. Leach v. Weaver Realty Co., 79 N.C. App. 710, 340 S.E.2d 766 (1986).

Defendants failed to meet the threshold question of showing that plaintiff did not allow defendants to place a mobile home on the property "because of" defendant's handicapping condition. Town of Newton Grove v. Sutton, 111 N.C. App. 376, 432 S.E.2d 441, cert. denied, 335 N.C. 181, 438 S.E.2d 208 (1993).

§ 41A-5. Proof of violation.

(a) It is a violation of this Chapter if:

(1) A person by his act or failure to act intends to discriminate against a person. A person intends to discriminate if, in committing an unlawful discriminatory housing practice described in G.S. 41A-4 he was motivated in full, or in any part at all, by race, color, religion, sex, national origin, handicapping condition, or familial status. An intent to discriminate may be established by direct or circumstantial evidence; or

(2) A person's act or failure to act has the effect, regardless of intent, of discriminating, as set forth in G.S. 41A-4, against a person of a particular race, color, religion, sex, national origin, handicapping condition, or familial status. However, it is not a violation of this Chapter if a person whose action or inaction has an unintended discriminatory effect, proves that his action or inaction was motivated and justified by business necessity.

(b) It shall be no defense to a violation of this Chapter that the violation was requested, sought, or otherwise procured by another person. (1983, c. 522, s. 1; 1987, c. 603, s. 1; 1989, c. 507, s. 3.)

§ 41A-6. Exemptions.

(a) The provisions of G.S. 41A-4, except for subdivision (a)(6), do not apply to the following:

(1) The rental of a housing accommodation in a building which contains housing accommodations for not more than four families living independently of each other, if the lessor or a member of his family resides in one of the housing accommodations;

(2) The rental of a room or rooms in a private house, not a boarding house, if the lessor or a member of his family resides in the house;

(3) Religious institutions or organizations or charitable or educational organizations operated, supervised, or controlled by religious institutions or organizations which give preference to members of the same religion in a real estate transaction, as long as membership in such religion is not restricted by race, color, sex, national origin, handicapping condition, or familial status;

(4) Private clubs, not in fact open to the public, which incident to their primary purpose or purposes provide lodging, which they own or operate for other than a commercial purpose, to their members or give preference to their members;

(5) With respect to discrimination based on sex, the rental or leasing of housing accommodations in single-sex dormitory property; and

(6) Repealed by Session Laws 1989 (Regular Session, 1990), c. 979, s. 4.

(7) The sale, rental, exchange, or lease of commercial real estate. For the purposes of this Chapter, commercial real estate means real property which is not intended for residential use.

(b) No provision of this Chapter requires that a dwelling be made available to a person whose tenancy would constitute a direct threat to the health or safety of other persons or whose tenancy would result in substantial physical damage to the property of others.

(c) No provision of this Chapter limits the applicability of any reasonable local or State restrictions regarding the maximum number of occupants permitted to occupy a dwelling unit.

(d) Nothing in this Chapter shall be deemed to nullify any provisions of the North Carolina Building Code applicable to the construction of residential housing for the handicapped.

(e) No provision of this Chapter regarding familial status applies with respect to housing for older persons. "Housing for older persons" means housing:

(1) Provided under any State or federal program specifically designed and operated to assist elderly persons as defined in the program;

(2) Intended for and solely occupied by person 62 years or older. Housing satisfies the requirements of this subdivision even though there are persons residing in such housing on September 13, 1988, who are under 62 years of age, provided that all new occupants after September 13, 1988, are 62 years or older; or

(3) Intended for and operated for occupancy by at least one person 55 years of age or older per unit as shown by such factors as (i) the existence of significant facilities and services specifically designed to meet the physical and social needs of older persons or, if this is not practicable, that the housing provides important housing opportunities for older persons, (ii) at least eighty percent (80%) of the units are occupied by at least one person 55 years of age or older per unit; and (iii) the publication of and adherence to policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years or older. Housing satisfies the requirements of this subdivision even though on September 13, 1988, under eighty percent (80%) of the units in the housing facility are occupied by at least one person 55 years or older per unit, provided that eighty percent (80%) of the units that are occupied by new tenants after September 13, 1988, are occupied by at least one person 55 years or older per unit until such time as eighty percent (80%) of all the units in the housing facility are occupied by at least one person 55 years or older. Housing facilities newly constructed for first occupancy after March 12, 1989, shall satisfy the requirements of this subdivision if (i) when twenty-five percent (25%) of the units are occupied, eighty percent (80%) of the occupied units are occupied by at least one person 55 years or older, and thereafter (ii) eighty percent (80%) of all newly occupied units are occupied by at least one person 55 years or older until such time as eighty percent (80%) of all the units in the housing facility are occupied by at least one person 55 years of age or older.

Housing satisfies the requirements of subdivisions (2) and (3) of this subsection even though there are units occupied by employees of the housing facility who are under the minimum age or family members of the employees residing in the same unit who are under the minimum age, provided the employees perform substantial duties directly related to the management of the housing. (1983, c. 522, s. 1; 1985, c. 371, ss. 1, 2; 1989, c. 507, s. 4; c. 721, s. 1; 1989 (Reg. Sess., 1990), c. 979, s. 4.)

§ 41A-7. Enforcement.

(a) Any person who claims to have been injured by an unlawful discriminatory housing practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice may file a complaint with the North Carolina Human Relations Commission. A fair housing enforcement organization, as defined in regulations adopted under 42 U.S.C. § 3602 (1968), may file a complaint with the Commission on behalf of a person who claims to have been injured by or reasonably believes he will be irrevocably injured by an unlawful discriminatory housing practice. Complaints shall be in writing, shall state the facts upon which the allegation of an unlawful discriminatory housing practice is based, and shall contain such other information and be in such form as the Commission requires. Commission employees shall assist complainants in reducing complaints to writing and shall assist in setting forth the information in the complaint as may be required by the Commission. Within 10 days after receipt of the complaint, the Director of the Commission shall serve on the respondent a copy of the complaint and a notice advising the respondent of his procedural rights and obligations under this Chapter. Within 10 days after receipt of the complaint, the Director of the Commission shall serve on the complainant a notice acknowledging the filing of the complaint and informing the complainant of his time limits and choice of forums under this Chapter.

No complaint may be filed with the Commission under this section during any period in which the Commission is not certified by the Secretary of the United States Department of Housing and Urban Development in accordance with 42 U.S.C. § 3610(f) to have jurisdiction over the subject matter of the complaint. Provided, however, that during any such period in which the Commission is not certified, any person who claims to have been injured by an unlawful discriminatory practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice may bring a civil action directly in superior court in accordance with the provisions of subsection (j) of this section, except that any such civil action shall be commenced within one year after the occurrence or termination of the alleged unlawful discriminatory housing practice.

(b) A complaint under subsection (a) shall be filed within one year after the alleged unlawful discriminatory housing practice occurred. A respondent may file an answer to the complaint against him within 10 days after receiving a copy of the complaint. With the leave of the Commission, which shall be granted whenever it would be reasonable and fair to do so, the complaint and the answer may be amended at any time. Complaints and answers shall be verified. The Commission shall make final administrative disposition of a complaint within one year of the date the complaint is filed, unless it is impracticable to do so. If the Commission is unable to do so, it shall notify the complainant and respondent, in writing, of the reasons for not doing so.

(c) Whenever another agency of the State or any other unit of government of the State has jurisdiction over the subject matter of any complaint filed under this section, and such agency or unit of government has legal authority equivalent to or greater than the authority under this Chapter to investigate or act upon the complaint, the Commission shall be divested of jurisdiction over such complaint. The Commission shall, within 30 days, notify the agency or unit of government of the apparent unlawful discriminatory housing practice, and request that the complaint be investigated in accordance with such authority.

(d) Complaints may be resolved at any time by informal conference, conciliation, or persuasion. Nothing said or done in the course of such informal procedure may be made public by the Commission or used as evidence in a subsequent proceeding under this Chapter without the written consent of the person concerned.

(e) Within 30 days after the filing of the complaint, the Commission shall commence an investigation of the complaint to ascertain the facts relating to the alleged unlawful discriminatory housing practice. If the complaint is not resolved before the investigation is complete, upon completion of the investigation, the Commission shall determine whether or not there are reasonable grounds to believe that an unlawful discriminatory housing practice has occurred. The Commission shall make a determination within 90 days after the filing of the complaint. If the Commission is unable to complete the investigation and issue a determination within 90 days after the filing of the complaint, the Commission shall notify the complainant and respondent in writing of the reasons for not doing so. If the Commission concludes at any time following the filing of a complaint under this section that prompt judicial action is necessary to carry out the purposes of this Chapter, the Commission may commence a civil action for, and the court may grant, appropriate temporary or preliminary relief pending final disposition of the complaint. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with G.S. 1A-1, et seq., Rules of Civil Procedure. The commencement of a civil action under this subsection does not affect the continuation of the Commission's investigation or the initiation of a separate civil action pursuant to other subsections of this section.

(f) If the Commission finds no reasonable ground to believe that an unlawful discriminatory housing practice has occurred or is about to occur it shall dismiss the complaint and issue to the complainant a right-to-sue letter which will enable him to bring a civil action in superior court in accordance with the provisions of subsection (j) of this section.

(g) If the Commission finds reasonable grounds to believe that an unlawful discriminatory housing practice has occurred or is about to occur it shall proceed to try to eliminate or correct the discriminatory housing practice by informal conference, conciliation, or persuasion. Each conciliation agreement arising out of conciliation efforts by the Commission, whether reached before or after the Commission makes a determination of the complaint pursuant to subsection (e), shall be:

(1) An agreement between the respondent and the complainant and shall be subject to the approval of the Commission. The Commission may also be a party to such conciliation agreements; and

(2) Made public unless the complainant and respondent otherwise agree, and the Commission determines that disclosure is not required to further the purposes of this Chapter.

(h) If the Commission is unable to resolve the alleged unlawful discriminatory housing practice it shall notify the parties in writing that conciliation efforts have failed.

(i) A complainant may make a written request to the Commission for a right-to-sue letter:

(1) Within 10 days following the receipt of a notice of conciliation failure; or

(2) After 130 days following the filing of a complaint, if the Commission has not issued a notice of conciliation failure.

Upon receipt of a timely request, the Commission shall issue to the complainant a right-to-sue letter which will enable him to bring a civil action in superior court in accordance with the provisions of subsection (j) of this section.

(j) A civil action brought by a complainant pursuant to subsections (f) or (i) of this section shall be commenced within one year after the right-to-sue letter is issued. The court may grant relief, as it deems appropriate, including any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff, actual and punitive damages, and may award court costs, and reasonable attorney's fees to the prevailing party. Provided, however, that a prevailing respondent may be awarded court costs and reasonable attorney's fees only upon a showing that the case is frivolous, unreasonable, or without foundation.

(k) After the Commission has issued a notice of conciliation failure pursuant to subsection (h) of this section, if the complainant does not request a right-to-sue letter pursuant to subsection (i) of this section, the complainant, the respondent, or the Commission may elect to have the claims and issues asserted in the reasonable grounds determination decided in a civil action commenced and maintained by the Commission.

(1) An election for a civil action under this subsection shall be made no later than 20 days after an electing complainant or respondent receives the notice of conciliation failure, or if the Commission makes the election, not more than 20 days after the notice of conciliation failure is issued. A complainant or respondent who makes an election for a civil action pursuant to this subsection shall give notice to the Commission. If the Commission makes an election, it shall notify all complainants and respondents of the election.

(2) If an election is made under this subsection, no later than 60 days after the election is made the Commission shall commence a civil action in superior court in its own name on behalf of the complainant. In such an action, the Commission shall be represented by an attorney employed by the Commission, and G.S. 114-2 shall not apply.

In a civil action brought under this subsection, the court may grant relief as it deems appropriate, including any permanent or temporary injunction, temporary restraining order, or other equitable relief and may award to any person aggrieved by an unlawful discriminatory housing practice compensatory and punitive damages. Parties to a civil action brought pursuant to this Chapter shall have the right to a jury trial as provided for by the North Carolina Rules of Civil Procedure.

(*l*) After the Commission has issued a notice of conciliation failure pursuant to subsection (h) of this section, if the complainant does not request a right-to-sue letter pursuant to subsection (i) of this section, and if an election for a civil action is not made pursuant to subsection (k) of this section, the Commission shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at a hearing of the case. Upon receipt of the application, the Director of the Office of Administrative Hearings shall, without undue delay, assign an administrative law judge to hear the case.

(1) All hearings shall be conducted pursuant to the provisions of Article 3A of Chapter 150B of the General Statutes, except that the case in support of the complaint shall be presented at the hearing by the Commission's attorney or agent, and G.S. 114-2 shall not apply. The parties to the complaint shall otherwise be given an opportunity to participate in the hearing as provided in G.S. 150B-40(a).

(2) The administrative law judge assigned to hear a case pursuant to this subsection shall sit in place of the Commission and shall have the authority of a presiding officer in a contested case under Article 3A of Chapter 150B of the General Statutes. The administrative law judge shall make a proposal for decision, which shall contain proposed findings of fact, proposed conclusions of law, and proposed relief, if appropriate. The Commission may make its final decision only after carefully reviewing and considering the administrative law judge's proposal for decision, and after a copy of that proposal for decision is served on the parties and an opportunity is given each party to file exceptions and proposed findings of fact and to present oral and written arguments to the Commission.

(3) The Commission's final decision may be made by a panel consisting of three Commission members appointed by the chairperson of the Commission. If the Commission, in its final decision, finds that a

respondent has violated or is about to violate this Chapter, it may order such relief as may be appropriate, including payment to the complainant by the respondent of compensatory damages and injunctive or other equitable relief. The Commission's order may also assess a civil penalty against the respondent:

a. In an amount not exceeding ten thousand dollars ($10,000) if the respondent has not been adjudged to have committed any prior unlawful discriminatory housing practices;
b. In an amount not exceeding twenty-five thousand dollars ($25,000) if the respondent has been adjudged to have committed one other unlawful discriminatory housing practice during the five-year period ending on the date of the filing of the complaint; or
c. In an amount not exceeding fifty thousand dollars ($50,000) if the respondent has been adjudged to have committed two or more unlawful discriminatory housing practices during the seven-year period ending on the date of the filing of the complaint.

If the acts constituting the unlawful discriminatory housing practice that is the object of the complaint are committed by the same natural person who has been previously adjudged to have committed acts constituting an unlawful discriminatory housing practice, then the civil penalties set forth in sub-subdivisions b and c of this subsection may be imposed without regard to the period of time within which any subsequent discriminatory housing practice occurred.

The clear proceeds of civil penalties assessed pursuant to this subdivision shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2.

(m) Any person aggrieved by the final agency decision following a hearing may petition for judicial review in accordance with the provisions of G.S. 150B-43 through G.S. 150B-52. The court in a review proceeding may:

(1) Affirm, modify, or reverse the Commission's decision in accordance with G.S. 150B-51;
(2) Remand the case to the Commission for further proceedings;
(3) Grant to any party such temporary relief, restraining order, or other order as it deems appropriate; or
(4) Issue an order to enforce the Commission's order to the extent that the order is affirmed or modified.

(n) If, within 30 days after service on the parties of the Commission's decision and order following a hearing, no party has petitioned for judicial review, the Commission or the person entitled to relief may file with the clerk of superior court in the county where the unlawful discriminatory housing practice occurred, or in the county where the real property is located, a certified copy of the Commission's final order. Upon such a filing, the clerk of the court shall enter an order enforcing the Commission's final order. (1983, c. 522, s. 1; 1985, c. 371, ss. 3-5; 1987, c. 603, ss. 2-4; 1989, c. 721, s. 2; 1989 (Reg. Sess., 1990), c. 979, ss. 1(2), 5, 6; 1998-215, s. 1; 2003-136, s. 1.)

Legal Periodicals. — For note, "North Carolina's New AIDS Discrimination Protection: Who Do They Think They're Fooling?," see 12 Campbell L. Rev. 475 (1990).

CASE NOTES

Fair Housing. — Fair housing organization lacked standing as it was not a person injured by an unlawful discriminatory housing practice within the meaning of the State Fair Housing Act, specifically, G.S. 41A-7(a), or Durham, North Carolina City Code § 8.5-27(A). Lee Ray Bergman Real Estate Rentals v. N.C. Fair Hous. Ctr., 153 N.C. App. 176, 568 S.E.2d 883, 2002 N.C. App. LEXIS 1089 (2002).

§ 41A-8. Investigation; subpoenas.

(a) In conducting an investigation, the Commission shall have access at all reasonable times to premises, records, documents, individuals, and other evidence or possible sources of evidence and may examine, record, and copy such materials and take and record the testimony or statements of such persons as are reasonably necessary for the furtherance of the investigation: Provided, however, that the Commission first complies with the provisions of the Fourth Amendment to the United States Constitution relating to unreasonable searches and seizures.

(b) The Commission may issue subpoenas to compel access to or the production of such materials, or the appearance of such persons, and may issue interrogatories to a respondent, to the same extent and subject to the same limitations as would apply if the subpoenas or interrogatories were issued or served in aid of a civil action in the general court of justice.

(c) Upon written application to the Commission, a respondent shall be entitled to the issuance of a reasonable number of subpoenas subject to the same limitations as subpoenas issued by the Commission. Subpoenas issued at the request of a respondent shall show on their face the name and address of such respondent and shall state that they were issued at his request.

(d) In case of contumacy or refusal to obey a subpoena, the Commission or the respondent may petition for its enforcement in the superior court for the district in which the person to whom the subpoena was addressed resides, was served, or transacts business. (1983, c. 522, s. 1; 1989 (Reg. Sess., 1990), c. 979, s. 1(3).)

§ 41A-9: Repealed by Session Laws 1989, c. 721, s. 3.

§ 41A-10. Venue.

All civil actions shall be commenced in the county where the alleged unlawful discriminatory housing practice occurred, or in the county where the real property is located. (1983, c. 522, s. 1.)

Legal Periodicals. — For article, “North Carolina’s Retreat From Fair Housing: A Critical Examination of North Carolina Human Relations Council v. Weaver Realty Co.,” see 16 N.C. Cent. L.J. 154 (1987).

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ARTICLE 1.

General Provisions.

§ 42-1. Lessor and lessee not partners.

No lessor of property, merely by reason that he is to receive as rent or compensation for its use a share of the proceeds or net profits of the business in which it is employed, or any other uncertain consideration, shall be held a partner of the lessee. (1868-9, c. 156, s. 3; Code, s. 1744; Rev., s. 1982; C.S., s. 2341.)

Legal Periodicals. — For case law survey as to landlord and tenant law, see 44 N.C.L. Rev. 1027 (1966); 45 N.C.L. Rev. 968 (1967).

For note discussing the enforceability of assessments against property owners in residential developments in light of Figure Eight Beach Homeowners' Ass'n v. Parker, 62 N.C. App. 367, 303 S.E.2d 336, cert. denied, 309 N.C. 320, 307 S.E.2d 170 (1983), see 7 Campbell L. Rev. 33 (1984).

CASE NOTES

The lessor and lessee are not partners. State v. Keith, 126 N.C. 1114, 36 S.E. 169 (1900).

Where B was to furnish land, farming implements, feed and a team and W was to do the work, and the crops were to be equally divided, it was held that this was not an agricultural partnership. Lawrence v. Week, 107 N.C. 119, 12 S.E. 120 (1890). See also, Day v. Stevens, 88 N.C. 83 (1883), explaining and correcting Curtis v. Cash, 84 N.C. 41 (1881); Keith v. Lee, 246 N.C. 188, 97 S.E.2d 859 (1957).

Applied in Moss v. Hicks, 240 N.C. 788, 83 S.E.2d 890 (1954).

Cited in Perkins v. Langdon, 231 N.C. 386, 57 S.E.2d 407 (1950); Johnson v. Gill, 235 N.C. 40, 68 S.E.2d 788 (1952); Bowman v. Drum, 97 N.C. App. 505, 389 S.E.2d 125 (1990).

§ 42-2. Attornment unnecessary on conveyance of reversions, etc.

Every conveyance of any rent, reversion, or remainder in lands, tenements or hereditaments, otherwise sufficient, shall be deemed complete without attornment by the holders of particular estates in said lands: Provided, no holder of a particular estate shall be prejudiced by any act done by him as holding under his grantor, without notice of such conveyance. (4 Anne, c. 16, s. 9; 1868-9, c. 156, s. 17; Code, s. 1764; Rev., s. 947; C.S., s. 2342.)

CASE NOTES

Lessee Becomes Tenant of Grantee. — When title passes, the lessee ceases to hold under the grantor. He then becomes a tenant of grantee, and his possession is grantee's possession. Pearce v. Gay, 263 N.C. 449, 139 S.E.2d 567 (1965).

Rent Follows Reversion. — Rent due under a lease follows reversion. Perkins v. Langdon, 231 N.C. 386, 57 S.E.2d 407 (1950).

Cited in Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984).

§ 42-3. Term forfeited for nonpayment of rent.

In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within 10 days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease. (1919, c. 34; C.S., s. 2343; 2001-502, s. 2; 2004-143, s. 1.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For a comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 Act to Clarify Landlord Eviction Remedies in Residential Tenancies, see 60 N.C.L. Rev. 885 (1982).

For a comment on the Landlord Eviction Remedies Act in light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

CASE NOTES

Purpose of Section. — This section was passed to protect landlords who made verbal or written leases and omitted in their contracts to make provision for reentry on nonpayment of rent when due. The consequence was that often an insolvent lessee would avoid payment of rent, refuse to vacate and stay on until his term expired. Ryan v. Reynolds, 190 N.C. 563, 130 S.E. 156 (1925).

Section Construed with § 42-33. — This section and G.S. 42-33 are in pari materia, and should be construed together. Ryan v. Reynolds, 190 N.C. 563, 130 S.E. 156 (1925).

Section 42-33 construed in pari materia with this section. Charlotte Office Tower Assocs. v. Carolina SNS Corp., 89 N.C. App. 697, 366 S.E.2d 905 (1988).

This section and § 42-33 are remedial in nature and will apply only where the parties' lease does not cover the issue of forfeiture of the lease term upon nonpayment of rent. Where the contracting parties have considered the issue, negotiated a response, and memorialized their response within the lease, the trial court appropriately should decline to apply these statutory provisions. Charlotte Office Tower Assocs. v. Carolina SNS Corp., 89 N.C. App. 697, 366 S.E.2d 905 (1988).

Provision Written into Lease. — This section writes into a contract of a lease of lands, when the lease is silent thereon, a forfeiture of the terms of the lease upon failure of the lessee to pay the rent within 10 days after a demand is made by the lessor or his agent for all past due rent, with right of the lessor to enter and dispossess the lessee. Ryan v. Reynolds, 190 N.C. 563, 130 S.E. 156 (1925).

Statutory forfeitures under this section are not implied where the lease itself provides for termination upon nonpayment of rent. Stanley v. Harvey, 90 N.C. App. 535, 369 S.E.2d 382 (1988).

Forfeiture Is for Benefit of Lessor. — The forfeiture implied by this section is for the benefit of the lessor, and is to be declared only at his application. Monger v. Lutterloh, 195 N.C. 274, 142 S.E. 12 (1928), holding section not applicable to facts of case.

Demand is a necessary prerequisite to forfeiture for nonpayment of rent. Snipes v. Snipes, 55 N.C. App. 498, 286 S.E.2d 591, aff'd, 306 N.C. 373, 293 S.E.2d 187 (1982).

Forfeiture under this section for failure to pay rent is not effective until the expiration of 10 days after a demand is made on the lessee for all past due rent. Snipes v. Snipes, 55 N.C. App. 498, 286 S.E.2d 591, aff'd, 306 N.C. 373, 293 S.E.2d 187 (1982).

Where the lease contains no forfeiture clause for failure to pay rent, lessors may assert forfeiture for nonpayment of rent only after 10 days from demand upon lessees for payment. Reynolds v. Earley, 241 N.C. 521, 85 S.E.2d 904 (1955).

Where a lease contained no forfeiture clause for failure to pay rent, and lessee, after lessor's death, paid rent to lessor's personal representative, to the knowledge of lessor's heir, the heir, who made no demand for the rent, could not declare the lease forfeited, since in the absence of a forfeiture clause, this section applied, and forfeiture under it was not effective until the expiration of 10 days after demand. First-Citizens Bank & Trust Co. v. Frazelle, 226 N.C. 724, 40 S.E.2d 367 (1946).

What Constitutes "Demand". — To constitute a "demand" under this section, a clear, unequivocal statement, either oral or written, requiring the lessee to pay all past due rent, is necessary. Snipes v. Snipes, 55 N.C. App. 498, 286 S.E.2d 591, aff'd, 306 N.C. 373, 293 S.E.2d 187 (1982).

Demand must be made with sufficient authority to place the lessee on notice that the lessor intends to exercise his or her statutory right to forfeiture for nonpayment of rent. Snipes v. Snipes, 55 N.C. App. 498, 286 S.E.2d 591, aff'd, 306 N.C. 373, 293 S.E.2d 187 (1982).

Where lessee waives all notice to vacate in the lease he cannot claim the benefit of this section. Tucker v. Arrowood, 211 N.C. 118, 189 S.E. 180 (1937).

Forfeiture Denied upon Tender of Rent and Costs. — Where, during the hearing and before judgment on a petition for forfeiture of a lease under this section, all rents and costs lawfully incurred were tendered to the petitioner, the petition was properly denied. Coleman v. Carolina Theatres, 195 N.C. 607, 143 S.E. 7 (1928).

Eviction of Tenants at Will Not Dependent upon Failure to Pay Rent. — Where a tenancy at will exists, a landlord's right to evict the tenants does not depend on whether the tenants have failed to pay their rent. Stout v. Crutchfield, 21 N.C. App. 387, 204 S.E.2d 541, cert. denied, 285 N.C. 595, 205 S.E.2d 726 (1974).

Upon Eviction, Tenancy at Will Instantly Expires. — When a landlord tells tenants to vacate the premises, their tenancy at will instantly expires, regardless of whether they have defaulted on the rent. Stout v. Crutchfield, 21 N.C. App. 387, 204 S.E.2d 541, cert. denied, 285 N.C. 595, 205 S.E.2d 726 (1974).

Tenants have the right to bring an immediate action for summary ejectment under G.S. 42-26(1). Stout v. Crutchfield, 21 N.C. App. 387, 204 S.E.2d 541, cert. denied, 285 N.C. 595, 205 S.E.2d 726 (1974).

Lessor Must Terminate Lessee's Estate Before Commencing Summary Ejectment Action. — The trial court erred in granting lessor summary ejectment of lessee since lessor's letter to lessee did not amount to notice that lease was terminated and lessor must terminate lessee's estate before commencing on summary ejectment action. Stanley v. Harvey, 90 N.C. App. 535, 369 S.E.2d 382 (1988).

Failure to Pay Taxes Not Equivalent of Failure to Pay Rent. — Alleged failure of tenant to pay property taxes on real property the tenant occupied under a lease with an option to purchase was not the equivalent of breach of a covenant to pay rent, and the landlord was not justified in attempting to declare the lease void and force the tenant to sign a new lese at a higher rent without the option to purchase; as lease was still in effect, tenant had the right to exercise the option to purchase the property. Creech v. Ranmar Properties, 146 N.C. App. 97, 551 S.E.2d 224, 2001 N.C. App. LEXIS 794 (2001), cert. denied, 356 N.C. 160, 568 S.E.2d 191 (2002), cert. dismissed, 356 N.C. 160, 568 S.E.2d 190 (2002).

Applied in Green v. Lybrand, 39 N.C. App. 56, 249 S.E.2d 443 (1978).

Cited in Duke v. Davenport, 240 N.C. 652, 83

S.E.2d 668 (1954); Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

§ 42-4. Recovery for use and occupation.

When any person occupies land of another by the permission of such other, without any express agreement for rent, or upon a parol lease which is void, the landlord may recover a reasonable compensation for such occupation, and if by such parol lease a certain rent was reserved, such reservation may be received as evidence of the value of the occupation. (1868-9, c. 156, s. 5; Code, s. 1746; Rev., s. 1986; C.S., s. 2344.)

Legal Periodicals. — For article on remedies for trespass on land in North Carolina, see 47 N.C.L. Rev. 334 (1969).

CASE NOTES

Judge Did Not Have Authority to Assign No Rental Value at All. — In an action under this section, while the trial judge had the authority to believe all, any or none of the landowner's testimony, and so to decline to accept her estimate of reasonable compensation, he did not have the authority to refuse to assign any rental value to the land at all. Even if the house on the property was fallen down or demolished, the land would still have had a rental value. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Period of Limitations on Action for Fair Rental Value. — An action for the "fair rental value" of occupied property was brought upon a statutory liability under this section and was subject to the three-year statute of limitations provided for in G.S. 1-52(2). Such a cause of action accrued continually, for each day the property was occupied. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Property owner was not entitled to 17 years of back rent from an occupier and an estate for use of his property because there was a three-year statute of limitations under G.S. 42-4 and G.S. 1-52(2). Perkins v. Watson, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 11192 (M.D.N.C. June 3, 2005).

Claim Against Administratrix for Reasonable Compensation Held Subject to Limitation Period in § 28A-19-3. — A landowner's claim under this section for "reasonable compensation" for occupation of her property, brought against one of the former cotenants as administratrix of her husband's estate, was presented to the administratrix within the statutory period (G.S. 28A-19-3) and was therefore not barred by the three-year statute of limitations (G.S. 1-52(2)) as of the decedent's death. The landowner was allowed to sue the administratrix for rents not paid in the period of three years prior to the decedent's death, although the action itself was not brought until some six months after this date. Simon v. Mock, 75 N.C. App. 564, 331 S.E.2d 300 (1985).

Where a lease was void under the statute of frauds, the lessors could only recover for the time the premises were occupied. Harty v. Harris, 120 N.C. 408, 27 S.E. 90 (1897).

Applied in Raleigh-Durham Airport Auth. v. Delta Air Lines, 429 F. Supp. 1069 (E.D.N.C. 1976).

§ 42-5. Rent apportioned, where lease terminated by death.

If a lease of land, in which rent is reserved, payable at the end of the year or other certain period of time, is determined by the death of any person during one of the periods in which the rent was growing due, the lessor or his personal representative may recover a part of the rent which becomes due after the death, proportionate to the part of the period elapsed before the death, subject to all just allowances; and if any security was given for such rent it shall be apportioned in like manner. (1868-9, c. 156, s. 6; Code, s. 1747; Rev., s. 1987; C.S., s. 2345.)

§ 42-6. Rents, annuities, etc., apportioned, where right to payment terminated by death.

In all cases where rents, rent charges, annuities, pensions, dividends, or any other payments of any description, are made payable at fixed periods to successive owners under any instrument, or by any will, and where the right of any owner to receive payment is terminable by a death or other uncertain event, and where such right so terminates during a period in which a payment is growing due, the payment becoming due next after such terminating event shall be apportioned among the successive owners according to the parts of such periods elapsing before and after the terminating event. (1868-9, c. 156, s. 7; Code, s. 1748; Rev., s. 1988; C.S., s. 2346.)

CASE NOTES

Section Inapplicable to Certain Annuities. — This section, providing that annuities shall be apportionable in certain instances, has no application to disability benefits payable annually under the terms of an insurance policy, since there is no provision for successive owners, and the right to payment terminates upon the death of the insured. Wells v. Guardian Life Ins. Co., 213 N.C. 178, 195 S.E. 394, 116 A.L.R. 130 (1938).

Rents Payable on Days Tenants Sold Crops Were Payable at "Fixed Periods". — Where the rents reserved were one-third of sale price of tobacco crops and were to be paid "at the warehouse" on the days the tenants sold tobacco, these sale days could not be designated in the lease, but they were no less "fixed periods" within the meaning of this section and "periodic payments" within the meaning of former G.S. 37-4. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

Section Provides for Successive Owners Under Same Instrument. — This section, by its terms, makes provision for successive owners under the same instrument. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

Owner of Fee Does Not Own Under Instrument Subsequently Executed. — Where predecessor owner had the fee prior to the execution of the instrument under which successive owners take, the former cannot be said to own by the instrument, i.e., the deed, will or trust indenture, by which the latter owners take. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

§ 42-7. In lieu of emblements, farm lessee holds out year, with rents apportioned.

When any lease for years of any land let for farming on which a rent is reserved determines during a current year of the tenancy, by the happening of any uncertain event determining the estate of the lessor, or by a sale of said land under any mortgage or deed of trust, the tenant in lieu of emblements shall continue his occupation to the end of such current year, and shall then give up such possession to the succeeding owner of the land, and shall pay to such succeeding owner a part of the rent accrued since the last payment became due, proportionate to the part of the period of payment elapsing after the termination of the estate of the lessor to the giving up such possession; and the tenant in such case shall be entitled to a reasonable compensation for the tillage and seed of any crop not gathered at the expiration of such current year from the person succeeding to the possession. (1868-9, c. 156, s. 8; Code, s. 1749; Rev., s. 1990; C.S., s. 2347; 1931, c. 173, s. 1.)

Legal Periodicals. — As to the 1931 amendment to this section, see 9 N.C.L. Rev. 379 (1931).

For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Constitutionality. — This section is but a reasonable legislative regulation of the method and means whereby the remainderman, or succeeding owner, comes into possession and complete enjoyment of his estate, and is constitutional. King v. Foscue, 91 N.C. 116 (1884).

Protection of Remainderman. — This section was passed to protect the right of the remainderman and to secure for him his rent for the part of the year which had not elapsed at the time his title vested. Under the statute the remainderman is entitled to a part of the rent proportionate to the part of the year elapsing after the termination of the life estate and before the surrendering of possession to the remainderman. See King v. Foscue, 91 N.C. 116 (1884); Hayes v. Wrenn, 167 N.C. 229, 83 S.E. 356 (1914); Collins v. Bass, 198 N.C. 99, 150 S.E. 706 (1929).

Section Apportions Rents When Life Tenant Dies During Lease Year. — This section apportions rents on farm leases which it extends in lieu of emblements, when the life tenant dies during the lease year. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

Only Applies If Such Death Determines Lease. — This section applies only to farm leases which are determined, inter alia, by the death of a life tenant. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

Where a settlor of a trust terminating on the death of the income recipient authorizes the trustee to make leases beyond the term of the duration of the trust, the leases so made do not terminate with the life tenant's death and this section does not apply. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

Lease for One Year Included. — The phrase "any lease for years" is used in a technical sense, and it embraces a lease for a single year. King v. Foscue, 91 N.C. 116 (1884).

Lease Continued to End of Year. — A lease of land made by a tenant for life terminates at his death, but by this section the lease is continued to the end of the current lease year so that the tenant's representatives may gather his crop. King v. Foscue, 91 N.C. 116 (1884).

Applied in Smith v. Smith, 65 N.C. App. 139, 308 S.E.2d 504 (1983).

Cited in Coleman v. Edwards, 70 N.C. App. 206, 318 S.E.2d 899 (1984).

§ 42-8. Grantees of reversion and assigns of lease have reciprocal rights under covenants.

The grantee in every conveyance of reversion in lands, tenements or hereditaments has the like advantages and remedies by action or entry against the holders of particular estates in such real property, and their assigns, for nonpayment of rent, and for the nonperformance of other conditions and agreements contained in the instruments by the tenants of such particular estates, as the grantor or lessor or his heirs might have; and the holders of such particular estates, and their assigns, have the like advantages and remedies against the grantee of the reversion, or any part thereof, for any conditions and agreements contained in such instruments, as they might have had against the grantor or his lessors or his heirs. (32 Hen. VIII, c. 34; 1868-9, c. 156, s. 18; Code, s. 1765; Rev., s. 1989; C.S., s. 2348.)

CASE NOTES

When title passes, the lessee ceases to hold under the grantor and he becomes a tenant of the grantee. In other words, privity is automatically established between the lessor's grantee and the lessee. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984), rev'd on other grounds, 313 N.C. 320, 327 S.E.2d 878 (1985).

The general rule is that the rights and liabilities existing between the grantee and lessee are the same as those existing between the grantor and the lessee, after the lessee is given notice of the transfer of the property. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984), rev'd on other grounds, 313 N.C. 320, 327 S.E.2d 878 (1985).

The inclusion of a seal in a lease agreement neither creates a duty between the parties nor shifts a pre-existing duty from one party to the other. It merely extends, by operation of law, the period of time in which the parties expose themselves to suit on the particular sealed instrument from three years to 10 years. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984), rev'd on other grounds, 313 N.C. 320, 327 S.E.2d 878 (1985).

Grantor Must Reserve Right If He Is to Collect Rents After Conveyance. — If the grantor is to collect rents accruing subsequent to the effective date of the conveyance, he must, by reservation in his deed, provide that the grantee shall not be entitled to possession prior to the expiration of the term fixed in the lease, or otherwise expressly reserve his right to collect subsequently accruing rents. Pearce v. Gay, 263 N.C. 449, 139 S.E.2d 567 (1965).

Substitution of Note or Bond Before Sale Relieves Lessee of Obligation to Pay Rent to Purchaser. — If lessee pays the rent before a sale, or executes a note or bond for the rent in substitution of his contract to pay the rent, and such note or bond is accepted by the then owner in discharge of lessee's obligation to pay rent, such substitution relieves the lessee of his obligation to pay rent. Since he has no obligation to pay rent, he is not obligated to pay the purchaser; his obligation is to the holder of the note or bond. Pearce v. Gay, 263 N.C. 449, 139 S.E.2d 567 (1965).

Cited in Perkins v. Langdon, 237 N.C. 159, 74 S.E.2d 634 (1953); Dixie Fire & Cas. Co. v. Esso Std. Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965).

§ 42-9. Agreement to rebuild, how construed in case of fire.

An agreement in a lease to repair a demised house shall not be construed to bind the contracting party to rebuild or repair in case the house shall be destroyed or damaged to more than one half of its value, by accidental fire not occurring from the want of ordinary diligence on his part. (1868-9, c. 156, s. 11; Code, s. 1752; Rev., s. 1985; C.S., s. 2349.)

CASE NOTES

Provisions of section are limited to destruction of house by fire. Atlantic Disct. Corp. v. Mangel's of N.C., Inc., 2 N.C. App. 472, 163 S.E.2d 295 (1968).

This section was enacted to change the rule, formerly existing, but limits its application to the destruction of a house by accidental fire, and only then where it is damaged to more than one half of its value. It does not apply to a case where the destruction is not by fire, but by ice and flood. Chambers v. North River Line, 179 N.C. 199, 102 S.E. 198 (1920).

§ 42-10. Tenant not liable for accidental damage.

A tenant for life, or years, or for a less term, shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part, unless he so contract. (1868-9, c. 156, s. 10; Code, s. 1751; Rev., s. 1991; C.S., s. 2350.)

Legal Periodicals. — For note on lessee's liability for sublessee's negligence, see 45 N.C.L. Rev. 295 (1966).

CASE NOTES

Implied Obligation to Use Reasonable Diligence. — In every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to use reasonable diligence to treat the demised premises in such manner that no injury is done to the property, so that the estate may revert to the lessor undeteriorated by the wilful or negligent act of the lessee. The lessee's obligation is based upon the maxim sic utere tuo ut alienum non laedas. Dixie Fire & Cas. Co. v. Esso Std. Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965).

Lessee is not liable for accidental damage by fire. Dixie Fire & Cas. Co. v. Esso Std. Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965).

Lessee is liable if buildings are damaged by negligence. Dixie Fire & Cas. Co. v. Esso Std. Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965).

When Lessor Is Liable to Third Parties. — While ordinarily the tenant and not the landlord is liable to third persons for injuries caused to them by failure to keep the premises in repair, the liability may be extended to the owner where the condition existed at the time the premises were leased, and for months and years, and the owner knew of it and had promised to rectify it at the solicitation of the tenant. Knight v. Foster, 163 N.C. 329, 79 S.E. 614 (1913).

Lessor and Lessee Both Held Liable. — Where a landlord leased the lower floor of his building as a store and rented an office above, which had defective plumbing, to a dentist, in an action by the lessee of the store for water damages to his stock of goods, evidence that the lessor had contracted to repair, but for years had failed to inspect or repair the plumbing, and that the dentist had approved an insufficient outlet for the water flowing from his cuspidor and had negligently left his cuspidor turned on during the night, was sufficient, if believed by the jury, to sustain a verdict against the landlord and the dentist jointly, the negligence of each being the proximate cause of the injury. Rucker & Sheely Co. v. Willey, 174 N.C. 42, 93 S.E. 379 (1917).

Cited in Rountree v. Thompson, 226 N.C. 553, 39 S.E.2d 523 (1946).

§ 42-11. Willful destruction by tenant misdemeanor.

If any tenant shall, during his term or after its expiration, willfully and unlawfully demolish, destroy, deface, injure or damage any tenement house, uninhabited house or other outhouse, belonging to his landlord or upon his premises by removing parts thereof or by burning, or in any other manner, or shall unlawfully and willfully burn, destroy, pull down, injure or remove any fence, wall or other inclosure or any part thereof, built or standing upon the premises of such landlord, or shall willfully and unlawfully cut down or destroy any timber, fruit, shade or ornamental tree belonging to said landlord, he shall be guilty of a Class 1 misdemeanor. (1883, c. 224; Code, s. 1761; Rev., s. 3686; C.S., s. 2351; 1993, c. 539, s. 402; 1994, Ex. Sess., c. 24, s. 14(c).)

Cross References. — As to larceny of ungathered crops, see G.S. 14-78. As to burning or destroying crops, see G.S. 14-141. For provisions applicable to landlord and tenant relations in certain counties, see G.S. 14-358, 14-359.

Legal Periodicals. — For article, "Legislative Kudzu and the New Millennium: An Opportunity for Reflection and Reform," see 23 Campbell L. Rev. 157 (2001).

CASE NOTES

For meaning of "tenement house," "uninhabited house" and "outhouse," as used in this section, see State v. Rowland Lumber Co., 153 N.C. 610, 69 S.E. 58 (1910).

Meaning of "Willful". — The word "willful," as used in this section, means something more than an intention to do a thing. It implies the doing of the act purposely and deliberately, indicating a purpose to do it, without authority, careless whether one has the right or not, in violation of law; and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute. State v. Whitener, 93 N.C. 590 (1885).

If the defendants reasonably and bona fide believe that they have the right to remove the buildings, etc., they are not guilty of removing them "willfully" so as to bring their act within the meaning of this section. State v. Rowland Lumber Co., 153 N.C. 610, 69 S.E. 58 (1910).

Right to Remove Certain Fixtures. — It is intimated that a tenant who is going away has the right to remove fixtures put on the premises by himself for his own convenience. State v. Whitener, 93 N.C. 590 (1885), approved in State v. Morgan, 136 N.C. 628, 48 S.E. 670 (1904).

Liability of Corporation. — A corporation is indictable for the acts of its officers and agents under this section. State v. Rowland Lumber Co., 153 N.C. 610, 69 S.E. 58 (1910).

Indictment. — An indictment charging the defendant with burning a dwelling house occupied by him "as lessee" falls within this section. State v. Graham, 121 N.C. 623, 28 S.E. 409 (1897).

Burden of Proof. — In an indictment under this section the burden of proof is upon the State to establish, first, that the relation of landlord and tenant existed, and, second, that during the tenant's term or after its expiration he did willfully and unlawfully injure the tenement house. State v. Godwin, 138 N.C. 582, 50 S.E. 277 (1905).

Admissibility of Evidence. — In the trial of an indictment for burning a dwelling house occupied by the defendant as lessee, evidence that the defendant at a prior time was guilty of a similar offense is inadmissible. State v. Graham, 121 N.C. 623, 28 S.E. 409 (1897).

Cited in Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985).

§ 42-12. Lessee may surrender, where building destroyed or damaged.

If a demised house, or other building, is destroyed during the term, or so much damaged that it cannot be made reasonably fit for the purpose for which it was hired, except at an expense exceeding one year's rent of the premises, and the damage or destruction occur without negligence on the part of the lessee or his agents or servants, and there is no agreement in the lease respecting repairs, or providing for such a case, and the use of the house damaged or destroyed was the main inducement to the hiring, the lessee may surrender his estate in the demised premises by a writing to that effect delivered or tendered to the landlord within 10 days from the damage or destruction, and by paying or tendering at the same time all rent in arrear, and a part of the rent growing due at the time of the damage or destruction, proportionate to the time between the last period of payment and the occurrence of the damage or destruction, and the lessee shall be thenceforth discharged from all rent accruing afterwards; but not from any other agreement in the lease. This section shall not apply if a contrary intention appear from the lease. (1868-9, c. 156, s. 12; Code, s. 1753; Rev., s. 1992; C.S., s. 2352.)

CASE NOTES

Applicability When Lessee Insists on Rights. — The modification of the common-law liability of the lessee of a building, etc., to pay the rent, when the building was accidentally destroyed, etc., during the term of his lease, by this section, under certain conditions, is to some extent a legislative recognition that without its provisions the principles of the common law would prevail; and neither the statute, being for the benefit of the lessee, nor the common-law principle, has application when the lessee is insisting on certain rights arising to him under the provisions of the lease. Miles v. Walker, 179 N.C. 479, 102 S.E. 884 (1920).

For case in which this section was not applicable, see Chambers v. North River Line, 179 N.C. 199, 102 S.E. 198 (1920).

Where the terms of a lease fully provide for the rights of the parties upon destruction of the property by a fire, such rights will be determined in accordance with the written agreement, without reference to this section. Grant v. Borden, 204 N.C. 415, 168 S.E. 492 (1933).

For case in which damage was held insufficient to enable lessee to surrender premises, see Carolina Mtg. Co. v. Massie, 209 N.C. 146, 183 S.E. 425 (1936).

Repairs by Lessor Within Reasonable Time. — Where the controversy was made to depend upon whether the damage to the leased premises had been repaired by the lessor within a reasonable time when the extent of the damage was insufficient to terminate the lease under its written terms, evidence that three days had elapsed between the time the lessor and lessee had agreed upon the necessary repairs and the time the repairs were made was sufficient to sustain an affirmative verdict that they were made in a reasonable time. Archibald v. Swaringen, 192 N.C. 756, 135 S.E. 849 (1926).

Where a swimming pool was leased for a year, under a written contract that the lease would terminate upon the pool becoming unfit for use, it was held that a crack in the walls thereof by which the pool was drained of water, which was repaired by the lessor at an inappreciable sum, was not sufficient to give the lessee the right to cancel the lease when the repair was made under a parol agreement within a reasonable time. Archibald v. Swaringen, 192 N.C. 756, 135 S.E. 849 (1926).

Time Allowed Lessee for Repairs. — Where a monthly rental to be paid by the lessee of a building, and an obligation to make certain repairs by him, are specified as the consideration for the lease, with forfeiture of the lease upon the nonpayment of the rent at stated times, the lessee's liability to repair and to pay rent are, as a rule, distinct and independent obligations, and the law will imply that the lessee be given a reasonable time in which to make the repairs if no time is stated in the lease. Miles v. Walker, 179 N.C. 479, 102 S.E. 884 (1920).

Applicability of Lease to Building Restored by Landlord. — Though the landlord may be under no implied obligation to restore or repair a building which has been destroyed, etc., if he does enter and make the required repairs without further agreement on the subject, the building so rebuilt or restored will come under the provisions of the lease as far as the same may be applied, and for a breach the landlord may be held responsible. Miles v. Walker, 179 N.C. 479, 102 S.E. 884 (1920).

§ 42-13. Wrongful surrender to other than landlord misdemeanor.

Any tenant or lessee of lands who shall willfully, wrongfully and with intent to defraud the landlord or lessor, give up the possession of the rented or leased premises to any person other than his landlord or lessor, shall be guilty of a Class 1 misdemeanor. (1883, c. 138; Code, s. 1760; Rev., s. 3682; C.S., s. 2353; 1993, c. 539, s. 403; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For article, "Legislative Kudzu and the New Millennium: An Opportunity for Reflection and Reform," see 23 Campbell L. Rev. 157 (2001).

§ 42-14. Notice to quit in certain tenancies.

A tenancy from year to year may be terminated by a notice to quit given one month or more before the end of the current year of the tenancy; a tenancy from month to month by a like notice of seven days; a tenancy from week to week, of two days. Provided, however, where the tenancy involves only the rental of a space for a manufactured home as defined in G.S. 143-143.9(6), a notice to quit must be given at least 60 days before the end of the current rental period, regardless of the term of the tenancy. (1868-9, c. 156, s. 9; Code, s. 1750; 1891, c. 227; Rev., s. 1984; C.S., s. 2354; 1985, c. 541; 2005-291, s. 1.)

Local Modification. — Forsyth: 1935, c. 119; Halifax: 1935, c. 22; Hertford: 1939, c. 367; Montgomery: 1925, c. 196, s. 2; Perquimans: 1935, c. 472; Pitt: 1925, c. 196, s. 2; Randolph: 1925, c. 196, s. 2; Wake: 1931, c. 20.

Effect of Amendments. — Session Laws 2005-291, s. 1, effective January 1, 2006, and applicable to all notices to quit given on or after that date, substituted "60" for "30" in the last sentence.

Legal Periodicals. — For note, "When A Hotel Is Your Home, Is There Protection?," see 15 Campbell L. Rev. 295 (1993).

CASE NOTES

A tenant from year to year is entitled to a written or verbal notice to quit, and a mere demand for possession is insufficient. Vincent v. Corbin, 85 N.C. 108 (1881).

A landlord has no right to dispossess his tenant from year to year, without first giving the statutory notice, where the tenant acknowledges the tenancy, sets up no adverse claim or other defense, and relies upon the want of legal notice. Fayetteville Waterworks Co. v. Tillinghast, 119 N.C. 343, 25 S.E. 960 (1896).

Verbal Notice Is Sufficient. — A verbal notice by landlord to tenant is sufficient. Poindexter v. Call, 182 N.C. 366, 109 S.E. 26 (1921).

Effect of Failure to Provide Notice. — Generally, the effect of failure to provide notice when it is required under this section is that the parties are bound to a new term. The rule applies to agricultural tenancies, even those for fixed one-year terms under G.S. 42-23. Lewis v. Lewis Nursery, Inc., 80 N.C. App. 246, 342 S.E.2d 45, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

Insufficient Notice. — In an action in summary ejectment under G.S. 42-26, proof of notice given the 14th of the month to quit the premises on or before the first of the following month was insufficient to show the statutory notice terminating the term, when it appeared that the original occupancy was taken on the 18th of the month and plaintiff offered no evidence as to the date of the month the term began or when the monthly rentals became due. Stafford v. Yale, 228 N.C. 220, 44 S.E.2d 872 (1947).

Where on May 18, 1897, a landlord gave a tenant from month to month notice "to get out within 30 days," and the landlord had received the rent for May, it was held that such notice was invalid as to May, as the rent had been paid, and as to June, because not ending with the month. Simmons v. Jarman, 122 N.C. 195, 29 S.E. 332 (1898).

Tenant at Will Not Entitled to Notice. — Where a person is put in possession of land by the owner, without any agreement for rent, and with an express provision that he shall leave it whenever the owner may require him to do so, he is not a tenant from year to year, but is strictly a tenant at will, and is not entitled to notice to quit as provided in this section. Humphries v. Humphries, 25 N.C. 362 (1843).

Election of Lessor When Tenant Holds Over. — Nothing else appearing, when a tenant for a fixed term of one year or more holds over after the expiration of such term, the lessor has an election. He may treat him as a trespasser and bring an action to evict him and to recover reasonable compensation for the use of the property, or he may recognize him as still a tenant, having the same rights and duties as under the original lease, except that the tenancy is one from year to year and is terminable by either party upon giving to the other 30 days' notice directed to the end of any year of such new tenancy. Coulter v. Capitol Fin. Co., 266 N.C. 214, 146 S.E.2d 97 (1966).

In the absence of a provision in the lease for an extension of the term, when a tenant under a lease for a fixed term of one year or more holds over after the end of the term the lessor may eject him or recognize him as a tenant. Kearney v. Hare, 265 N.C. 570, 144 S.E.2d 636 (1965).

Term and Rights of Tenant Who Holds Over and Is Recognized. — When a tenant for a year or longer time holds over and is recognized by the landlord without further agreement or other qualifying facts or circumstances, he becomes a tenant from year to year, and is subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existing conditions. Stedman v. McIntosh, 26 N.C. 291 (1844); Scheelky v. Koch, 119 N.C. 80, 25 S.E. 713 (1896); Harty v. Harris, 120 N.C. 408, 27 S.E. 90 (1897); Holton v. Andrews, 151 N.C. 340, 66 S.E. 212 (1909); Murrill v. Palmer, 164 N.C. 50, 80 S.E. 55 (1913).

If the lessor elects to treat as a tenant one holding over after the end of the term of a lease for one year or more, a new tenancy relationship is created as of the end of the former term. This is, by presumption of law, a tenancy from year to year, the terms of which are the same as those of the former lease insofar as they are applicable, in the absence of a new contract between them or of other circumstances rebutting such presumption. Such a tenancy may be terminated by either party at the end of any year thereof by giving notice of intent so to terminate 30 days before the end of such year. Kearney v. Hare, 265 N.C. 570, 144 S.E.2d 636 (1965).

It was not error to charge the jury that if tenant leased premises at $5.00 per month and had held over several months, paying the same rent without any new agreement, he was a tenant from month to month, and entitled to 14 days' (now seven days') notice to quit. Branton v. O'Briant, 93 N.C. 99 (1885).

The fact that a tenant who entered into the occupation of premises under an express lease from month to month continued the occupation for more than two years did not entitle him to one month's notice to quit. Jones v. Willis, 53 N.C. 430 (1862).

Special Agreement When Tenant Holds Over. — It is competent to rebut the presumption that a tenant who holds over is a tenant from year to year by proof of a special agreement. Harty v. Harris, 120 N.C. 408, 27 S.E. 90 (1897).

Where a tenancy is from year to year, and, after the commencement of a year, there is an express lease for a certain time and an agreement to quit at the end of that time, no notice is necessary in order to terminate the tenancy after such time. Williams v. Bennett, 26 N.C. 122 (1843).

Where a lease for an original term of 36 months provided that "should the lessee remain in possession of the leased premises beyond the expiration of the original term or any renewal or extension of this lease, which shall result in a tenancy from month to month, this lease may be terminated by either party upon the giving of thirty (30) days' written notice to the other party," the purpose of the clause was held to have been to provide that in such circumstances the tenancy would be from month to month, and so terminable by either party at the end of any month, but only upon 30 days' notice rather than upon the seven days' notice which would otherwise be sufficient to terminate a month to month tenancy under this section. Coulter v. Capitol Fin. Co., 266 N.C. 214, 146 S.E.2d 97 (1966).

Different Agreement as to Termination Not Prohibited. — This section does not preclude the parties from making a different agreement as to notice of intention to terminate tenancy. Cherry v. Whitehurst, 216 N.C. 340, 4 S.E.2d 900 (1939).

Effect of Leaving Premises After Waiver of Notice. — A tenant from year to year who waives his right to notice to quit and goes out of possession has no right to go back on the premises. Torrans v. Stricklin, 52 N.C. 50 (1859).

Where one occupied land as his own and refused to quit when possession was demanded, it was held that he could not afterwards insist upon the statutory notice. Head v. Head, 52 N.C. 620 (1860).

Applied in Cla-Mar Mgt. v. Harris, 76 N.C. App. 300, 332 S.E.2d 495 (1985).

Cited in Goler Metro. Apts., Inc. v. Williams, 43 N.C. App. 648, 260 S.E.2d 146 (1979); Kent v. Humphries, 50 N.C. App. 580, 275 S.E.2d 176 (1981); Stanley v. Harvey, 90 N.C. App. 535, 369 S.E.2d 382 (1988).

§ 42-14.1. Rent control.

No county or city as defined by G.S. 160A-1 may enact, maintain, or enforce any ordinance or resolution which regulates the amount of rent to be charged for privately owned, single-family or multiple unit residential or commercial rental property. This section shall not be construed as prohibiting any county or city, or any authority created by a county or city for that purpose, from:

(1) Regulating in any way property belonging to that city, county, or authority;
(2) Entering into agreements with private persons which regulate the amount of rent charged for subsidized rental properties; or
(3) Enacting ordinances or resolutions restricting rent for properties assisted with Community Development Block Grant Funds. (1987, c. 458, s. 1.)

§ 42-14.2. Death, illness, or conviction of certain crimes not a material fact.

In offering real property for rent or lease it shall not be deemed a material fact that the real property was occupied previously by a person who died or had a serious illness while occupying the property or that a person convicted of any crime for which registration is required by Article 27A of Chapter 14 of the General Statutes occupies, occupied, or resides near the property; provided, however, that no landlord or lessor may knowingly make a false statement regarding any such fact. (1989, c. 592, s. 2; 1998-212, s. 17.16A(b).)

§ 42-14.3. Notice of conversion of manufactured home communities.

(a) In the event that an owner of a manufactured home community (defined as a parcel of land, whether undivided or subdivided, that has been designed to accommodate at least five manufactured homes) intends to convert the manufactured home community, or any part thereof, to another use that will require movement of the manufactured homes, the owner of the manufactured home community shall give each owner of a manufactured home notice of the intended conversion at least 180 days before the owner of a manufactured home is required to vacate and move the manufactured home, regardless of the term of the tenancy. Failure to give notice as required by this section is a defense in an action for possession. The respective rights and obligations of the community owner and the owner of the manufactured home under their lease shall continue in effect during the notice period.

(b) Notwithstanding subsection (a) of this section, if a manufactured home community is being closed pursuant to a valid order of any unit of State or local government, the owner of the community shall be required to give notice of the closure of the community to each resident of the community within three business days of the date on which the order is issued. (2003-400, s. 5.)

ARTICLE 2.

Agricultural Tenancies.

§ 42-15. Landlord's lien on crops for rents, advances, etc.; enforcement.

When lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands are paid and until all the stipulations contained in the lease or agreement are performed, or damages in lieu thereof paid to the lessor or his assigns, and until said party or his assigns is paid for all advancements made and expenses incurred in making and saving said crops.

This lien shall be preferred to all other liens, and the lessor or his assigns is entitled, against the lessee or cropper, or the assigns of either, who removes the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property.

Provided, that when advances have been made by the federal government or any of its agencies, to any tenant or tenants on lands under the control of any guardian, executor and/or administrator for the purpose of enabling said tenant or tenants to plant, cultivate and harvest crops grown on said land, the said guardian, executor, and/or administrator may waive the above lien in favor of the federal government, or any of its agencies, making said advances. (1876-7, c. 283; Code, s. 1754; Rev., s. 1993; 1917, c. 134; C.S., s. 2355; 1933, c. 219; 1985, c. 689, s. 11.)

Legal Periodicals. — For article discussing effect of landlord's lien upon cooperative marketing, see 2 N.C.L. Rev. 188 (1924).

For summary of the 1933 amendment, see 11 N.C.L. Rev. 265 (1933).

For article on agricultural tenancies in the southeastern states, see 26 N.C.L. Rev. 274 (1948).

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For article, "Estate Planning for Farmers after the Reform Act of 1976," see 14 Wake Forest L. Rev. 577 (1978).

CASE NOTES

I. In General.
II. Possession and Title to Crop.
III. Advancements.
IV. Remedy of Lessor.

I. IN GENERAL.

The lien under this section is acquired automatically by virtue of the landlord's status, and no writing or recordation is required in order to establish the lien. Rivenbark v. Moore, 57 N.C. App. 339, 291 S.E.2d 293 (1982).

This section makes a judgment for rent a lien on the crop. Hargrove v. Harris, 116 N.C. 418, 21 S.E. 916 (1895).

Lien Hereunder Is Exclusive. — The only statutory landlord's lien in this jurisdiction is that provided for by this section. Dunham's Music House, Inc. v. Asheville Theatres, Inc., 10 N.C. App. 242, 178 S.E.2d 124 (1970).

No Right of Distress. — A landlord's right of distress as a security for the payment of rent available under English common law has never existed in North Carolina. Dunham's Music House, Inc. v. Asheville Theatres, Inc., 10 N.C. App. 242, 178 S.E.2d 124 (1970).

The common-law remedy of lessors by distress does not obtain in this State; and except as specifically given by statute, a landlord has no lien on the product of the leased property for rent. Howland v. Forlaw, 108 N.C. 567, 13 S.E. 173 (1891); Reynolds v. Taylor, 144 N.C. 165, 56 S.E. 871 (1907).

Lien Applies Only to Leases for Agricultural Purposes. — This statutory lien is only given when lands are rented or leased for agricultural purposes. Reynolds v. Taylor, 144 N.C. 165, 56 S.E. 871 (1907).

Except in the case of landlord and tenant provided for specifically by this section, the lessor has no lien upon the product of the leased property as rent; it is for all purposes, until division, deemed vested in the tenant, and his sale to a third person before the rent is ascertained and set apart conveys a good title. Howland v. Forlaw, 108 N.C. 567, 13 S.E. 173 (1891).

The words "crops raised" mean simply the crops grown or gathered during the year. The word "raised" appears nowhere else in the section, nor in succeeding section; only the word "crops" is used. The legislature had in mind no distinction between fructus industriales (products obtained by labor and cultivation) and fructus naturales (products which emanate from the power of nature alone), and there was no need of any. State v. Crook, 132 N.C. 1053, 44 S.E. 32 (1903).

Hay is ordinarily embraced in the word "crop," as used in this section. But not, it seems, when it is merely a spontaneous growth, such as crabgrass, which springs up after another crop is housed. State v. Crook, 132 N.C. 1053, 44 S.E. 32 (1903).

What Constitutes One a Cropper. — An agreement by him who cultivates land that the owner who advances guano, seed wheat, etc., shall out of the crop be repaid in wheat for such advancements, constitutes the former a cropper, and not a tenant. State v. Burwell, 63 N.C. 661 (1869).

A cropper has no estate in the land, and his possession is that of the landlord. State v. Austin, 123 N.C. 749, 31 S.E. 731 (1898).

Lien Covers All Crops of the Season. — This section gives the landlord a lien for his rent "on any and all crops," that is, on all that is "cropped, cut or gathered" in that season from his land. State v. Crook, 132 N.C. 1053, 44 S.E. 32 (1903).

Lien Does Not Cover Crops of Subsequent Years. — The landlord's lien under this section does not attach to a crop made entirely in a year subsequent to that in which the advancements are furnished to the tenant. Brooks v. Garrett, 195 N.C. 452, 142 S.E. 486 (1928).

The operation of a mortgage or agricultural lien in respect to crops is confined to crops then or about to be planted, and will not be extended further than those planted next after the execution of the instrument. Wooten v. Hill, 98 N.C. 48, 3 S.E. 846 (1887).

Antecedent Debts Not Included. — It was not intended to confer a lien upon the landlord for antecedent debts which the lessee might stipulate to pay, and give them a preference over the agricultural lienee, whose money and supplies materially assisted in the production of the crops. This view is assumed to be correct in Thigpen v. Maget, 107 N.C. 39, 12 S.E. 272 (1890) and is undoubtedly in harmony with the policy of the law in securing the landlord his rent, and at the same time enabling the tenant to obtain advances from third parties. Ballard v. Johnson, 114 N.C. 141, 19 S.E. 98 (1894).

No Priority for Antecedent Debts. — Although under this section and former G.S. 44-52 and 44-60 the lien of a landlord for rent and advances is superior to that of a third party making advances to the tenant, yet such priority exists only for rent accruing or advances made during the year in which the crops are grown, and not for a balance due for an antecedent year. Ballard v. Johnson, 114 N.C. 141, 19 S.E. 98 (1894).

Lien Does Not Attach to Proceeds of Hail Insurance Policy. — Where a tenant procures and pays for a policy of hail storm insurance, nothing else appearing, the landlord's statutory crop lien for advancements under this section does not extend to the fund paid by insurer under the policy after damage to the crop by the risk covered. Peoples v. United States Fire Ins. Co., 248 N.C. 303, 103 S.E.2d 381 (1958).

Lien of Assignee. — The assignee of a note given by a tenant for rent has a landlord's lien on the crop. Avera v. McNeill, 77 N.C. 50 (1877).

The assignee of a landlord's lien for rent is the owner of the crops raised to the extent of cash rent due and is entitled thereto as against tenant and third-party holder of note for rent. Rhodes v. Smith-Douglass Fertilizer Co., 220 N.C. 21, 16 S.E.2d 408 (1941).

Where the occupant of land is a vendee or mortgagor in default, although he may for some purposes be considered a tenant at will, he is not a lessee whose crop, under the provisions of this section, is vested in the landlord. Taylor v. Taylor, 112 N.C. 27, 16 S.E. 924 (1893).

Lien Conferred upon Mortgagee by Agreement. — An agreement after default, between mortgagor and mortgagee, that the mortgagor was to remain in possession as tenant, would confer a landlord's lien upon the mortgagee. Cooper v. Kimbell, 123 N.C. 120, 31 S.E. 346 (1898).

Lien Conferred by Contract on Vendor After Default. — After default by a vendee of land to pay the purchase money, the vendor may by contract become landlord of the vendee so as to avail himself of the landlord's lien given by this section. Jones v. Jones, 117 N.C. 254, 23 S.E. 214 (1895); Ford v. Green, 121 N.C. 70, 28 S.E. 132 (1897).

Agreements Between Tenants in Common. — Where A and B, tenants in common, agreed to make partition of lands and fix the boundaries, and A agreed that B should occupy the whole and pay to him a portion of the crop raised thereon, it was held that although this was valid as an agreement for a year, it did not constitute a lease, so as to create the relation of landlord and tenant between the parties. Medlin v. Steele, 75 N.C. 154 (1876).

When Lessee Has Lien. — When a lessee sublets a part of the farm he becomes a lessor to his sublessee and is entitled to the same lien on his crop which the statute gives a lessor. Moore v. Faison, 97 N.C. 322, 2 S.E. 169 (1887). See also, Perry v. Perry, 127 N.C. 23, 37 S.E. 71 (1900).

Effect of Subletting. — The landlord's right to the crop to secure payment of rent is not impaired by the subletting of his tenant. The subtenant's crop may thereby be subjected to a double lien, that of the landlord and that of his immediate lessor, but the lien of the landlord is paramount. Montague v. Mial, 89 N.C. 137 (1883); Moore v. Faison, 97 N.C. 322, 2 S.E. 169 (1887); State v. Crook, 132 N.C. 1053, 44 S.E. 32 (1903).

Priority of Landlord's Lien. — The landlord's lien is made superior to all other liens. Ledbetter v. Quick, 90 N.C. 276 (1884); Wooten v. Hill, 98 N.C. 48, 3 S.E. 846 (1887); Brewer v. Chappell, 101 N.C. 251, 7 S.E. 670 (1888), overruled insofar as inconsistent, Killebrew v. Hines, 104 N.C. 182, 10 S.E. 162 (1889); Reynolds v. Taylor, 144 N.C. 165, 56 S.E. 871 (1907); Rhodes v. Smith-Douglass Fertilizer Co., 220 N.C. 21, 16 S.E.2d 408 (1941).

Under this section, a landlord has a preferred lien on the entire crop until the rent and all advancements made and expenses incurred in making and saving the crop are paid. Eason v. Dew, 244 N.C. 571, 94 S.E.2d 603 (1956).

Landlord's Priority in Bankruptcy Proceedings. — Although landlord's claim for rent of 250 acres pursuant to the statutory landlord's lien of this section would be denied, since the bankruptcy trustee could properly avoid that lien pursuant to 11 U.S.C. § 545(3), the landlord had an administrative expense priority claim for rent in the amount of $12,073.39 pursuant to 11 U.S.C. § 364(a) and 503(b)(1). In re Harrell, 55 Bankr. 203 (Bankr. E.D.N.C. 1985).

Subtenant's Lien for Labor. — Landlord's lien for rent and advancements held superior to subtenant's lien for labor under separate contract with tenant. Eason v. Dew, 244 N.C. 571, 94 S.E.2d 603 (1956).

The landlord's lien may be enforced as against purchaser of the crop. Burwell v. Coopers Coop. Whse. Co., 172 N.C. 79, 89 S.E. 1064 (1916).

This section gives a landlord the title to the crop until the rent is actually paid (whether the claim be reduced to a judgment or not), and such title is not impaired by the fact that the tenant conveys the crop to a third person, who takes without notice of the landlord's claim. The rule caveat emptor applies. Belcher v. Grimsley, 88 N.C. 88 (1883).

The tenant, who owns the crop subject to the landlord's rights and lien, has the right to sell the crop, but in the same plight in which he holds it, that is, the purchaser from the tenant takes subject to the landlord's lien, and where the crop remains on the land, the purchaser can remove the crop only by consent of the landlord until the rent is paid. Hall v. Odom, 240 N.C. 66, 81 S.E.2d 129 (1954).

Third Party Charged with Notice. — Every person who makes advancements to a tenant or cropper of another does so with notice of the rights of the landlord, and with notice that any lien that he may have on the tenant's crop is preferred to all others, and the risk is his if the tenant does not satisfy the preferred lien by complying with the contract and all stipulations in regard thereto. Thigpen v. Leigh, 93 N.C. 47 (1885); Thigpen v. Maget, 107 N.C. 39, 12 S.E. 272 (1890). See also Eason v. Dew, 244 N.C. 571, 94 S.E.2d 603 (1956).

A purchaser or mortgagee of a crop takes with full knowledge that if advances shall be necessary to enable the cultivator to make the crop, and without which there would perhaps be no crop, such advances shall be a preferred lien upon the crop, made by reason of such advances, and this preference shall extend to "existing" liens. Wooten v. Hill, 98 N.C. 48, 3 S.E. 846 (1887).

The landlord's lien exists by virtue of this section. No written instrument is required or contemplated. The registration acts, which apply only to written instruments capable of registration, have no significance relative to a landlord's lien. This section itself gives notice to all the world of the law relative to a landlord's lien. Hall v. Odom, 240 N.C. 66, 81 S.E.2d 129 (1954).

The landlord's lien remains intact until the rent is paid, and all who deal with a tenant with reference to the crop are charged with notice thereof. Nothing short of an actual payment or a complete satisfaction of the lessor's demands meets the words of this section or will serve to determine his lien or title. Neither can the fact that purchasers of the crop had no notice of the landlord's claim at all impair it, in the absence of any suggestion of fraud on his part. It is a question of title, and the tenant can convey no better right to the property than he himself was possessed of. The principle of caveat emptor applies with full force to the case. Hall v. Odom, 240 N.C. 66, 81 S.E.2d 129 (1954).

A person who deals with the tenant is charged with notice of the landlord's rights under this section. Rivenbark v. Moore, 57 N.C. App. 339, 291 S.E.2d 293 (1982).

Action Against Tenant by Third Party. — In an action against a tenant to recover damages for his failure to deliver a crop under his contract of sale, the defense that the tenant had not settled with his landlord, and that the contract was therefore illegal, was not available when it was shown that the landlord had consented to the sale and had thereafter taken possession of the crop at the tenant's request. Lee v. Melton, 173 N.C. 704, 91 S.E. 697 (1917).

Liability of Landlord to Other

Lienholders. — A landlord is liable to account to persons who have a lien for supplies furnished for the value of the crops in excess of his lien. Crinkley v. Egerton, 113 N.C. 142, 18 S.E. 341 (1893).

The landlord can expressly or impliedly waive the lien or by his acts and conduct be estopped from asserting the lien. Rivenbark v. Moore, 57 N.C. App. 339, 291 S.E.2d 293 (1982).

Pleading and Proof of Waiver. — It is not to be understood that a landlord cannot by agreement, express or implied, waive his lien, or by his acts and conduct be estopped from asserting his lien. The gist of such affirmative defense is allegation and proof of such facts and circumstances as will establish the proposition that the landlord in effect constituted the tenant his agent to sell the crop for their joint benefit and account to the landlord for his share out of the proceeds of sale. It is an affirmative defense which must be pleaded with certainty and particularity and established by the greater weight of the evidence. Hall v. Odom, 240 N.C. 66, 81 S.E.2d 129 (1954).

Landlord Estopped to Assert Claim. — Where a landlord who retained a lien on tobacco grown by his tenant gave his AAA marketing card to his tenant in order that he might sell the tobacco in a warehouse, the landlord clothed the tenant with authority or apparent authority to receive payment for the tobacco, and was estopped to assert a claim against the warehouse for the amount of his lien thereon. Adams v. Growers' Whse., Inc., 230 N.C. 704, 55 S.E.2d 331 (1949).

Uniform Commercial Code. — A lien on personal property granted a lessor by contract is not excluded from the provisions of the Uniform Commercial Code, G.S. 25-1-101 et seq. Dunham's Music House, Inc. v. Asheville Theatres, Inc., 10 N.C. App. 242, 178 S.E.2d 124 (1970).

Marketing of Tenant's Tobacco. — This section gives the landlord only a preferred lien on his tenant's crop on his rented lands for the payment of the rent; and unless and until the landlord has acquired a part of his tenant's crop for the rent, he has acquired no tobacco from his tenant that comes within the provisions of his membership contract in the Tobacco Growers Co-operative Association, and is not liable for the penalty therein contained for failure to market the tobacco raised by his tenant. Tobacco Growers Coop. Ass'n v. Bissett, 187 N.C. 180, 121 S.E. 446 (1924).

Applied in Sugg v. Parrish, 51 N.C. App. 630, 277 S.E.2d 557 (1981); Suggs v. Parrish, 303 N.C. 550, 281 S.E.2d 401 (1981).

Cited in Jennings v. Keel, 196 N.C. 675, 146 S.E. 716 (1929); Never Fail Land Co. v. Cole, 197 N.C. 452, 149 S.E. 585 (1929); Stanley v. Harvey, 90 N.C. App. 535, 369 S.E.2d 382 (1988).

II. POSSESSION AND TITLE TO CROP.

Title to Crops — Under Common-Law. — Before this section was passed, the title to the whole of the crop was, in contemplation of law, vested in the tenant (even where the parties had agreed upon the payment as rent of a certain portion of the crop) until a division had been made and the share of the landlord had been set apart to him in severalty. Deaver v. Rice, 20 N.C. 567 (1839); Gordon v. Armstrong, 27 N.C. 409 (1845); Ross v. Swaringer, 31 N.C. 481 (1849); Biggs v. Ferrell, 34 N.C. 1 (1851); Howland v. Forlaw, 108 N.C. 567, 13 S.E. 173 (1891).

Same — Under This Section. — All crops raised on the land, whether by tenant or cropper, are by this section deemed to be vested in the landlord, in the absence of an agreement to the contrary, until the rents and advancements are paid. Durham v. Speeke, 82 N.C. 87 (1880); Smith v. Tindall, 107 N.C. 88, 12 S.E. 121 (1890); State v. Austin, 123 N.C. 749, 31 S.E. 731 (1898); State v. Keith, 126 N.C. 1114, 36 S.E. 169 (1900); Batts v. Sullivan, 182 N.C. 129, 108 S.E. 511 (1921); Rhodes v. Smith-Douglass Fertilizer Co., 220 N.C. 21, 16 S.E.2d 408 (1941).

For the lessor's protection, as between him and the tenant, the possession of the crop is deemed vested in the lessor. State v. Higgins, 126 N.C. 1112, 36 S.E. 113 (1900).

Actual Possession Is in Tenant. — Though constructive possession of the crop is vested by statute in the landlord, yet, during the cultivation, and for all purposes of making and gathering the crop, the actual possession is in the tenant until the rent and advances become due or a division can be had. Jordan v. Bryan, 103 N.C. 59, 9 S.E. 135 (1889).

The whole tenor of this and the following sections contemplates the right of the lessee or cropper to hold the actual possession until such time as a division shall be made. State v. Copeland, 86 N.C. 691 (1882).

Tenant May Maintain Action for Inquiry Thereto. — As against third parties, the tenant is entitled to the possession both of the land and crop while it is being cultivated, and he may maintain an action in his own name for any injury thereto. Bridgers v. Dill, 97 N.C. 222, 1 S.E. 767 (1887). See also, State v. Higgins, 126 N.C. 1112, 36 S.E. 113 (1900).

Tenant Has Insurable Interest. — The fact that the possession and title to the crop are deemed vested in the landlord does not divest the tenant of an insurable interest in the crops before division. Batts v. Sullivan, 182 N.C. 129, 108 S.E. 511 (1921).

When Crop to Be Divided. — Unless otherwise provided by agreement, the crop should be divided from time to time, as considerable parts thereof shall be gathered, especially where the gathering of the whole is delayed for a considerable length of time. Smith v. Tindall, 107 N.C. 88, 12 S.E. 121 (1890).

Crop Left in Field. — A crop cultivated by a tenant and left standing in the field after the expiration of his term becomes the property of the landlord, and this is so, whether or not the tenant has assigned the crop. Sanders v. Ellington, 77 N.C. 255 (1877).

III. ADVANCEMENTS.

What Are "Advancements" — In General. — The "advancements" referred to in this section embrace anything of value supplied by the landlord to the tenant or cropper in good faith, directly or indirectly, for the purpose of making and saving the crop. Brown v. Brown, 109 N.C. 124, 13 S.E. 797 (1891).

Where a landlord either pays or becomes responsible for supplies to enable the tenant to make a crop, such supplies are advances. Powell v. Perry, 127 N.C. 22, 37 S.E. 71 (1900).

Supplies necessary to make and save a crop are such articles as are in good faith furnished to and received by the tenant for that purpose. Ledbetter v. Quick, 90 N.C. 276 (1884).

When advancements are of such things as in their nature are appropriate and necessary to the cultivation of the crop, e.g., farming implements and work animals, they will be presumed to create the lien; but where they are of articles not in themselves so appropriate and necessary, e.g., dry goods and groceries, whether they will constitute a lien depends upon the purpose for which they were furnished, and it must affirmatively appear that they were made in aid of the crop. Brown v. Brown, 109 N.C. 124, 13 S.E. 797 (1891).

Same — Question for Jury. — It was proper in the court to leave it to the jury to find whether upon the evidence a mule and wagon, etc., were treated as advancements. Ledbetter v. Quick, 90 N.C. 276 (1884).

Fact that lessee diverts advancements from the purpose contemplated cannot change their nature and the purpose of them. Womble v. Leach, 83 N.C. 84 (1880); Ledbetter v. Quick, 90 N.C. 276 (1884); Brown v. Brown, 109 N.C. 124, 13 S.E. 797 (1891).

Where a landlord furnished advancements for the making of crops, the liens for the rent and for advancements were in equal degree, and attached, since the 1925 amendment of former G.S. 44-52, to the crops raised by the tenant on the same lands, planted during one calendar year and harvested in the next. Brooks v. Garrett, 195 N.C. 452, 142 S.E. 486 (1928).

Where landlord advanced certain cottonseed, etc., to his tenant in 1884, and in 1885 and 1886 allowed his tenant to retain parts of the undivided cottonseed and crops by way of advancement, it was held that the plaintiff had a landlord's lien on such seed and crops. Thigpen v. Maget, 107 N.C. 39, 12 S.E. 272 (1890).

Where the landlord supplied the tenant and his family with board, to the end that he might make and save the crop, nothing to the contrary appearing, the reasonable value of such board would constitute an advancement within the meaning of this section. Brown v. Brown, 109 N.C. 124, 13 S.E. 797 (1891).

Collusion and Fraud in Creating "Advancements." — Where landlord and tenants undertake by collusion and fraud to create an indebtedness to the former, under color of "advancements," to the prejudice of creditors of the tenant, such a transaction will not be sustained. Ledbetter v. Quick, 90 N.C. 276 (1884).

Advances to Sublessee. — The original lessor, after his lessee has paid him in full, has no lien under the statute on the crop of his sublessee for advances made by him to the sublessee. Moore v. Faison, 97 N.C. 322, 2 S.E. 169 (1887).

Lien of Third Party for Advances. — The lien of a landlord takes precedence to that of a third party for advances, notwithstanding the priority of the latter in time. Spruill v. Arrington, 109 N.C. 192, 13 S.E. 779 (1891); Crinkley v. Egerton, 113 N.C. 444, 18 S.E. 669 (1893). See also, Wooten v. Hill, 98 N.C. 48, 3 S.E. 846 (1887); Wise Supply Co. v. Davis, 194 N.C. 328, 139 S.E. 599 (1927).

The statutory landlord's lien under this section was superior to that of one furnishing supplies to the cropper under former G.S. 44-52; but where the cropper under a separate contract with the landlord raised a certain crop, the lien for advancements attached to such crop, and where the landlord received payment for the entire crop including the special crop under separate contract with the cropper and paid himself the amount due as rent, the lien for advancements attached to the surplus and the holder of the lien could recover thereon from the landlord. Glover v. Dail, 199 N.C. 659, 155 S.E. 575 (1930).

A contract expressed and purporting to be a lease of lands for agricultural purposes does not change the relationship of landlord and tenant between the parties upon the ground that if the amount of stipulated rent should be paid at a certain time it should be regarded as a credit upon the purchase of the land at a stated price, it not appearing that the transaction of the contemplated purchase had been made under option given; and the landlord or one to whom the contract had been validly assigned could enforce his lien under this section in priority to the lien, under former G.S. 44-52, of one furnishing advancements for the cultivation of the crop. Wise Supply Co. v. Davis, 194 N.C. 328, 139 S.E. 599 (1927).

IV. REMEDY OF LESSOR.

Remedies for Unauthorized Removal of Crop by Tenant. — This section vests the possession of the crop in the landlord, and, under this right of possession, he has the right to use force, if necessary, to prevent unauthorized removal by the tenant. Moreover, if the tenant, without the consent of the landlord, willfully removes the crop without giving five days' notice of removal, before satisfying the landlord's lien, he is guilty of a misdemeanor under G.S. 42-22. In such case, the tenant is liable both civilly and criminally; for the constructive possession of the crop is in the landlord. Hall v. Odom, 240 N.C. 66, 81 S.E.2d 129 (1954).

An attempt to appropriate and carry off the crop may be repelled by the landlord by force, provided no more force is used than is necessary to protect his possession. State v. Austin, 123 N.C. 749, 31 S.E. 731 (1898).

The landlord may bring claim and delivery to recover possession of crops raised by the tenant or cropper, where his right of possession under this section is denied, or he may resort to any other appropriate remedy to enforce his lien for the rent due and the advances made. Livingston v. Farish, 89 N.C. 140 (1883).

When Action Lies. — The action will lie, not only where the crops are removed from the land leased, but also in a case where the tenant or cropper, or any other person, takes the crops into his absolute possession and denies the right of the landlord thereto. Livingston v. Farish, 89 N.C. 140 (1883).

The remedy of claim and delivery was designated for the landlord's protection, and it cannot, either by the terms of the statute or by any fair construction, be resorted to before the time fixed for division, unless the tenant is about to remove or dispose of the crop, or abandon a growing crop; otherwise, the tenant might be sued for parcel of the crop as it was gathered. Neither the language nor the spirit of the statute will permit this. Jordan v. Bryan, 103 N.C. 59, 9 S.E. 135 (1889).

Where, in a contract between the landlord and tenant, no time was fixed for division of the crop, the landlord was not obliged to wait until the whole crop had been gathered, but had a right to bring his action for the possession of the crop before it was fully harvested. Smith v. Tindall, 107 N.C. 88, 12 S.E. 121 (1890); Rich v. Hobson, 112 N.C. 79, 16 S.E. 931 (1893).

Action for Undivided Portion. — The lessor can maintain an action for recovery of an undivided portion of a crop, and it is not necessary that he shall specifically designate in his complaint or affidavit in claim and delivery such undivided part. Boone v. Darden, 109 N.C. 74, 13 S.E. 728 (1891).

Denial of Landlord's Title. — Where, in his answer in an action of claim and delivery, the defendant tenant denies that the crop for the possession of which the action is brought is vested in the plaintiff landlord, such denial avoids the necessity of proving a demand before the commencement of the action. Rich v. Hobson, 112 N.C. 79, 16 S.E. 931 (1893).

No Right to Personal Property Exemption. — The right to enforce the landlord's lien cannot be defeated by the lessee claiming the crop as a part of his personal property exemption. Durham v. Speeke, 82 N.C. 87 (1880).

The landlord's lien extends to and includes the costs of such legal proceedings as are necessary to recover his rents; and, as all the crops are his until such lien is duly discharged, the tenant has no property therein which he can claim as his constitutional exemption as against such costs. Slaughter v. Winfrey, 85 N.C. 159 (1881).

Liability of Warehouse Purchasing from Tenant or Selling as His Agent. — Nothing else appearing, if a warehouse purchased tobacco from a tenant, or sold the tobacco as agent for the tenant, and paid the tenant therefor, without regard to the landlord's lien, the warehouse would be accountable to the landlord on the basis of money had and received for the proceeds of sale up to the balance due as rent. Hall v. Odom, 240 N.C. 66, 81 S.E.2d 129 (1954).

Tenant's Liability. — If the tenant, at any time before satisfying the landlord's liens for rent and advances, removes the crop, or any part of it, he becomes liable civilly and criminally. Jordan v. Bryan, 103 N.C. 59, 9 S.E. 135 (1889).

§ 42-15.1. Landlord's lien on crop insurance for rents, advances, etc.; enforcement.

Where lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, the landlord or his assigns shall have a lien on all the insurance procured by the tenant or cropper on the crops raised on the lands leased or rented to the extent of any rents due or advances made to the tenant or cropper.

The lien provided herein shall be preferred to all other liens on said insurance, and the landlord or his assigns shall be entitled to all the remedies at law for the enforcement of the lien. (1959, c. 1291; 1985, c. 689, s. 12.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

§ 42-16. Rights of tenants.

When the lessor or his assigns gets the actual possession of the crop or any part thereof otherwise than by the mode prescribed in G.S. 42-15, and refuses or neglects, upon a notice, written or oral, of five days, given by the lessee or cropper or the assigns of either, to make a fair division of said crop, or to pay over to such lessee or cropper or the assigns of either, such part thereof as he may be entitled to under the lease or agreement, then and in that case the lessee or cropper or the assigns of either is entitled to the remedies against the lessor or his assigns given in an action upon a claim for the delivery of personal property to recover such part of the crop as he, in law and according to the lease or agreement, may be entitled to. The amount or quantity of such crop claimed by said lessee or cropper or the assigns of either, together with a statement of the grounds upon which it is claimed, shall be fully set forth in an affidavit at the beginning of the action. (1876-7, c. 283, s. 2; Code, s. 1755; Rev., s. 1994; C.S., s. 2356.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

Purpose of Section. — This section intends to encourage and favor the laborer as to those matters and things upon which his labor has been bestowed, so that he may reap the just benefit of his toil. Rouse v. Wooten, 104 N.C. 229, 10 S.E. 190 (1889).

Creation of Lien. — While one who labors in the cultivation of a crop, under a contract that he shall receive his compensation from the crop when matured and gathered, has no estate or interest in the land, but is simply a laborer — at most, a cropper — his right to receive his share is protected by this section, which for certain purposes creates a lien in his favor, which will be enforced against the employer or landlord or his assigns, and which has precedence over agricultural liens made subsequent to his contract, but before the crop is harvested. Rouse v. Wooten, 104 N.C. 229, 10 S.E. 190 (1889).

Seizure of Crop by Lessor. — The lessor has no right, when there is no agreement to that effect, to take actual possession from the lessee or cropper, and can never do so, except when he obtains the same by an action of claim and delivery, upon the removal of the crop by the lessee or cropper. State v. Copeland, 86 N.C. 691 (1882).

Where Lessor Seizes Too Much. — If a lessor seizes more than enough to satisfy his lien, and refuses to make a fair division of the crop, the lessee or cropper can compel him to do so in the manner prescribed in this section. Boone v. Darden, 109 N.C. 74, 13 S.E. 728 (1891).

Lessee Left to Civil Remedy. — When the lessee is wrongfully deprived of the actual possession of his crop by the lessor, he is left to his civil remedy under this section for the breach of trust, should the lessor refuse to account. State v. Keith, 126 N.C. 1114, 36 S.E. 169 (1900).

By Claim and Delivery. — Where a lessor gets possession of the crop by his own act, the remedy of the lessee to recover his part thereof is by claim and delivery. Wilson v. Respass, 86 N.C. 112 (1882).

Against Whom Action May Be Brought. — The action allowed to a cropper by this section is given against the lessor or employer, and also against any person to whom he may assign or sell the crop, or any interest therein, as, for example, the person who might have an "agricultural lien" upon it, acquired subsequently to the making of the contract with the cropper. Rouse v. Wooten, 104 N.C. 229, 10 S.E. 190 (1889).

When a cropper dies before harvesting his crop, his personal representatives are entitled to recover his share of the crop. Parker v. Brown, 136 N.C. 280, 48 S.E. 657 (1904).

Trover Held Improper. — Where a landlord took the crop into his sole possession, and refused to divide it when it was demanded, on the ground that the crop was not then in condition for a division, but he did not deny the tenant's right to a division, and while in his possession the crop was destroyed by fire, it was held that this did not amount to a conversion, and an action in the nature of trover could not be maintained. Shearin v. Riggsbee, 97 N.C. 216, 1 S.E. 770 (1887).

§ 42-17. Action to settle dispute between parties.

When any controversy arises between the parties, and neither party avails himself of the provisions of this Chapter, it is competent for either party to proceed at once to have the matter determined in the appropriate trial division of the General Court of Justice. (1876-7, c. 283, s. 3; Code, s. 1756; Rev., s. 1995; C.S., s. 2357; 1971, c. 533, s. 1.)

CASE NOTES

Purpose. — The purpose of this section and G.S. 42-18 is to provide a summary mode for ascertaining a disputed liability, and, in case of delay, to secure the fruits of the judgment by requiring of the lessee, as a condition of his remaining in possession of the property, an adequate undertaking for the payment of what may be recovered. Deloatch v. Coman, 90 N.C. 186 (1884).

Nonpossessory Action Contemplated. — This section and the following section contemplate an action to determine a dispute growing out of the agreement, and the relative rights and obligations created by its stipulations, without disturbing the possession of the lessee, cropper or assignee of either, and this intent is very clearly expressed in the terms used in the enactment. It is a method of settling a controversy without resort to the possessory actions authorized in the antecedent sections. Wilson v. Respass, 86 N.C. 112 (1882).

Inapplicability Where Occupant Is Vendee or Mortgagor. — This and the following section, like G.S. 42-15, are plainly inapplicable where the occupant of the land is a vendee or mortgagor. Taylor v. Taylor, 112 N.C. 27, 16 S.E. 924 (1893).

As to jurisdiction prior to the 1971 amendment to this section, see Foster v. Penny, 76 N.C. 131 (1877); Deloatch v. Coman, 90 N.C. 186 (1884). See also, Montague v. Mial, 89 N.C. 137 (1883), as to tort actions.

Action by Tenant's Widow. — The widow of a tenant cultivating land on shares, after the crop is allotted to her in her year's support, may maintain an action for conversion against the landlord. She is not compelled to resort to the remedy prescribed by this section. She may pursue her remedy by a civil action to recover the value of the crops, subject to such deductions as the lessor is entitled to by reason of advancements, costs of housing, and such damage as he may have sustained by reason of the inability of the lessee to perform his contract. Parker v. Brown, 136 N.C. 280, 48 S.E. 657 (1904).

§ 42-18. Tenant's undertaking on continuance or appeal.

In case there is a continuance or an appeal from the magistrate's decision to the district court, the lessee or cropper, or the assigns of either, shall be allowed to retain possession of said property upon his giving an undertaking to the lessor or his assigns, or the adverse party, in a sum double the amount of the claim, if such claim does not amount to more than the value of such property, otherwise to double the value of such property, with good and sufficient surety, to be approved by the magistrate or the clerk of the superior court, conditioned for the faithful payment to the adverse party of such damages as he shall recover in said action. (1876-7, c. 283, s. 3; Code, s. 1756; Rev., s. 1995; C.S., s. 2358; 1971, c. 533, s. 2.)

CASE NOTES

Where the lessor has taken possession of the crop, and is solvent and has been required to give the bond of indemnity, the court will not restrain him from selling the crop. In such a case it seems that the tenant cannot regain possession of the crop under the provisions of G.S. 42-18, since that section contemplates nonintervention on the part of the court and not a removal of possession from one party to another. Wilson v. Respass, 86 N.C. 112 (1882).

§ 42-19. Crops delivered to landlord on his undertaking.

In case the lessee or cropper, or the assigns of either, at the time of the appeal or continuance mentioned in G.S. 42-18, fails to give the undertaking therein required, then the sheriff or other lawful officer shall deliver the property into the actual possession of the lessor or his assigns, upon the lessor or his assigns giving to the adverse party an undertaking in double the amount of said property, to be justified as required in G.S. 42-18, conditioned for the forthcoming of such property, or the value thereof, in case judgment is pronounced against him. (1876-7, c. 283, s. 4; Code, s. 1757; Rev., s. 1996; C.S., s. 2359; 1973, c. 108, s. 17.)

CASE NOTES

Where the lessor has taken possession of the crop, and is solvent and has been required to give the bond of indemnity, the court will not restrain him from selling the crop. In such a case it seems that the tenant cannot regain possession of the crop under the provisions of G.S. 42-18, since that section contemplates nonintervention on the part of the court and not a removal of possession from one party to another. Wilson v. Respass, 86 N.C. 112 (1882).

§ 42-20. Crops sold, if neither party gives undertaking.

If neither party gives the undertaking described in G.S. 42-18 and 42-19, it is the duty of the clerk of the superior court to issue an order to the sheriff, or other lawful officer, directing him to take into his possession all of said property, or so much thereof as may be necessary to satisfy the claimant's demand and costs, and to sell the same under the rules and regulations prescribed by law for the sale of personal property under execution, and to hold the proceeds thereof subject to the decision of the court upon the issue or issues pending between the parties. (1876-7, c. 283, s. 5; Code, s. 1758; Rev., s. 1997; C.S., s. 2360; 1971, c. 533, s. 3.)

§ 42-21. Tenant's crop not subject to execution against landlord.

Whenever servants and laborers in agriculture shall by their contracts, oral or written, be entitled, for wages, to a part of the crops cultivated by them, such part shall not be subject to sale under executions against their employers, or the owners of the land cultivated. (Code, s. 1796; Rev., s. 1998; C.S., s. 2361.)

§ 42-22. Unlawful seizure by landlord or removal by tenant misdemeanor.

If any landlord shall unlawfully, willfully, knowingly and without process of law, and unjustly seize the crop of his tenant when there is nothing due him, he shall be guilty of a Class 1 misdemeanor. If any lessee or cropper, or the assigns of either, or any other person, shall remove a crop, or any part thereof, from land without the consent of the lessor or his assigns, and without giving him or his agent five days' notice of such intended removal, and before satisfying all the liens held by the lessor or his assigns, on said crop, he shall be guilty of a Class 1 misdemeanor. (1876-7, c. 283, s. 6; 1883, c. 83; Code, s. 1759; Rev., ss. 3664, 3665; C.S., s. 2362; 1993, c. 539, s. 404; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

CASE NOTES

I. In General.
II. Seizure of Crops.
III. Removal of Crops.

I. IN GENERAL.

Purpose. — The purpose of this section is to render the statutory provisions and regulations of the preceding sections more effective, and this penal provision must be interpreted in that light and in that view. It embraces both the landlord and the tenant, and intends the more effectually to secure their respective rights as prescribed. State v. Ewing, 108 N.C. 755, 13 S.E. 10 (1981).

The leading and material part of the purpose of this section is to keep the crops on the land, so that they may be easily seen, known, identified and protected, and to prevent fraud and fraudulent practices that would be greatly facilitated by removing them from the land to any distance. State v. Williams, 106 N.C. 646, 10 S.E. 901 (1890).

Section Applies Only to Specified Liens. — This section does not extend to and embrace all liens which the lessor may have on any property of the tenants, but only "all the liens held by the lessor or his assigns on the crop." State v. Turner, 106 N.C. 91, 10 S.E. 1026 (1890).

This section extends to and protects receivers charged with the management of lands. State v. Turner, 106 N.C. 91, 10 S.E. 1026 (1890).

The lessor's rights cannot be abridged by any subordinate contracts of the lessee. Montague v. Mial, 89 N.C. 137 (1883).

Cited in Never Fail Land Co. v. Cole, 197 N.C. 452, 149 S.E. 585 (1929); Hall v. Odom, 240 N.C. 66, 81 S.E.2d 129 (1954).

II. SEIZURE OF CROPS.

Actual Seizure Unnecessary. — To constitute the offense of an unlawful seizure of crops by a landlord under this section, it is not essential that the landlord should take forcible or even manual possession of them; the offense will be complete if he exercises that possession or control which prevents the tenant from gathering and removing his crop in a peaceable manner. State v. Ewing, 108 N.C. 755, 13 S.E. 10 (1891).

III. REMOVAL OF CROPS.

Removal of Crops Is a Misdemeanor Only. — The offense of removing crops, without payment or notice of such removal, although it may have been committed secretly, or at night, is a simple misdemeanor, and cannot be punished by imprisonment in the penitentiary. State v. Powell, 94 N.C. 920 (1886).

Larceny of Crops. — An indictment for larceny will not lie against a lessee or cropper for secretly appropriating the crop to his own use, even if done with a felonious intent, where he is in the actual possession of the same. State v. Copeland, 86 N.C. 691 (1882).

An indictment for larceny will lie against a lessee or cropper for secretly appropriating the crop to his own use, where his actual possession thereof has terminated by a delivery to the landlord. State v. Webb, 87 N.C. 558 (1882).

If the crop is in the actual possession of the landlord, though undivided, the tenant may be convicted of larceny for feloniously taking and carrying it away; and the ownership of the property will be laid properly in the name of the landlord. State v. King, 98 N.C. 648, 4 S.E. 44 (1887).

Gathering the Crop. — How far the tenant might be justified under the statute in severing the crops from the land and storing them on it simply for the purpose of protection to them has been doubtful, but it has been held that he may do so in good faith for such purpose; he may not go beyond that. Varner v. Spencer, 72 N.C. 381 (1875); State v. Williams, 106 N.C. 646, 10 S.E. 901 (1890).

The gathering and preservation of crops was not the evil intended to be remedied by this section, but rather, the wrongful appropriation, whether by carrying them off the premises or consuming them on the premises. Varner v. Spencer, 72 N.C. 381 (1875).

Feeding Crop to Stock. — Where a lessee, after putting a crop in the crib, converted a portion thereof to his own use by feeding it to his stock without the consent of the landlord, this was a removal within the meaning of this section and was indictable. Varner v. Spencer, 72 N.C. 381 (1875).

Removal from Premises. — Where a tenant, without the consent of, or notice to, his landlord, and before satisfying the latter's lien, removed a portion of the crop from the land upon which it was produced and stored it in a building upon the tenant's own land, it was held that he was guilty of unlawfully removing crops, notwithstanding the fact that he made the removal for the purpose of sheltering the crop, and kept it separate from others. State v. Williams, 106 N.C. 646, 10 S.E. 901 (1890).

If it becomes necessary, in possible cases, to remove crops from the land for their protection, this should be done on notice, or legal steps taken as contemplated and allowed by the statute. State v. Williams, 106 N.C. 646, 10 S.E. 901 (1890).

Intent Is Immaterial. — While the obvious purpose of this section is the protection of the lessor's interest against a fraudulent disposition or appropriation of the property, inconsistent with his right and tending to defeat his lien for rent, the wrongful intent is not a constituent of the criminal act described, and the offense is sufficiently charged in the substantial words of the act. State v. Pender, 83 N.C. 651 (1880).

The intent in making the removal is immaterial. State v. Williams, 106 N.C. 646, 10 S.E. 901 (1890); State v. Crook, 132 N.C. 1053, 44 S.E. 32 (1903).

Intent Implied from Act. — The statute broadly forbids the removal of the crops, or any part of them, from the land, except in the case and in the way prescribed, and that without regard to the actual intent. The removal implies the intent to commit the offense. State v. Williams, 106 N.C. 646, 10 S.E. 901 (1890).

Lack of Notice Part of Offense. — The offense of removing a crop by a tenant before paying the rent and discharging all liens of the landlord on it is not complete unless the crop is removed without giving the five days' notice, for if the notice is given, removing the crop is not an offense. State v. Crowder, 97 N.C. 432, 1 S.E. 690 (1887).

In order to convict the defendant of the offense of removing a crop without the consent of the landlord, the burden is on the State to show that the defendant had not given his landlord the statutory five days' previous notice before the crop had been removed. State v. Harris, 161 N.C. 267, 76 S.E. 683 (1912).

How Want of Notice Proven. — The want of notice may be proved by any competent evidence, and it is not necessary that it should be proved by the landlord or his agent or assignee. State v. Crowder, 97 N.C. 432, 1 S.E. 690 (1887).

If a tenant aids and abets a subtenant in removing a crop, before paying the lien of the landlord, he is guilty of a misdemeanor. State v. Crook, 132 N.C. 1053, 44 S.E. 32 (1903).

Landlord's Failure to Comply with Contract No Defense. — A tenant indicted for removal of crops without giving the landlord five days' notice cannot show in defense that he had sustained damage by the failure of the landlord to comply with the contract to the amount of the rents due. State v. Bell, 136 N.C. 674, 49 S.E. 163 (1904), overruling State v. Neal, 129 N.C. 692, 40 S.E. 205 (1901).

Indictment Must Follow. — An indictment under this section charging the defendant with removing the crop "without satisfying all liens on said crop" is defective. The words of the statute, "before satisfying all liens held by the lessor or his assigns on said crop," should have been followed. State v. Merritt, 89 N.C. 506 (1883); State v. Rose, 90 N.C. 712 (1884).

Sufficient Averments. — In an indictment under this section, it is sufficient to aver, in the words of the statute, that the act was done, "willfully and unlawfully," leaving it to the defendant to show in excuse, if he can, that such removal was made in good faith and for the preservation of the crop. State v. Pender, 83 N.C. 651 (1880).

An averment in an indictment for removing a crop "without having given any notice of such intended removal" is equivalent to the averment that the removal was made without giving "five days' notice." State v. Powell, 94 N.C. 920 (1886).

Where an indictment for removing a crop alleged that the defendants did "rent from B," and subsequently, that he did "remove the crop without satisfying all liens held by said B," it was held that this, in effect, sufficiently charged the relation of landlord and tenant, and that the "liens held by the lessor" were unpaid at the time of the alleged unlawful removal. State v. Turner, 106 N.C. 91, 10 S.E. 1026 (1890).

In this section the word "crop" includes those ungathered as well as those gathered, and an indictment charging that the landlord seized the "crop growing and unmatured in the field," etc., charges an indictable offense, when it is otherwise sufficient. State v. Townsend, 170 N.C. 696, 86 S.E. 718 (1915).

Allegation as to Lien. — It is not necessary to allege, in an indictment under this section, that the lessor or landlord had a lien on the crop, where the bill contains an averment of the lease and of the relation of landlord and tenant, or cropper. By virtue of the statute the law implies a lien, and of this the courts will take notice. State v. Smith, 106 N.C. 653, 11 S.E. 166 (1890), distinguishing State v. Merritt, 89 N.C. 506 (1883). See State v. Rose, 90 N.C. 712 (1884).

In an indictment for removing a crop, it is not necessary to negative the fact that, by agreement between the parties, it was stipulated that the crops should not be subjected to the statutory liens. State v. Turner, 106 N.C. 91, 10 S.E. 1026 (1890).

Variance Not Shown. — Where an indictment for removal of crops without notice to the landlord charged an agreement by the defendant to raise a crop on the land of G, and on the trial the proof showed the title to be in another, who rented the land to G, it was held that there was no variance. State v. Foushee, 117 N.C. 766, 23 S.E. 247 (1895).

Arrest of Judgment. — When on the trial it was proved that the defendants, who were indicted as third persons for removing the crop, had a license from the tenant, from whom they bought the crop, but such fact was not charged in the indictment, the judgment would be arrested. State v. Sears, 71 N.C. 295 (1874).

§ 42-22.1. Failure of tenant to account for sales under tobacco marketing cards.

Any tenant or share cropper having possession of a tobacco marketing card issued by any agency of the State or federal government who sells tobacco authorized to be sold thereby and fails to account to his landlord, to the extent of the net proceeds of such sale or sales, for all liens, rents, advances, or other claims held by his landlord against the tobacco or the proceeds of the sale of such tobacco, shall be guilty of a Class 1 misdemeanor. (1949, c. 193; 1993, c. 539, s. 405; 1994, Ex. Sess., c. 24, s. 14(c).)

Legal Periodicals. — For brief comment on this section, see 27 N.C.L. Rev. 466 (1949).

CASE NOTES

Cited in Hall v. Odom, 240 N.C. 66, 81 S.E.2d 129 (1954).

§ 42-23. Terms of agricultural tenancies in certain counties.

All agricultural leases and contracts hereafter made between landlord and tenant for a period of one year or from year to year, whether such tenant pay a specified rental or share in the crops grown, such year shall be from December first to December first, and such period of time shall constitute a year for agricultural tenancies in lieu of the law and custom heretofore prevailing, namely from January first to January first. In all cases of such tenancies a notice to quit of one month as provided in G.S. 42-14 shall be applicable. If on account of illness or any other good cause, the tenant is unable to harvest all the crops grown on lands leased by him for any year prior to the termination of his lease contract on December first, he shall have a right to return to the premises vacated by him at any time prior to December thirty-first of said year, for the purpose only of harvesting and dividing the remaining crops so ungathered. But he shall have no right to use the houses or outbuildings or that part of the lands from which the crops have been harvested prior to the termination of the tenant year, as defined in this section.

This section shall only apply to the counties of Alamance, Anson, Ashe, Bladen, Brunswick, Columbus, Craven, Cumberland, Duplin, Edgecombe, Gaston, Greene, Hoke, Jones, Lenoir, Lincoln, Montgomery, Onslow, Pender, Person, Pitt, Robeson, Sampson, Wayne and Yadkin. (Pub. Loc. 1929, c. 40; Pub. Loc. 1935, c. 288; Pub. Loc. 1937, cc. 96, 600; Pub. Loc. 1941, c. 41; 1943, c. 68; 1945, c. 700; 1949, c. 136; 1953, c. 499, s. 1; 1955, c. 136; 1959, c. 1076; 1981, c. 97, s. 1.)

Local Modification. — Columbus: 1947, c. 783; Harnett: 1955, c. 938.

CASE NOTES

Applicability. — For a lease to fall within this section it must be both (1) for an agricultural purpose, and (2) for a period of one year or from year to year. Lewis v. Lewis Nursery, Inc., 80 N.C. App. 246, 342 S.E.2d 45, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

When Notice Must Be Given. — Because this section prescribes December 1 as the expiration of the lease year, notice must be given by the preceding November 1. Lewis v. Lewis Nursery, Inc., 80 N.C. App. 246, 342 S.E.2d 45, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

This section requires that notice to quit be given, in accordance with G.S. 42-14, one month before the expiration of the tenancy, even if the tenancy is an estate for years. Lewis v. Lewis Nursery, Inc., 80 N.C. App. 246, 342 S.E.2d 45, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

Effect of Failure to Provide Notice. — Generally, the effect of failure to provide notice when it is required under G.S. 42-14 is that the parties are bound to a new term. This rule applies to agricultural tenancies, even those for fixed one-year terms under this section. Lewis v. Lewis Nursery, Inc., 80 N.C. App. 246, 342 S.E.2d 45, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

Cited in Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

§ 42-24. Turpentine and lightwood leases.

This Chapter shall apply to all leases or contracts to lease turpentine trees, or use lightwood for purposes of making tar, and the parties thereto shall be fully subject to the provisions and penalties of this Chapter. (1876-7, c. 283, s. 7; Code, s. 1762; 1893, c. 517; Rev., s. 1999; C.S., s. 2363.)

CASE NOTES

Extension of § 42-22. — This section extends G.S. 42-22 to "all leases or contracts to lease turpentine trees," and thus it is made a misdemeanor for the lessee of turpentine trees to remove any part of the turpentine crop in the like case as when the removal of the crop by an agricultural tenant is made an offense. State v. Turner, 106 N.C. 91, 10 S.E. 1026 (1890).

Cited in Farmville Oil & Fertilizer Co. v. Bourne, 205 N.C. 337, 171 S.E. 368 (1933).

§ 42-25. Mining and timberland leases.

If in a lease of land for mining, or of timbered land for the purpose of manufacturing the timber into goods, rent is reserved, and if it is agreed in the lease that the minerals, timber or goods, or any portion thereof, shall not be removed until the payment of the rent, in such case the lessor shall have the rights and be entitled to the remedy given by this Chapter. (1868-9, c. 156, s. 16; Code, s. 1763; Rev., s. 2000; C.S., s. 2364.)

CASE NOTES

Where the owner of lands conveys the timber standing and growing thereon, with provision that the time for cutting and removing it will be extended upon payment of a certain sum, this is not a leasehold interest but an estate in fee. Carolina Timber Co. v. Wills, 171 N.C. 262, 88 S.E. 327 (1916).

§§ 42-25.1 through 42-25.5: Reserved for future codification purposes.

ARTICLE 2A.

Ejectment of Residential Tenants.

§ 42-25.6. Manner of ejectment of residential tenants.

It is the public policy of the State of North Carolina, in order to maintain the public peace, that a residential tenant shall be evicted, dispossessed or otherwise constructively or actually removed from his dwelling unit only in accordance with the procedure prescribed in Article 3 or Article 7 of this Chapter. (1981, c. 566, s. 1; 1995, c. 419, s. 1.1.)

Legal Periodicals. — For article discussing self-help residential eviction by landlords in light of the Landlord Eviction Remedies Act, see 13 N.C. Cent. L.J. 195 (1982).

For comment on the Landlord Eviction Remedies Act in light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

For note, "When A Hotel Is Your Home, Is There Protection?," see 15 Campbell L. Rev. 295 (1993).

For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina," see 21 N.C. Cent. L.J. 79 (1995).

CASE NOTES

This Article prohibits landlord self-help eviction where residential tenancies are involved. Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

North Carolina law requires eviction of residential tenants to be accomplished through court action; thus, in federally subsidized housing cases, the court decides whether applicable rules and regulations have been followed and whether termination of the lease is permissible. Charlotte Hous. Auth. v. Patterson, 120 N.C. App. 552, 464 S.E.2d 68 (1995).

The landlord's exclusive remedy to regain possession of house is by means of statutory summary ejectment proceedings pursuant to G.S. 42-26 to 42-36.1. Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984), overruled on other grounds, Stanley v. Moore, 339 N.C. 717, 454 S.E.2d 225 (1995).

Residents of Hotel. — Where each plaintiff resided in hotel pursuant to an oral lease and leased his apartment as his sole and permanent residence, some plaintiffs had resided in the building for as long as six years, and the payments for the apartments were made weekly and were referred to by each party as "rent," at a minimum, the evidence presented genuine issues of material fact regarding plaintiffs' status as residential tenants, and for this reason, summary judgment was improperly granted. Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

§ 42-25.7. Distress and distraint not permitted.

It is the public policy of the State of North Carolina that distress and distraint are prohibited and that landlords of residential rental property shall have rights concerning the personal property of their residential tenants only in accordance with G.S. 42-25.9(d), 42-25.9(g), 42-25.9(h), or 42-36.2. (1981, c. 566, s. 1; 1995, c. 460, s. 8.)

§ 42-25.8. Contrary lease provisions.

Any lease or contract provision contrary to this Article shall be void as against public policy. (1981, c. 566, s. 1.)

§ 42-25.9. Remedies.

(a) If any lessor, landlord, or agent removes or attempts to remove a tenant from a dwelling unit in any manner contrary to this Article, the tenant shall be entitled to recover possession or to terminate his lease and the lessor, landlord or agent shall be liable to the tenant for damages caused by the tenant's removal or attempted removal. Damages in any action brought by a tenant under this Article shall be limited to actual damages as in an action for trespass or conversion and shall not include punitive damages, treble damages or damages for emotional distress.

(b) If any lessor, landlord, or agent seizes possession of or interferes with a tenant's access to a tenant's or household member's personal property in any manner not in accordance with G.S. 44A-2(e2), 42-25.9(d), 42-25.9(g), 42-25.9(h), or G.S. 42-36.2 the tenant or household member shall be entitled to recover possession of his personal property or compensation for the value of the personal property, and, in any action brought by a tenant or household member under this Article, the landlord shall be liable to the tenant or household member for actual damages, but not including punitive damages, treble damages or damages for emotional distress.

(c) The remedies created by this section are supplementary to all existing common-law and statutory rights and remedies.

(d) If any tenant abandons personal property of five hundred dollar ($500.00) value or less in the demised premises, or fails to remove such property at the time of execution of a writ of possession in an action for summary ejectment, the landlord may, as an alternative to the procedures provided in G.S.42-25.9(g), 42-25.9(h), or 42-36.2, deliver the property into the custody of a nonprofit organization regularly providing free or at a nominal price clothing and household furnishings to people in need, upon that organization agreeing to identify and separately store the property for 30 days and to release the property to the tenant at no charge within the 30-day period. A landlord electing to use this procedure shall immediately post at the demised premises a notice containing the name and address of the property recipient, post the same notice for 30 days or more at the place where rent is received, and send the same notice by first-class mail to the tenant at the tenant's last known address. Provided, however, that the notice shall not include a description of the property.

(e) For purposes of subsection (d), personal property shall be deemed abandoned if the landlord finds evidence that clearly shows the premises has been voluntarily vacated after the paid rental period has expired and the landlord has no notice of a disability that caused the vacancy. A presumption of abandonment shall arise 10 or more days after the landlord has posted conspicuously a notice of suspected abandonment both inside and outside the premises and has received no response from the tenant.

(f) Any nonprofit organization agreeing to receive personal property under subsection (d) shall not be liable to the owner for a disposition of such property provided that the property has been separately identified and stored for release to the owner for a period of 30 days.

(g) Ten days after being placed in lawful possession by execution of a writ of possession, a landlord may throw away, dispose of, or sell all items of personal property remaining on the premises, except that in the case of the lease of a space for a manufactured home as defined in G.S. 143-143.9(6), G.S. 44A-2(e2) shall apply to the disposition of a manufactured home with a current value in excess of five hundred dollars ($500.00) and its contents by a landlord after being placed in lawful possession by execution of a writ of possession. During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. Upon the tenant's request prior to the expiration of the 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. If the landlord elects to sell the property at public or private sale, the landlord shall give written notice to the tenant by first-class mail to the tenant's last known address at least seven days prior to the day of the sale. The seven-day notice of sale may run concurrently with the 10-day period which allows the tenant to request possession of the property. The written notice shall state the date, time, and place of the sale, and that any surplus of proceeds from the sale, after payment of unpaid rents, damages, storage fees, and sale costs, shall be disbursed to the tenant, upon request, within 10 days after the sale, and will thereafter be delivered to the government of the county in which the rental property is located. Upon the tenant's request prior to the day of sale, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. The landlord may apply the proceeds of the sale to the unpaid rents, damages, storage fees, and sale costs. Any surplus from the sale shall be disbursed to the tenant, upon request, within 10 days of the sale and shall thereafter be delivered to the government of the county in which the rental property is located.

(h) If the total value of all property remaining on the premises at the time of execution of a writ of possession in an action for summary ejectment is less than one hundred dollars ($100.00), then the property shall be deemed abandoned five days after the time of execution, and the landlord may throw away or dispose of the property. Upon the tenant's request prior to the expiration of the five-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. (1981, c. 566, s. 1; 1985, c. 612, ss. 1-4; 1995, c. 460, ss. 1-3; 1999-278, ss. 1, 2.)

Legal Periodicals. — For note, "When A Hotel Is Your Home, Is There Protection?," see 15 Campbell L. Rev. 295 (1993).

CASE NOTES

The landlord's exclusive remedy to regain possession of house is by means of statutory summary ejectment proceedings pursuant to G.S. 42-26 to 42-36.1. Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984), overruled on other grounds, Stanley v. Moore, 339 N.C. 717, 454 S.E.2d 225 (1995).

Recovery of Treble Damages and Attorney's Fees. — The prohibition against punitive or treble damages in wrongful eviction actions contained in subsection (a) does not preclude tenants from recovering treble damages under G.S. 75-16 and attorney's fees under G.S. 75-16.1 of the Unfair and Deceptive Practices Act. Stanley v. Moore, 339 N.C. 717, 454 S.E.2d 225 (1995).

Cited in North Carolina Steel, Inc. v. National Council Comp. Ins., 347 N.C. 627, 496 S.E.2d 369 (1998).

ARTICLE 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.

(a) Any tenant or lessee of any house or land, and the assigns under the tenant or legal representatives of such tenant or lessee, who holds over and continues in the possession of the demised premises, or any part thereof, without the permission of the landlord, and after demand made for its surrender, may be removed from such premises in the manner hereinafter prescribed in any of the following cases:

(1) When a tenant in possession of real estate holds over after his term has expired.

(2) When the tenant or lessee, or other person under him, has done or omitted any act by which, according to the stipulations of the lease, his estate has ceased.

(3) When any tenant or lessee of lands or tenements, who is in arrear for rent or has agreed to cultivate the demised premises and to pay a part of the crop to be made thereon as rent, or who has given to the lessor a lien on such crop as a security for the rent, deserts the demised premises, and leaves them unoccupied and uncultivated.

(b) An arrearage in costs owed by a tenant for water or sewer services pursuant to G.S. 62-110(g) shall not be used as a basis for termination of a lease under this Chapter. Any payment to the landlord shall be applied first to the rent owed and then to charges for water or sewer service, unless otherwise designated by the tenant. (4 Geo. II, c. 28; 1868-9, c. 156, s. 19; Code, ss. 1766, 1777; 1905, cc. 297, 299, 820; Rev., s. 2001; C.S., s. 2365; 2001-502, s. 3; 2004-143, s. 2.)

Local Modification. — Johnston: 1933, c. 390.

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For note on retaliatory evictions and housing code enforcement, see 49 N.C.L. Rev. 569 (1971).

For article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

For comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 Act to Clarify Landlord Eviction Remedies in Residential Tenancies, see 60 N.C.L. Rev. 885 (1982).

For article discussing self-help residential eviction by landlords in light of the Landlord Eviction Remedies Act, see 13 N.C. Cent. L.J. 195 (1982).

For comment on the Landlord Eviction Remedies Act in light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

CASE NOTES

I. In General.
II. Holding Over.
III. Breach of Provision of Lease.

I. IN GENERAL.

The basis and scope of summary ejectment in actions between landlord and tenant are established by this section. Warren v. Breedlove, 219 N.C. 383, 14 S.E.2d 43 (1941).

Remedy Is Restricted to Cases Enumerated. — The remedy by summary proceedings in ejectment is restricted to those cases expressly provided by this section. Howell v. Branson, 226 N.C. 264, 37 S.E.2d 687 (1946), citing Hauser v. Morrison, 146 N.C. 248, 59 S.E. 693 (1907); Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967); Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

The remedy provided by this section is restricted to cases where the relation between the parties is simply that of landlord and tenant. College Heights Credit Union v. Boyd, 104 N.C. App. 494, 409 S.E.2d 742 (1991).

This section is only intended to apply to case in which tenant entered into possession under some contract or lease, either actual or implied, with the supposed landlord, or with some person under whom the landlord claimed in privity, or where the tenant himself is in privity with some person who had so entered. Jones v. Swain, 89 N.C. App. 663, 367 S.E.2d 136 (1988).

Jurisdiction Is Statutory. — Jurisdiction in summary ejectment proceedings is purely statutory, and may be exercised only in cases where the relationship of landlord and tenant exists, and the tenant holds over after the expiration of his term, or has otherwise violated the provisions of his lease. Howell v. Branson, 226 N.C. 264, 37 S.E.2d 687 (1946); Goins v. McLoud, 228 N.C. 655, 46 S.E.2d 712 (1948).

A court, in conducting summary ejectment proceedings, derives its jurisdiction solely from this statute, and it may exercise such jurisdiction only where a relationship of landlord and tenant exists and where one of three statutory violations occurs. Hayes v. Turner, 98 N.C. App. 451, 391 S.E.2d 513 (1990).

Trial court had jurisdiction pursuant to G.S. 42-26 over dispute between plaintiff landlord and defendant tenant involving a commercial lease, as that section had been applied to the summary ejectment of commercial tenants and plaintiff had sought summary ejectment of defendant for defendant's nonpayment of rent. ARE-100/800/801 Capitola, LLC v. Triangle Labs., Inc., 144 N.C. App. 212, 550 S.E.2d 31, 2001 N.C. App. LEXIS 434 (2001).

Under subdivision (2), a breach of the lease cannot be made the basis of summary ejectment unless the lease itself provides for termination by such breach or reserves a right of reentry for such breach. Stanley v. Harvey, 90 N.C. App. 535, 369 S.E.2d 382 (1988).

Under this section, it is no longer necessary to allege that a landlord-tenant rela-

tionship exists between parties as jurisdictional matter, but it is still necessary to show that the relationship exists in order to bring the case within the provisions of this section before the summary ejectment remedy may be properly granted. Jones v. Swain, 89 N.C. App. 663, 367 S.E.2d 136 (1988).

Allegation of Landlord-Tenant Relationship. — Under this section, it is no longer necessary to allege that a landlord-tenant relationship exists between the parties as a jurisdictional matter, but it is still necessary to show that the relationship exists in order to bring the case within the provisions of this section before the summary ejectment remedy may be properly granted. Jones v. Swain, 89 N.C. App. 663, 367 S.E.2d 136 (1988).

Right to Renew Lease. — A tenant, in the absence of an agreement, has neither a legal nor an equitable right to a renewal of the lease. Barnes v. Saleeby, 177 N.C. 256, 98 S.E. 708 (1919).

No Consideration for Option to Renew. — An option in the original lease to renew would not be without consideration, but landlord's agreement during the lease, not constituting part of the lease, not to lease the property without first giving the tenant an opportunity to renew the lease was unenforcable, being without consideration. Barnes v. Saleeby, 177 N.C. 256, 98 S.E. 708 (1919).

The hearing to be afforded tenants of public housing before the determination to evict them requires (1) timely and adequate notice detailing the reasons for a proposed termination, (2) an opportunity on the part of the tenant to confront and cross-examine adverse witnesses, (3) the right of a tenant to be represented by counsel provided by him to delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally safeguard his interests, (4) a decision, based on evidence adduced at the hearing, in which the reasons for decision and the evidence relied on are set forth, and (5) an impartial decision maker. Caulder v. Durham Hous. Auth., 433 F.2d 998 (4th Cir. 1970), cert. denied, 401 U.S. 1003, 91 S. Ct. 1228, 28 L. Ed. 2d 539 (1971).

Relation of Landlord and Tenant Necessary. — The summary remedy in ejectment provided by this section for the ousting of tenants who hold over after the expiration of the term is restricted to cases where the relation between the parties is that of landlord and tenant. McCombs v. Wallace, 66 N.C. 481 (1872); Hughes v. Mason, 84 N.C. 472 (1881); Hauser v. Morrison, 146 N.C. 248, 59 S.E. 693 (1907); McIver v. Seaboard Airline R.R., 163 N.C. 544, 79 S.E. 1107 (1913); Prudential Ins. Co. v. Totten, 203 N.C. 431, 166 S.E. 316 (1932); Simons v. Lebrun, 219 N.C. 42, 12 S.E.2d 644 (1941). See also, Ford v. Ford Moulding Co., 231 N.C. 105, 56 S.E.2d 14 (1949).

When the remedy of summary ejectment is sought, the allegation that the relationship of landlord and tenant exists between the parties is no longer necessary as a jurisdictional matter, but it is still necessary to show that the relationship exists in order to bring the case within the provisions of this section before the remedy may be properly granted. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

The remedy by summary proceedings in ejectment given by this section is not coextensive with the doctrine of estoppel arising where one enters and holds land under another, but is restricted to the case where the relation between the parties is simply that of landlord and tenant. Hauser v. Morrison, 146 N.C. 248, 59 S.E. 693 (1907); McLaurin v. McIntyre, 167 N.C. 350, 83 S.E. 627 (1914).

Some Contract or Lease Required. — This section was only intended to apply to a case in which the tenant entered into possession under some contract or lease, either actual or implied, with the supposed landlord, or with some person under whom the landlord claimed in privity, or where the tenant himself is in privity with some person who had so entered. McCombs v. Wallace, 66 N.C. 481 (1872).

Trial court erred by granting the new owner of a rental house summary ejectment relief pursuant to G.S. 42-26, because no lease contract existed between the new owner and the tenants who were ordered to surrender possession, and subject matter jurisdiction in a summary ejectment proceeding was premises on an enforceable contract. Adams v. Woods, 169 N.C. App. 242, 609 S.E.2d 429, 2005 N.C. App. LEXIS 531 (2005).

Definite Term Not Necessary. — Summary ejectment will lie only where the relationship of landlord and tenant existed between the parties under a lease contract, express or implied, and the tenant has held over after the expiration of the term, but while it is necessary that the tenant's entry should have been under a demise, it need not be for a definite term, a tenancy at will being sufficient. Simons v. Lebrun, 219 N.C. 42, 12 S.E.2d 644 (1941).

Lessor Must Terminate Lessee's Estate Before Commencing Summary Ejectment Action. — The trial court erred in granting lessor summary ejectment of lessee since lessor's letter to lessee did not amount to notice that lease was terminated and lessor must terminate lessee's estate before commencing on summary ejectment action. Stanley v. Harvey, 90 N.C. App. 535, 369 S.E.2d 382 (1988).

Summary Ejectment of Tenants at Will. — When a landlord tells tenants at will to vacate the premises, their tenancy instantly expires, regardless of whether they have defaulted on the rent, and the landlord has the right to bring an immediate action for summary ejectment under this section. Stout v. Crutchfield, 21 N.C. App. 387, 204 S.E.2d 541, cert. denied, 285 N.C. 595, 205 S.E.2d 726 (1974).

Summary Ejectment Where Purchase Changed to Lease. — Where one unconditionally surrenders his rights under a contract of purchase and enters into a contract of lease, he may be evicted by a summary proceeding under this section; and it is not necessary that he should actually surrender the possession of the land and receive it again at the hands of the lessor. Riley v. Jordan, 75 N.C. 180 (1876).

Obligation to Pay Rent. — Where lease did not contain a provision expressly holding the tenant liable for future rents after ejectment, the lease was terminated when defendants were removed and the landlord was placed in possession pursuant to the summary ejectment proceeding, and thus defendants' obligation to pay future rent was also terminated. Holly Farm Foods, Inc. v. Kuykendall, 114 N.C. App. 412, 442 S.E.2d 94 (1994).

When Section Does Not Apply — Generally. — The remedy by summary ejectment under this and the following sections is not available when there is a relation of mortgagor and mortgagee or vendor and vendee. McLaurin v. McIntyre, 167 N.C. 350, 83 S.E. 627 (1914).

The construction of this section excludes two classes, namely, vendees in possession under a contract for title and vendors retaining possession after a sale, even though such persons are tenants at will or sufferance for some purposes, and are frequently so styled. McCombs v. Wallace, 66 N.C. 481 (1872).

Same — Title Disputes. — Where a controversy involved the disputed title to real property, out of which certain equities arose, this section did not apply. McLaurin v. McIntyre, 167 N.C. 350, 83 S.E. 627 (1914).

When title to property is in issue, the jurisdiction of the justice of the peace (now magistrate) is ousted, and the proceeding is properly dismissed as in case of nonsuit upon appeal to the superior (now district) court. Prudential Ins. Co. v. Totten, 203 N.C. 431, 166 S.E. 316 (1932); Home Bldg. & Loan Ass'n v. Moore, 207 N.C. 515, 177 S.E. 633 (1935).

Plaintiff acquired a quitclaim deed to defendants' property at a tax sale and then attempted to quiet title or to establish title to the property through a summary ejectment proceeding. This was simply the wrong action to quiet title and, because the plaintiff and defendants were not in a landlord-tenant relationship, the wrong circumstance under which to bring an action in summary ejectment. College Heights Credit Union v. Boyd, 104 N.C. App. 494, 409 S.E.2d 742 (1991).

Same — Bargainor in Deed of Trust. — A bargainor in a deed of trust containing a stipulation of the retention of the possession of the land conveyed until sold under the terms of the trust, who holds possession after a sale of the premises by a trustee, is not such a tenant as comes within the purview of this section, and hence proceedings cannot be taken thereunder to evict him. McCombs v. Wallace, 66 N.C. 481 (1872).

Same — Entry as Vendee. — Where a party entered land under a contract of purchase, while he is so possessed a justice of the peace (now magistrate) has no jurisdiction to oust him under this section. McCombs v. Wallace, 66 N.C. 481 (1872); McMillan v. Love, 72 N.C. 18 (1875); Riley v. Jordan, 75 N.C. 180 (1876).

A vendee under a contract for sale and purchase of land is not such a tenant as may be evicted by summary ejectment under this section. Brannock v. Fletcher, 271 N.C. 65, 155 S.E.2d 532 (1967).

If a vendee, after cancellation, of a contract for the sale of property, continues in possession, he is regarded as a tenant at sufferance, and is properly subject to ejectment under this section. Marantz Piano Co. v. Kincaid, 108 N.C. App. 693, 424 S.E.2d 671 (1993).

Who May Bring Action. — The landlord under whom a tenant has entered into possession of the leased premises is the proper person to bring a summary action of ejectment to dispossess the tenant holding over after the expiration of his lease, upon proper notice to vacate, and the objection of the tenant that the landlord has again leased the premises to another to begin immediately upon the expiration of his term, and that the second lessee is the only one who can maintain the proceedings in ejectment, is untenable. Shelton v. Clinard, 187 N.C. 664, 122 S.E. 477 (1924).

Estoppel to Deny Landlord's Title. — A tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease or tenancy. Lawrence v. Eller, 169 N.C. 211, 85 S.E. 291 (1915). See also, Steadman v. Jones, 65 N.C. 388 (1871).

Neither the tenant nor any person claiming title by or through him can dispute the right of the landlord to recover the premises in ejectment, after the expiration of the lease, upon the ground of a defect of title in the landlord. Callendar v. Sherman, 27 N.C. 711 (1845).

Where the relation of landlord and tenant is established, and the latter is in possession, the tenant will not be permitted to dispute the title of the landlord during the continuance of the lease. Hobby v. Freeman, 183 N.C. 240, 111 S.E. 1 (1922).

In a proceeding before a justice of the peace (now magistrate) under this section, a defendant who does not deny having entered as the tenant of the plaintiff is estopped from setting up a superior title existing at the date of the lease or subsequently acquired from a third person. Heyer v. Beatty, 76 N.C. 28 (1877).

A suit to restrain execution on a judgment in summary ejectment by a justice of the peace (now magistrate) on the ground that the justice had no jurisdiction was properly dismissed where it appeared that plaintiff, formerly the mortgagor of the property, had leased the property and was estopped from attacking the foreclosure and setting up the relation of mortgagor and mortgagee. Shuford v. Greensboro Joint-Stock Land Bank, 207 N.C. 428, 177 S.E. 408 (1934).

Before disputing his landlord's title, the tenant must restore possession. Buckhorn Land & Timber Co. v. Yarbrough, 179 N.C. 335, 102 S.E. 630 (1920).

Sublessee Also Estopped to Deny Title. — Not only the tenant but his sublessee is estopped to deny the title of his immediate landlord. Bonds v. Smith, 106 N.C. 553, 11 S.E. 322 (1890).

Tenant May Dispute Assignment of Lease. — Where an action of ejectment is brought by one claiming to be an assignee of the landlord, the tenant may dispute the assignment. Steadman v. Jones, 65 N.C. 388 (1871).

Consideration of Equitable Defenses. — A justice of the peace (now magistrate) has jurisdiction of a summary action in ejectment, and may determine the questions of tenancy and holding over, and while he has no equitable jurisdiction, he may consider equitable defenses set up in a summary ejectment insofar as they relate to the issue of tenancy. Farmville Oil & Fertilizer Co. v. Bowen, 204 N.C. 375, 168 S.E. 211 (1933).

Provision for Renewal as Defense. — While a provision of renewal of a lease is not itself a renewal so as to vest an estate, yet it gives an equity which may be set up as a defense in a summary proceeding in ejectment. While the court allows this equitable defense to the summary proceedings, the defendants must pay the accrued rent. McAdoo v. Callum Bros. & Co., 86 N.C. 419 (1882).

Claim in Respect to Improvements Outside Scope of Proceeding. — Evidence that the relationship of landlord and tenant existed between the parties and that defendants were holding over after the expiration of the term was sufficient to take the case to the jury and support a judgment for plaintiff in summary ejectment, and defendants' claim in respect to improvements was outside the scope of the proceeding and not justiciable therein. Ford v. Ford Moulding Co., 231 N.C. 105, 56 S.E.2d 14 (1949). See Hargrove v. Cox, 180 N.C. 360, 104 S.E. 757 (1920).

As to insufficient notice to quit, etc. in an action under this section, see Stafford v. Yale, 228 N.C. 220, 44 S.E.2d 872 (1947).

Defendant tenant's estate had not ceased pursuant to G.S. 42-26(2), and thus, plaintiff was not entitled to summarily eject defendant, where the reason the estate had not terminated was that plaintiff's written notice to defendant upon defendant's default of commercial lease for nonpayment of rent did not comply with any of the three methods existing in the lease, but merely stated that plaintiff would be pursuing "curative remedies under the lease and the law." ARE-100/800/801 Capitola, LLC v. Triangle Labs., Inc., 144 N.C. App. 212, 550 S.E.2d 31, 2001 N.C. App. LEXIS 434 (2001).

Burden of Proof. — In an action of ejectment, the burden of proving that the tenancy has terminated is on the plaintiff. Poindexter v. Call, 182 N.C. 366, 109 S.E. 26 (1921).

Remedy. — The remedy given by this section is restricted to the case where the relation between the parties is simply that of landlord and tenant. Jones v. Swain, 89 N.C. App. 663, 367 S.E.2d 136 (1988).

The remedy of summary ejectment may be obtained in a small-claim action heard by a magistrate. Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975).

A lessor has three separate remedies under this Article: (i) possession of the premises; (ii) an award of unpaid rent; and (iii) an award of damages for the tenant's occupation of the premises after the cessation of the estate. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

All Damages Must Be Recovered in One Action. — The fact that this Article specifically allows a lessor to bring an action to regain possession of the premises separate from an action for damages does not create an exception to the general rule that all damages must be recovered in one action. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

Monetary Relief Limited. — In a summary ejectment proceeding, monetary relief — the recovery of rent in arrears and damages for hold-over occupancy — is limited to the amount that the magistrate is statutorily authorized to award. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

Superior Court Has Original Jurisdiction. — When the legislature created the district court division and gave it concurrent original jurisdiction over all matters except probate and matters of decedents' estates, it did not thereby divest the superior court division of any of its original jurisdiction; hence, the superior court division has original jurisdiction over summary ejectment actions. East Carolina Farm Credit v. Salter, 113 N.C. App. 394, 439 S.E.2d 610 (1994).

As to the nonexclusivity of jurisdiction of the justice of the peace (now magistrate), see Stonestreet v. Means, 228 N.C. 113, 44 S.E.2d 600 (1947); Bryan v. Street, 209 N.C. 284, 183 S.E. 366 (1936).

Court Had No Jurisdiction Where Daughter Was Not a Tenant. — Where lease described mother as the head of the household and "Tenant," and where daughter was listed as a member of the household, trial court did not have subject matter jurisdiction under the summary ejectment statute to order daughter to vacate the housing unit since she was not a tenant; the court did have subject matter jurisdiction as to mother who was a tenant. Housing Auth. v. McCleain, 93 N.C. App. 735, 379 S.E.2d 104 (1989).

Dismissal of Appeal Where Defendants Had Surrendered Possession. — In a summary ejectment proceeding, under this and the following sections of this Article, where the subject of the litigation, the right of plaintiffs to immediate possession of premises, had been disposed of by the surrender of same by defendants to plaintiffs and no other question was raised in the court below, appeal would be dismissed. Cochran v. Rowe, 225 N.C. 645, 36 S.E.2d 75 (1945).

Third-Party as Defendant in Action for Recovery. — When, in an action for the recovery of real estate, both the plaintiff and a third-party claim to be the landlord of the defendant, the latter has a right, upon affidavit, to be let in as a party defendant to the action. Rollins v. Rollins, 76 N.C. 264 (1877).

Applied in Stadiem v. Harvell, 208 N.C. 103, 179 S.E. 448 (1935); Lassiter v. Stell, 214 N.C. 391, 199 S.E. 409 (1938).

Cited in Texas Co. v. Beaufort Oil & Fuel Co., 199 N.C. 492, 154 S.E. 829 (1930); Seligson v. Klyman, 227 N.C. 347, 42 S.E.2d 220 (1947); Couch v. ADC Realty Corp., 48 N.C. App. 108, 268 S.E.2d 237 (1980); Swann v. Gastonia Hous. Auth., 675 F.2d 1342 (4th Cir. 1982); Satterfield v. Pappas, 67 N.C. App. 28, 312 S.E.2d 511 (1984); Cla-Mar Mgt. v. Harris, 76 N.C. App. 300, 332 S.E.2d 495 (1985).

II. HOLDING OVER.

Constitutionality. — The summary ejectment procedure as set out in subdivision (1) of this section and G.S. 42-32 is not unconstitutional on grounds that subdivision (1) provides no defense whatsoever to a residential tenant of commercially owned property who holds over after being given notice that the term has expired or that the owner desires possession. Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

Subdivision (1) of this section, as to a tenant holding over, was declared constitutional in Credle v. Gibbs, 65 N.C. 192 (1871).

Subdivision (1) of this section provides no defense because none exists. Once the estate of the lessee expires, the lessor, by virtue of his superior title, may resume possession by following proper procedures. Defendant's right to possession is protected by virtue of G.S. 42-35 and 42-36, which provide a remedy to the tenant if he is evicted, but later restored to possession. Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

Effect of Recognition of Tenant Holding Over. — The landlord may treat his tenant who holds over as a trespasser and eject him, or he may recognize him as a tenant; but when such recognition has been made, a presumption arises of a tenancy from year to year, and as stated, under the terms and stipulations of the lease as far as the same may apply. Murrill v. Palmer, 164 N.C. 50, 80 S.E. 55 (1913).

When a tenant for a year or a longer time holds over and is recognized as tenant by the landlord, without further agreement or other qualifying facts or circumstances, he becomes a tenant from year to year, and is subject to the payment of the rent and other stipulations of the lease as far as the same may be applied to existent conditions. Stedman v. McIntosh, 26 N.C. 291 (1844); Scheelky v. Koch, 119 N.C. 80, 25 S.E. 713 (1896); Harty v. Harris, 120 N.C. 408, 27 S.E. 90 (1897); Holton v. Andrews, 151 N.C. 340, 66 S.E. 212 (1909); Murrill v. Palmer, 164 N.C. 50, 80 S.E. 55 (1913).

A mere acceptance of rents by the landlord does not create a tenancy from year to year, nor preclude the landlord from recovery of possession. In an action to recover the possession, as the plaintiff is entitled to damages for the occupation of the premises, the plaintiff can accept voluntary payments without thereby ratifying the tenant's possession. Vanderford v. Foreman, 129 N.C. 217, 39 S.E. 839 (1901).

Periodic Tenancy Created Where Rent Accepted and Tenant in Possession. — When a tenant enters into possession under an invalid lease and tenders rent which is accepted by the landlord, a periodic tenancy is created. The period of the tenancy is determined by the interval between rental payments. Kent v. Humphries, 303 N.C. 675, 281 S.E.2d 43 (1981).

When Holding Over Is Allowed. — It seems that it is not a wrongful holding over when the tenant has been compelled to continue his occupation of necessity; for instance, when he has remained in possession solely by reason of the sickness of himself or some member of his family, of such a character that removal could not be presently made without serious danger to the patient. Murrill v. Palmer, 164 N.C. 50, 80 S.E. 55 (1913).

Issue as to Holding Over. — The only question the court can try under subdivision (1) of this section is, "Was the defendant the tenant of the plaintiff, and does he hold over after the expiration of the tenancy?" McDonald v. Ingram, 124 N.C. 272, 32 S.E. 677 (1899); McIver v. Seaboard Airline R.R., 163 N.C. 544, 79 S.E. 1107 (1913).

III. BREACH OF PROVISION OF LEASE.

Condition Must Be in Lease. — A summary proceeding in ejectment begun during the lessee's term cannot be maintained where the contract of lease contained no condition, the breach of which would authorize a reentry by the lessor. The mere failure to pay rent upon "a lease at ...... dollars a year, payable monthly" does not warrant such reentry. Meroney v. Wright, 81 N.C. 390 (1879).

Breach of a condition in a lease that the lessee should not use or permit the use of any portion of the premises for any unlawful purpose or purposes, without a provision in the lease automatically terminating the lease or reserving the right of reentry for breach of such condition, cannot be made the basis of summary ejectment, and a provision in the lease that should the landlord bring suit because of the breach of any covenant and prevail in such suit, the tenant should pay reasonable attorneys' fees, does not constitute a provision automatically terminating the lease for breach of such condition or preserve the right of reentry. Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

Except in cases where § 42-3 writes into a lease a forfeiture upon failure of the lessee to pay the rent within 10 days after a demand is made by the lessor or his agent for all past due rent, with right of the lessor to enter and dispossess the lessee, a breach of the conditions of a lease between a landlord and tenant cannot be made the basis of summary ejectment unless the lease itself provides for termination of such breach or reserves the right of reentry for such breach. Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

Provisions for Termination on Receivership or Bankruptcy Are Not Void. — Provisions of a lease authorizing lessors to terminate the lease and repossess the property upon the appointment of a receiver for lessee or adjudication that lessee was a bankrupt were not void. Such provisions are not contrary to public policy, nor are they prohibited by statute. To the contrary, similar provisions are frequently inserted in leases, particularly when they are of long duration. Carson v. Imperial '400' Nat'l, Inc., 267 N.C. 229, 147 S.E.2d 898 (1966).

When Breach Waived. — After breach by the tenant of his contract, acceptance of rent by the landlord which has accrued thereafter will prevent the landlord from insisting on forfeiture. Winder v. Martin, 183 N.C. 410, 111 S.E. 708 (1922).

Jury Decides Whether Landlord Waived Provisions. — Whether a landlord has waived provisions in lease agreement regarding the manner of renewal of the lease for another term is a question of fact to be decided by the jury, as is the application of the doctrine of estoppel. Wachovia Bank & Trust Co. v. Rubish, 50 N.C. App. 662, 275 S.E.2d 494, rev'd on other grounds, 306 N.C. 417, 293 S.E.2d 749 (1982).

Where defendant has been partially evicted, in order for him, in a summary action of ejectment, to retain possession of the leased premises by paying a reduction in the rental price fixed by his contract, he must prove that such eviction was caused by the plaintiff, or one acting under his authority, or one paramount in title, and upon failure of evidence of this character, his claim therefor is properly denied as a matter of law. Blomberg v. Evans, 194 N.C. 113, 138 S.E. 593 (1927).

Suit for Rescission Cannot Be Substituted on Appeal. — Where a verbal lease does not provide for its termination or reserve the right of reentry for breach by the tenant of stipulated conditions in regard to maintenance and operation of the property, breach of such conditions cannot be made the basis for summary ejectment, and issues of fraud in procuring the lease and willful breach of the conditions are erroneously submitted in the superior court upon appeal in such action, it not being permissible for a party to substitute on appeal a suit for rescission. Dees v. Apple, 207 N.C. 763, 178 S.E. 557 (1935).

Proper grounds existed for a summary ejectment proceeding, where the lease specified that if the rent was not paid within 15 days of the first of each month, the date on which the rent was due, the lessor would have the right to re-enter the premises after notifying the lessee of the forfeiture of the estate, and lessee had in fact breached this condition of the lease. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990).

OPINIONS OF ATTORNEY GENERAL

Summary ejectment proceedings are a landlord's exclusive remedy to regain possession of his property; the General Assembly did not intend for other statutory provisions, such as G.S. 1-111, to apply to summary ejectment proceedings. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

The only undertaking the General Assembly intended to require of the defendants is the rent undertaking that G.S. 42-34 provides they must make to suspend judgment when they appeal their cases to district court. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

A summary ejectment action heard by a magistrate is an expedited judicial proceeding; under G.S. 7A-214, the trial of a small claim summary ejectment action is set no more than 30 days after the action is commenced. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

Pleadings in small claim summary ejectment actions are the same as in other small claim actions. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Safety, — N.C.A.G. — (February 10, 1995).

A defendant is not required to file any pleading at all to maintain a defense in a summary ejectment proceeding. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

Defendants in summary ejectment actions are not required to post bond before pleading, pursuant to G.S. 1-111. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-26.1: Expired.

Editor's Note. — This section expired, pursuant to the terms of Session Laws 1991, c. 166, s. 3, on June 30, 1993.

§ 42-27. Local: Refusal to perform contract ground for dispossession.

When any tenant or cropper who enters into a contract for the rental of land for the current or ensuing year willfully neglects or refuses to perform the terms of his contract without just cause, he shall forfeit his right of possession to the premises. This section applies only to the following counties: Alamance, Alexander, Alleghany, Anson, Ashe, Beaufort, Bertie, Bladen, Brunswick, Burke, Cabarrus, Camden, Carteret, Caswell, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Davidson, Duplin, Edgecombe, Forsyth, Franklin, Gaston, Gates, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Hyde, Jackson, Johnston, Jones, Lee, Lenoir, Martin, Mecklenburg, Montgomery, Moore, Nash, New Hanover, Northampton, Onslow, Pasquotank, Pender, Perquimans, Pitt, Polk, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Stokes, Surry, Swain, Tyrrell, Union, Wake, Warren, Washington, Wayne, Wilson, Yadkin. (4 Geo. II, c. 28; 1868-9, c. 156, s. 19; Code, ss. 1766, 1777; 1905, cc. 297, 299, 820; Rev., s. 2001, subsec. 4; 1907, cc. 43, 153; 1909, cc. 40, 550; C.S., s. 2366; Pub. Loc. Ex. Sess. 1924, c. 66; 1931, cc. 50, 194, 446; 1933, cc. 86, 485; 1935, c. 39; 1943, cc. 69, 115, 459; 1951, c. 279; 1953, c. 271; c. 499, s. 2; 1955, c. 93; 1961, c. 25; 1995 (Reg. Sess., 1996), c. 566, s. 1.)

§ 42-28. Summons issued by clerk.

When the lessor or his assignee files a complaint pursuant to G.S. 42-26 or 42-27, and asks to be put in possession of the leased premises, the clerk of superior court shall issue a summons requiring the defendant to appear at a certain time and place not to exceed seven days from the issuance of the summons, excluding weekends and legal holidays, to answer the complaint. The plaintiff may claim rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee, not to exceed the jurisdictional amount established by G.S. 7A-210(1), but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery. (1868-9, c. 156, s. 20; 1869-70, c. 212; Code, s. 1767; Rev., s. 2002; C.S., s. 2367; 1971, c. 533, s. 4; 1973, c. 1267, s. 4; 1979, c. 144, s. 4; 1981, c. 555, s. 4; 1983, c. 332, s. 2; 1985, c. 329, s. 1; 1989, c. 311, s. 3; 1993, c. 553, s. 73(c); 1995, c. 460, s. 4.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 752 (1983), see 63 N.C.L. Rev. 222 (1984).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

For note, "When A Hotel Is Your Home, Is There Protection?," see 15 Campbell L. Rev. 295 (1993).

CASE NOTES

This section prior to its 1971 amendment was not an exception to the requirements of § 1-57. Choate Rental Co. v. Justice, 211 N.C. 54, 188 S.E. 609 (1936); Home Real Estate, Loan & Ins. Co. v. Locker, 214 N.C. 1, 197 S.E. 555 (1938).

A lessor has three separate remedies under this Article: (i) possession of the premises; (ii) an award of unpaid rent; and (iii) an award of damages for the tenant's occupation of the premises after the cessation of the estate. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

Implication of Language "But If He Omits to Make Such Claim." — Although this section does not explicitly state that assertion of a claim for damages and past-due rents in the summary ejectment proceeding will bar a separate action for that claim, the necessary implication of the language "but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery" is that if the plaintiff does make such claims in the summary ejectment proceeding he shall be prejudiced in another action whereby he attempts to relitigate these claims. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

Monetary Relief Limited. — In a summary ejectment proceeding, monetary relief — the recovery of rent in arrears and damages for hold-over occupancy — is limited to the amount that the magistrate is statutorily authorized to award. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

All Damages Must Be Recovered in One Action. — The fact that this article specifically allows a lessor to bring an action to regain possession of the premises separate from an action for damages does not create an exception to the general rule that all damages must be recovered in one action. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

No Res Judicata as to Damages. — Dismissal of an individual defendant with prejudice in an ejectment action did not operate as res judicata or collateral estoppel on the individual's liability in an action for damages, as G.S. 42-28 allowed a lessor to bring an action to regain possession of premises separately from an action for damages. N.C. Indus. Capital, LLC v. Clayton, — N.C. App. —, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007).

Applied in Rogers v. Hall, 227 N.C. 363, 42 S.E.2d 347 (1947); Morris v. Austraw, 269 N.C. 218, 152 S.E.2d 155 (1967).

Cited in Seligson v. Klyman, 227 N.C. 347, 42 S.E.2d 220 (1947).

§ 42-29. Service of summons.

The officer receiving the summons shall mail a copy of the summons and complaint to the defendant no later than the end of the next business day or as soon as practicable at the defendant's last known address in a stamped addressed envelope provided by the plaintiff to the action. The officer may, within five days of the issuance of the summons, attempt to telephone the defendant requesting that the defendant either personally visit the officer to accept service, or schedule an appointment for the defendant to receive delivery of service from the officer. If the officer does not attempt to telephone the defendant or the attempt is unsuccessful or does not result in service to the defendant, the officer shall make at least one visit to the place of abode of the defendant within five days of the issuance of the summons at a time reasonably calculated to find the defendant at the place of abode to attempt personal delivery of service. He then shall deliver a copy of the summons together with a copy of the complaint to the defendant, or leave copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. If such service cannot be made the officer shall affix copies to some conspicuous part of the premises claimed and make due return showing compliance with this section. (1868-9, c. 156, s. 21; Code, s. 1768; Rev., s. 2003; C.S., s. 2368; 1973, c. 87; 1983, c. 332, s. 1; 1985, c. 102; 1995, c. 460, s. 5.)

OPINIONS OF ATTORNEY GENERAL

Notice Not Adequate for Money Damages. — In a summary ejectment proceeding where the tenant does not make an appearance, the magistrate may not enter a money judgment for rents and other damages in addition to a order for possession where service of process was effected by first class mail and posting on the premises pursuant to this section. See opinion of Attorney General to Hon. Thomas N. Hix, Chief District Court Judge, 29th Judicial Circuit, 60 N.C.A.G. 95 (1992).

Because G.S. 7-217(4) states that the procedure found in this section can be used in summary ejectment cases only, and because summary ejectment is in the nature of an in rem proceeding, an in personam money damages claim cannot be heard and a money judgment cannot be entered in an action where service of process is effected through the alternative method under this section. The requirements for actual service of process found elsewhere in G.S. G.S. 7A-213 and in G.S. 1A-1, Rule 4 would still apply to the claim for rents and other money damages. See opinion of Attorney General to Hon. Thomas N. Hix, Chief District Court Judge, 29th Judicial Circuit, 60 N.C.A.G. 95 (1992).

§ 42-30. Judgment by confession, where plaintiff has proved case, or failure to appear.

The summons shall be returned according to its tenor, and if on its return it appears to have been duly served, and if (i) the plaintiff proves his case by a preponderance of the evidence, (ii) the defendant admits the allegations of the complaint, or (iii) the defendant fails to appear on the day of court, and the plaintiff requests in open court a judgment for possession based solely on the filed pleadings where the pleadings allege defendant's failure to pay rent as a breach of the lease for which reentry is allowed and the defendant has not filed a responsive pleading, the magistrate shall give judgment that the defendant be removed from, and the plaintiff be put in possession of, the demised premises; and if any rent or damages for the occupation of the premises after the cessation of the estate of the lessee, not exceeding the jurisdictional amount established by G.S. 7A-210(1), be claimed in the oath of the plaintiff as due and unpaid, the magistrate shall inquire thereof, and if supported by a preponderance of the evidence, give judgment as he may find the fact to be. (1868-9, c. 156, s. 22; Code, s. 1769; Rev., s. 2004; C.S., s. 2369; 1971, c. 533, s. 5; 1973, c. 10; c. 1267, s. 4; 1979, c. 144, s. 5; 1981, c. 555, s. 5; 1985, c. 329, s. 1; 1989, c. 311, s. 4; 1993, c. 553, s. 73(d); 2005-423, s. 10.)

Legal Periodicals. — For article on defending the low-income tenant in North Carolina, see 2 N.C. Cent. L.J. 21 (1970).

For article discussing 1983 amendments to the Federal Rules of Civil Procedure relative to magistrate practice, comparing state court magistrate practice, and making certain suggestions, see 20 Wake Forest L. Rev. 819 (1984).

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Where both plaintiff and an interpleading third-party claim to be landlords of defendant, if a judgment by default is taken against the tenant, no writ of possession can issue until determination of the controversy between plaintiff and the interpleading defendant. Rollins v. Rollins, 76 N.C. 264 (1877).

A lessor has three separate remedies under this Article: (i) possession of the premises; (ii) an award of unpaid rent; and (iii) an award of damages for the tenant's occupation of the premises after the cessation of the estate. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

Monetary Relief Limited. — In a summary ejectment proceeding, monetary relief — the recovery of rent in arrears and damages for hold-over occupancy — is limited to the amount that the magistrate is statutorily authorized to award. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

All Damages Must Be Recovered in One Action. — The fact that this article specifically allows a lessor to bring an action to regain possession of the premises separate from an action for damages does not create an exception to the general rule that all damages must be recovered in one action. Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 N.C. App. 81, 398 S.E.2d 628 (1990), discretionary review denied, 328 N.C. 570, 403 S.E.2d 509 (1991).

If in an action for the recovery of real estate in which a third person claiming as landlord of the defendant has been made a party defendant, judgment is taken against the tenant defendant and he is evicted, he is entitled to be restored to possession until determination of the controversy between the plaintiff and the interpleading defendant. Rollins v. Bishop, 76 N.C. 268 (1877).

Upon appeal, when the appeal is dismissed as to the tenant defendant, no writ of possession can issue from the justice's (now magistrate's) court until determination of the controversy between the plaintiff and the interpleading defendant. Rollins v. Henry, 76 N.C. 269 (1877).

Applied in Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980).

Cited in Seligson v. Klyman, 227 N.C. 347, 42 S.E.2d 220 (1947).

OPINIONS OF ATTORNEY GENERAL

For a summary ejectment action to be processed as a small claim, the complaint must designate it as a small claim, and the action must be assigned to a magistrate. This practice is almost universal, and Article 3 of the Landlord and Tenant Act refers only to determinations in these cases being made in the first instance by magistrates. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-31. Trial by magistrate.

If the defendant by his answer denies any material allegation in the oath of the plaintiff, the magistrate shall hear the evidence and give judgment as he shall find the facts to be. (1868-9, c. 156, s. 23; Code, s. 1770; Rev., s. 2005; C.S., s. 2370; 1971, c. 533, s. 6.)

Legal Periodicals. — For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 752 (1983), see 63 N.C.L. Rev. 222 (1984).

CASE NOTES

Denial of Tenancy. — In a proceeding before a justice of the peace (now magistrate), where the defendant denies the alleged tenancy, it is the duty of the justice (now magistrate) to proceed and try the issue of tenancy. Foster v. Penry, 77 N.C. 160 (1877).

Title to Land. — The question of jurisdiction is not to be determined by matter set up in the answer, but the court should hear the evidence as to the issue of tenancy, and if the same is found for the landlord, an estoppel operates upon the tenant, and the title to the land is not drawn in controversy. Hahn v. Latham, 87 N.C. 172 (1882).

If the defense involves the title to real estate, a justice of the peace (now magistrate) has no jurisdiction thereof, and should dismiss the proceeding. Forsythe v. Bullock, 74 N.C. 135 (1876).

Equitable Defense. — The tenant may set up in his answer any equitable defense which he may have to his landlord's claim. Forsythe v. Bullock, 74 N.C. 135 (1876).

Failure to Set Up Defense. — Where defendant failed to set up the defense that he was not a tenant, but held under an agreement to purchase, and it was decided that he was a tenant, he could not be heard to question the validity of the judgment, nor could he restrain its execution except in a direct proceeding to set it aside for fraud, etc. Isler v. Hart, 161 N.C. 499, 77 S.E. 681 (1913).

Provision for Renewal. — A provision for renewal in a lease is not itself a renewal so as to vest an estate, yet it gives an equity which may be set up as a defense in a summary proceeding in ejectment. McAdoo v. Callum Bros. & Co., 86 N.C. 419 (1882).

Res Judicata Effect of Judgment on Issue of Tenancy. — Where in proceedings in summary ejectment, on final judgment entered in the superior court, it was adjudicated that A was the tenant of B, which judgment was not appealed from, the matter was res judicata, and A could not maintain a suit for an injunction to restrain the execution of the judgment in the former action, or that he be kept in possession, or for an accounting, his remedy being to vacate the judgment for recognized equitable reasons in direct proceedings. Isler v. Hart, 161 N.C. 499, 77 S.E. 681 (1913).

Effect of Judgment for Tenant. — A judgment for a tenant in summary proceedings is not an estoppel on the landlord to the extent of precluding him from showing, in a subsequent action, advancements made prior to eviction to which he was entitled. Burwell v. Brodie, 134 N.C. 540, 47 S.E. 47 (1904).

Where a person has been enjoined from bringing actions on each installment of rent as vexatious, such person is not precluded by such injunction from issuing execution on a judgment taken in a summary action in ejectment for the recovery of the property after the expiration of the lease. Featherstone v. Carr, 134 N.C. 66, 46 S.E. 15 (1903).

OPINIONS OF ATTORNEY GENERAL

For a summary ejectment action to be processed as a small claim, the complaint must designate it as a small claim, and the action must be assigned to a magistrate. This practice is almost universal, and Article 3 of the Landlord and Tenant Act refers only to determinations in these cases being made in the first instance by magistrates. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-32. Damages assessed to trial.

On appeal to the district court, the jury trying issues joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court; and, if the jury finds that the detention was wrongful and that the appeal was without merit and taken for the purpose of delay, the plaintiff, in addition to any other damages allowed, shall be entitled to the amount of rent in arrears, or which may have accrued, to the time of trial in the district court. Judgment for the rent in arrears and for the damages assessed may, on motion, be rendered against the sureties to the appeal. (1868-9, c. 156, s. 28; Code, s. 1775; Rev., s. 2006; C.S., s. 2371; 1945, c. 796; 1971, c. 533, s. 7; 1979, c. 820, s. 7.)

Legal Periodicals. — For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

For a survey of 1977 law on property, see 56 N.C.L. Rev. 1111 (1978).

CASE NOTES

Constitutionality. — As to the unconstitutionality of the scheme of this section, G.S. 42-34(b) and G.S. 1A-1, Rule 62(a), prior to amendment by Session Laws 1979, c. 820, see Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

The summary ejectment procedure as set out in G.S. 42-26(1) and this section is not unconstitutional in that G.S. 42-26(1) provides no defense whatsoever to a residential tenant of commercially-owned property who holds over after being given notice that the term has expired or that the owner desires possession. Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

Nonsuit upon Appeal on Payment of Damages. — Where there is an appeal from the justice of the peace (now magistrate) in ejectment, the jury shall assess all damages of the plaintiff to which he is entitled from the time of the unlawful detention to the time of the trial in the superior (now district) court, and upon the defendant's tendering the amount sued for and the costs to that time, a judgment as of nonsuit is properly allowed. Ryan v. Reynolds, 190 N.C. 563, 130 S.E. 156 (1925).

Liability of Surety. — The surety on a bond to stay execution on appeal from the judgment of a justice of the peace (now magistrate) rendered in summary proceedings in ejectment is liable for such rents and profits to the plaintiff as may accrue to the date of the trial in the superior (now district) court. Dunn v. Patrick, 156 N.C. 248, 72 S.E. 220 (1911).

Effect of Emergency Price Control Act. — Where rental value of premises was fixed by rent control office, local statutes authorizing collection of double rents or other damages did not entitle plaintiff to collect an amount exceeding the maximum rent fixed by the O.P.A. McGuinn v. McLain, 225 N.C. 750, 36 S.E.2d 377 (1945).

The fact that landlord obtained permission from rent control office of O.P.A. to institute action under local law for the possession of his property did not release the property from the provisions of the Emergency Price Control Act of 1942. McGuinn v. McLain, 225 N.C. 750, 36 S.E.2d 377 (1945).

Cited in Seligson v. Klyman, 227 N.C. 347, 42 S.E.2d 220 (1947).

§ 42-33. Rent and costs tendered by tenant.

If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease. If the plaintiff further prosecutes his action, and the defendant pays into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed. (4 Geo. II, c. 28, s. 4; 1868-9, c. 156, s. 26; Code, s. 1773; Rev., s. 2007; C.S., s. 2372.)

Legal Periodicals. — For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

CASE NOTES

This section was passed in the interest of the tenant. A landlord could bring an action after demand as required by the statute, when each installment of rent was due. The tenant had to pay the rent and costs before judgment or get out. This section was to protect the tenant from hasty eviction, while at the same time the landlord would obtain his rent and costs. Ryan v. Reynolds, 190 N.C. 563, 130 S.E. 156 (1925).

Applicability of Section. — The wording of this section makes it clear that the section applies not only to summary ejectment actions, but to any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent. Green v. Lybrand, 39 N.C. App. 56, 249 S.E.2d 443 (1978).

This section has no application if the terms of the lease provide that the lessor can terminate the lease upon nonpayment of the rent. Couch v. ADC Realty Corp., 48 N.C. App. 108, 268 S.E.2d 237 (1980).

This section applies to actions to recover possession of demised premises "upon a forfeiture for the nonpayment of rent" and not to actions to recover possession of property for one of the causes enumerated in G.S. 42-26. Seligson v. Klyman, 227 N.C. 347, 42 S.E.2d 220 (1947).

This section is construed in pari materia with § 42-3. Charlotte Office Tower Assocs. v. Carolina SNS Corp., 89 N.C. App. 697, 366 S.E.2d 905 (1988).

Section 42-3 and this section are remedial in nature and will apply only where the parties' lease does not cover the issue of forfeiture of the lease term upon nonpayment of rent. Where the contracting parties have considered the issue, negotiated a response, and memorialized their response within the lease, the trial court appropriately should decline to apply these statutory provisions. Charlotte Office Tower Assocs. v. Carolina SNS Corp., 89 N.C. App. 697, 366 S.E.2d 905 (1988).

What Must Be Paid. — Under the provisions of this section the lessee in summary ejectment is given the right to tender or pay into court the amount of rent due under the lease to the time of the beginning of the action, with interest and costs, and upon his so doing, the proceedings will be stayed; and thus the exception of a lessor that all rents, whether due under the terms of the contract or not, should be included to the time of the dismissal of the action, was untenable. Ryan v. Reynolds, 190 N.C. 563, 130 S.E. 156 (1925).

Where a contract for the lease of land at a specified rent contains a provision giving to the lessee the right to take sand therefrom at a stated price, the lessor in ejectment cannot maintain the position that the lessee should tender or pay for the sand he may thus have used, under the provision of this section, as a part of the rental due by him, the contract being construed separately as to the two provisions. Ryan v. Reynolds, 190 N.C. 563, 130 S.E. 156 (1925).

Effect of Tender Where Term Has Not Expired. — Where, in an action in ejectment against a tenant for nonpayment of rent, the answer denies default and pleads tender of the rent, under this section, judgment on the pleadings in plaintiff's favor is properly denied, and the term not having expired, the tender of rent in arrears before judgment would bar the cause. Hoover v. Crotts, 232 N.C. 617, 61 S.E.2d 705 (1950).

Where during the hearing and before judgment on a petition under G.S. 42-3 for the forfeiture of a lease held by an insolvent corporation in the hands of a receiver, the receiver tendered to the petitioner all rents due, together with all costs lawfully incurred, as provided in this section, it was held that the petition was properly denied. Coleman v. Carolina Theatres, 195 N.C. 607, 143 S.E. 7 (1928).

Where lease provides that landlord shall have the option to declare the lease void upon failure of lessee to pay rent when due, and waives notice to vacate, lessee may not prevent forfeiture by tendering rents due upon the trial. Tucker v. Arrowood, 211 N.C. 118, 189 S.E. 180 (1937).

A tender by the tenant of rent accrued after termination of the lease does not preclude the landlord from recovering possession. Vanderford v. Foreman, 129 N.C. 217, 39 S.E. 839 (1901).

Effect of Acceptance of Rent. — Acceptance by the landlord of rent accruing after termination of lease, after suit for possession, does not create a tenancy from year to year, and does not preclude the landlord from recovery. Vanderford v. Forman, 129 N.C. 217, 39 S.E. 839 (1901).

Forfeiture by Breach of Covenant. — Unless there is an express provision for a forfeiture in a lease, a breach of a covenant does not work a forfeiture. Couch v. ADC Realty Corp., 48 N.C. App. 108, 268 S.E.2d 237 (1980).

Applied in Menache v. Atlantic Coast Mgt. Corp., 43 N.C. App. 733, 260 S.E.2d 100 (1979).

§ 42-34. Undertaking on appeal and order staying execution.

(a) Upon appeal to the district court, either party may demand that the case be tried at the first session of the court after the appeal is docketed, but the presiding judge, in his discretion, may first try any pending case in which the rights of the parties or the public demand it. If the case has not been previously continued in district court, the court shall continue the case for an appropriate period of time if any party initiates discovery or files a motion to allow further pleadings pursuant to G.S. 7A-220 or G.S. 7A-229, or for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure.

(b) During an appeal to district court, it shall be sufficient to stay execution of a judgment for ejectment if the defendant appellant pays to the clerk of superior court any rent in arrears as determined by the magistrate and signs an undertaking that he or she will pay into the office of the clerk of superior court the amount of the tenant's share of the contract rent as it becomes due periodically after the judgment was entered and, where applicable, comply with subdivision (c) below. For the sole purpose of determining the amount of rent in arrears pursuant to a judgment for possession pursuant to G.S. 42-30(iii), the magistrate's determination shall be based upon (i) the available evidence presented to the magistrate or (ii) the amounts listed on the face of the filed Complaint in Summary Ejectment. Provided however, when the magistrate makes a finding in the record, based on evidence presented in court, that there is an actual dispute as to the amount of rent in arrears that is due and the magistrate specifies the specific amount of rent in arrears in dispute, in order to stay execution of a judgment for ejectment, the defendant appellant shall not be required to pay to the clerk of superior court the amount of rent in arrears found by the magistrate to be in dispute, even if the magistrate's judgment includes this amount in the amount of rent found to be in arrears. If a defendant appellant appeared at the hearing before the magistrate and the magistrate found an amount of rent in arrears that was not in dispute, and if an attorney representing the defendant appellant on appeal to the district court signs a pleading stating that there is evidence of an actual dispute as to the amount of rent in arrears, then the defendant appellant shall not be required to pay the rent in arrears alleged to be in dispute to stay execution of a judgment for ejectment pending appeal. Any magistrate, clerk, or district court judge shall order stay of execution upon the defendant appellant's paying the undisputed rent in arrears to the clerk and signing the undertaking. If either party disputes the amount of the payment or the due date in the undertaking, the aggrieved party may move for modification of the terms of the undertaking before the clerk of superior court or the district court. Upon such motion and upon notice to all interested parties, the clerk or court shall hold a hearing within 10 calendar days of the date the motion is filed and determine what modifications, if any, are appropriate.

(c) In an ejectment action based upon alleged nonpayment of rent where the judgment is entered more than five working days before the day when the next rent will be due under the lease, the appellant shall make an additional undertaking to stay execution pending appeal. Such additional undertaking shall be the payment of the prorated rent for the days between the day that the judgment was entered and the next day when the rent will be due under the lease.

(c1) Notwithstanding the provisions of subsection (b) of this section, an indigent defendant appellant, as set forth in G.S. 1-110, who prosecutes his or her appeal as an indigent and who meets the requirement of G.S. 1-288 shall pay the amount of the contract rent as it becomes periodically due as set forth in subsection (b) of this section, but shall not be required to pay rent in arrears as set forth in subsection (b) of this section in order to stay execution pending appeal.

(d) The undertaking by the appellant and the order staying execution may be substantially in the following form:

"State of North Carolina,
"County of __________
"____________, Plaintiff
vs.
"____________, Defendant

Bond to
Stay Execution
On Appeal to
District Court

"Now comes the defendant in the above entitled action and respectfully shows the court that judgment for summary ejectment was entered against the defendant and for the plaintiff on the ________ day of ________, ________, by the Magistrate. Defendant has appealed the judgment to the District Court.

"Pursuant to the terms of the lease between plaintiff and defendant, defendant is obligated to pay rent in the amount of $________ per ________, due on the ________ day of each ________.

"Where the payment of rent in arrears or an additional undertaking is required by G.S. 42-34, the defendant hereby tenders $________ to the Court as required.

"Defendant hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid terms of the lease and moves the Court to stay execution on the judgment for summary ejectment until this matter is heard on appeal by the District Court.

"This the ______ day of ______, ______.

____

Defendant

"Upon execution of the above bond, execution on said judgment for summary ejectment is hereby stayed until the action is heard on appeal in the District Court. If defendant fails to make any rental payment to the clerk's office within five days of the due date, upon application of the plaintiff, the stay of execution shall dissolve and the sheriff may dispossess the defendant.

"This ______ day of ______, ______.

____

Assistant Clerk of Superior Court."

(e) Upon application of the plaintiff, the clerk of superior court shall pay to the plaintiff any amount of the rental payments paid by the defendant into the clerk's office which are not claimed by the defendant in any pleadings.

(f) If the defendant fails to make a payment within five days of the due date according to the undertaking and order staying execution, the clerk, upon application of the plaintiff, shall issue execution on the judgment for possession.

(g) When it appears by stipulation executed by all of the parties or by final order of the court that the appeal has been resolved, the clerk of court shall disburse any accrued moneys of the undertaking remaining in the clerk's office according to the terms of the stipulation or order. (1868-9, c. 156, s. 25; 1883, c. 316; Code, s. 1772; Rev., s. 2008; C.S., s. 2373; 1921, c. 90; Ex. Sess., 1921, c. 17; 1933, c. 154; 1937, c. 294; 1949, c. 1159; 1971, c. 533, s. 8; 1979, c. 820, ss. 1-6; 1998-125, s. 1; 1999-456, s. 59; 2005-423, s. 11.)

Local Modification. — Burke: Pub. Loc. 1927, c. 57; Cabarrus, Craven, Davie, Granville, Iredell, Mecklenburg, Swain, Watauga: 1921, c. 90; Ex. Sess., 1921, c. 17.

Editor's Note. — Session Laws 1998-125, s. 3 provides that the Administrative Office of the Courts shall amend the Small Claims form entitled "Judgment In Action For Summary Ejectment" to provide for a block in the magistrate's findings to designate in accordance with G.S. 42-34(b) that either there is no actual dispute as to the amount of rent in arrears, or if there is an actual dispute of the amount of rent in arrears, the amount found to be in dispute.

Legal Periodicals. — For a survey of 1977 constitutional law, see 56 N.C.L. Rev. 943 (1978).

For a survey of 1977 law on property, see 56 N.C.L. Rev. 1111 (1978).

For a comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 Act to Clarify Landlord Eviction Remedies in Residential Tenancies, see 60 N.C.L. Rev. 885 (1982).

For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 752 (1983), see 63 N.C.L. Rev. 222 (1984).

See legislative survey, 21 Campbell L. Rev. 323 (1999).

CASE NOTES

Constitutionality. — As to the unconstitutionality of the scheme of subsection (b) of this section, G.S. 42-32, and G.S. 1A-1, Rule 62(a), prior to amendment by Session Laws 1979, c. 820, see Usher v. Waters Ins. & Realty Co., 438 F. Supp. 1215 (W.D.N.C. 1977).

Plaintiff was not required to comply with this section in order to perfect her appeal, because this section only provides the mechanism for an appellant to stay execution of the magistrate's judgment pending the appeal. Fairchild Properties v. Hall, 122 N.C. App. 286, 468 S.E.2d 605 (1996).

Discretion as to Surety. — On an application to a justice of the peace (now magistrate) for a suspension of execution after a recovery by a landlord against his tenant, the justice (now magistrate) has discretion as to the sufficiency of the surety, the exercise of which a judge will not review in the absence of any suggestion that the justice (now magistrate) acted dishonestly or capriciously. Steadman v. Jones, 65 N.C. 388 (1871).

Power to Increase Bond. — If the bonds should become impaired or if the litigation should become protracted to such an extent as to require additional security to protect the plaintiffs in their rents, then under this section the superior (now district) court can require additional security. Featherstone v. Carr, 132 N.C. 800, 44 S.E. 592 (1903).

Not only is it within the jurisdiction and power of the superior (now district) courts to have the bonds increased or strengthened, but under their general powers in equity they would have the right to take such action. Featherstone v. Carr, 132 N.C. 800, 44 S.E. 592 (1903).

No Provision for Waiver of Bond. — Examination of this section fails to disclose any provision for waiver of the bond to perfect the appeal. Caulder v. Durham Hous. Auth., 433 F.2d 998 (4th Cir. 1970), cert. denied, 401 U.S. 1003, 91 S. Ct. 1228, 28 L. Ed. 2d 539 (1971).

Judgment Prior to Action on Bond. — A bond with sureties, conditioned upon the payment of any judgment given in summary proceedings in ejectment, makes the obtaining of the judgment a condition precedent to a recovery thereon against the sureties; and the obtaining of such a judgment must be shown by proper averment and proof, or an action against the sureties will be premature. Blackmore v. Winders, 144 N.C. 212, 56 S.E. 874 (1907).

Prejudgment Interest. — In a suit for the breach of a lease, the lessor was entitled under G.S. 24-5 to prejudgment interest on payments withheld by the clerk of court under G.S. 42-34; the payments did not include interest and were not a final settlement, and the lessor was deprived of the use of its money while it was retained by the clerk. N.C. Indus. Capital, LLC v. Clayton, — N.C. App. —, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007).

As to precedence in trial prior to the 1971 amendment, see Roediger v. Sapos, 217 N.C. 95, 6 S.E.2d 801 (1940).

Late Fees Under Lease. — Commercial lessor that brought a suit for breach of the lease was not entitled to contractual late fees on sums that the lessee paid to the clerk of superior court under G.S. 42-34.1(b); the clerk's order was an "undertaking" under the statute, and thus the lease terms regarding late fees were no longer applicable. N.C. Indus. Capital, LLC v. Clayton, — N.C. App. —, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007).

Cited in Crockett v. Lowry, 8 N.C. App. 71, 173 S.E. 566 (1970); In re Nexus Communications, Inc., 55 Bankr. 596 (Bankr. E.D.N.C. 1985); Stanley v. Harvey, 90 N.C. App. 535, 369 S.E.2d 382 (1988).

OPINIONS OF ATTORNEY GENERAL

The only undertaking the General Assembly intended to require of summary ejectment defendants is the rent undertaking that this section provides they must make to suspend judgment when they appeal their cases to district court. See Opinion of Attorney General to Mr. Thurman B. Hampton, Secretary, Department of Crime Control and Public Safety, — N.C.A.G. — (February 10, 1995).

§ 42-34.1. Rent pending execution of judgment; post bond pending appeal.

(a) If the judgment in district court is against the defendant appellant and the defendant appellant does not appeal the judgment, the defendant appellant shall pay rent to the plaintiff for the time the defendant appellant remains in possession of the premises after the judgment is given. Rent shall be prorated if the judgment is executed before the day rent would become due under the terms of the lease. The clerk of court shall disperse any rent in arrears paid by the defendant appellant in accordance with a stipulation executed by all parties or, if there is no stipulation, in accordance with the judge's order.

(b) If the judgment in district court is against the defendant appellant and the defendant appellant appeals the judgment, it shall be sufficient to stay execution of the judgment if the defendant appellant posts a bond as provided in G.S. 42-34(b). If the defendant appellant fails to perfect the appeal or the appellate court upholds the judgment of the district court, the execution of the judgment shall proceed. The clerk of court shall not disperse any rent in arrears paid by the defendant appellant until all appeals have been resolved. (1998-125, s. 2.)

CASE NOTES

Applied in N.C. Indus. Capital, LLC v. Clayton, — N.C. App. —, 649 S.E.2d 14, 2007 N.C. App. LEXIS 1825 (2007).

§ 42-35. Restitution of tenant, if case quashed, etc., on appeal.

If the proceedings before the magistrate are brought before a district court and quashed, or judgment is given against the plaintiff, the district or other court in which final judgment is given shall, if necessary, restore the defendant to the possession, and issue such writs as are proper for that purpose. (1868-9, c. 156, s. 27; Code, s. 1774; Rev., s. 2009; C.S., s. 2374; 1971, c. 533, s. 9.)

CASE NOTES

When Tenant Restored to Possession. — When a party is put out of possession of land, or is compelled to pay money, under a judgment which is afterwards reserved or set aside, the court will restore the party to the possession of the land, and give him a remedy for the money thus paid. Lytle v. Lytle, 94 N.C. 522 (1886).

The writ of restitution lies to restore a party to the possession of property of which he has been deprived by some erroneous process; but it will not be employed to put one in possession where he has not been ousted by the court, nor to take possession from one who has acquired it pending litigation, but not by virtue of any order, judgment or process therein. Durham & N.R.R. v. North Carolina R.R., 108 N.C. 304, 12 S.E. 983 (1891).

Writ as Part of Judgment. — Whenever a party is put out of possession by process of law, and the proceedings are adjudged void, an order for a writ of restitution is a part of the judgment. Perry v. Tupper, 70 N.C. 538 (1874); Meroney v. Wright, 84 N.C. 336 (1881).

Where on trial of summary ejectment before a justice of peace (now magistrate), judgment was rendered for the plaintiff, who was put into possession, and on appeal the superior (now district) court decided against the plaintiff, upon the ground that the lease had not terminated, the defendant was entitled to a writ of restitution as a part of the judgment in his favor. Meroney v. Wright, 84 N.C. 336 (1881).

Cited in Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

§ 42-36. Damages to tenant for dispossession, if proceedings quashed, etc.

If, by order of the magistrate, the plaintiff is put in possession, and the proceedings shall afterwards be quashed or reversed, the defendant may recover damages of the plaintiff for his removal. (1868-9, c. 156, s. 30; Code, s. 1776; Rev., s. 2010; C.S., s. 2375; 1971, c. 533, s. 10.)

CASE NOTES

Eviction of Tenant in Federally Subsidized Low-Income Housing Project. — A tenant in a federally subsidized low-income housing project has an "entitlement" to continued occupancy and cannot be evicted until certain procedural protections have been afforded him. Where a tenant, upon eviction, was not afforded Housing and Urban Development eviction procedures, tenant's tenancy continued as a month-to-month tenancy without interruption. Pursuant to this section, the damages of the tenant which proximately flowed from her wrongful eviction were the loss of her security deposit, her moving expenses, the cost of transfer and storage of her furniture, and the loss of her entitlement to federal rental subsidy payments from the time of her eviction until she obtained a reversal of the eviction order. Goler

Metro. Apts., Inc. v. Williams, 43 N.C. App. 648, 260 S.E.2d 146 (1979), cert. denied, 299 N.C. 328, 265 S.E.2d 395 (1980).

Sufficient Allegations. — A complaint in an action by a tenant for wrongful eviction by summary proceedings, alleging that by reason thereof the tenant was deprived of his house and garden for the shelter and support of his family, and was distressed in body and mind and put to great mortification and shame and loss of employment, sufficiently alleged damages other than the loss of his crops. Burwell v. Brodie, 134 N.C. 540, 47 S.E. 47 (1904).

Assessment of Damages. — Under this section a tenant who secures the reversal of summary proceedings against him may have damages for eviction assessed in the original or in a separate action. Burwell v. Brodie, 134 N.C. 540, 47 S.E. 47 (1904).

Recovery by Landlord. — Where a landlord wrongfully evicts a tenant he can recover for advancements to the tenant before the eviction, but not for labor performed by himself after the eviction. Burwell v. Brodie, 134 N.C. 540, 47 S.E. 47 (1904).

Cited in Twin City Apts., Inc. v. Landrum, 45 N.C. App. 490, 263 S.E.2d 323 (1980).

§ 42-36.1. Lease or rental of manufactured homes.

The provisions of this Article shall apply to the lease or rental of manufactured homes, as defined in G.S. 143-145. (1971, c. 764; 1985, c. 487, s. 8.)

§ 42-36.1A. Judgments for possession more than 30 days old.

Prior to obtaining execution of a judgment that has been entered for more than 30 days for possession of demised premises, a landlord shall sign an affidavit stating that the landlord has neither entered into a formal lease with the defendant nor accepted rental money from the defendant for any period of time after entry of the judgment. (1995, c. 460, s. 7.)

§ 42-36.2. Notice to tenant of execution of writ for possession of property; storage of evicted tenant's personal property.

(a) When Sheriff May Remove Property. — Before removing a tenant's personal property from demised premises pursuant to a writ for possession of real property or an order, the sheriff shall give the tenant notice of the approximate time the writ will be executed. The time within which the sheriff shall have to execute the writ shall be no more than seven days from the sheriff's receipt thereof. The sheriff shall remove the tenant's property, as provided in the writ, no earlier than the time specified in the notice, unless:

(1) The landlord, or his authorized agent, signs a statement saying that the tenant's property can remain on the premises, in which case the sheriff shall simply lock the premises; or

(2) The landlord, or his authorized agent, signs a statement saying that the landlord does not want to eject the tenant because the tenant has paid all court costs charged to him and has satisfied his indebtedness to the landlord.

Upon receipt of either statement by the landlord, the sheriff shall return the writ unexecuted to the issuing clerk of court and shall make a notation on the writ of his reasons. The sheriff shall attach a copy of the landlord's statement to the writ. If the writ is returned unexecuted because the landlord signed a statement described in subdivision (2) of this subsection, the clerk shall make an entry of satisfaction on the judgment docket. If the sheriff padlocks, the costs of the proceeding shall be charged as part of the court costs.

(b) Sheriff May Store Property. — When the sheriff removes the personal property of an evicted tenant from demised premises pursuant to a writ or order the tenant shall take possession of his property. If the tenant fails or refuses to take possession of his property, the sheriff may deliver the property to any storage warehouse in the county, or in an adjoining county if no storage warehouse is located in that county, for storage. The sheriff may require the landlord to advance the cost of delivering the property to a storage warehouse plus the cost of one month's storage before delivering the property to a storage warehouse. If a landlord refuses to advance these costs when requested to do so by the sheriff, the sheriff shall not remove the tenant's property, but shall return the writ unexecuted to the issuing clerk of court with a notation thereon of his reason for not executing the writ. Except for the disposition of manufactured homes and their contents as provided in G.S. 42-25.9(g) and G.S. 44A-2(e2), within 10 days of the landlord's being placed in lawful possession by execution of a writ of possession and upon the tenant's request within that 10-day period, the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon. During the 10-day period after being placed in lawful possession by execution of a writ of possession, a landlord may move for storage purposes, but shall not throw away, dispose of, or sell any items of personal property remaining on the premises unless otherwise provided for in this Chapter. After the expiration of the 10-day period, the landlord may throw away, dispose of, or sell the property in accordance with the provisions of G.S. 42-25.9(g). If the tenant does not request release of the property within 10 days, all costs of summary ejectment, execution and storage proceedings shall be charged to the tenant as court costs and shall constitute a lien against the stored property or a claim against any remaining balance of the proceeds of a warehouseman's lien sale.

(c) Liability of the Sheriff. — A sheriff who stores a tenant's property pursuant to this section and any person acting under the sheriff's direction, control, or employment shall be liable for any claims arising out of the willful or wanton negligence in storing the tenant's property.

(d) Notice. — The notice required by subsection (a) shall, except in actions involving the lease of a space for a manufactured home as defined in G.S. 143-143.9(6), inform the tenant that failure to request possession of any property on the premises within 10 days of execution may result in the property being thrown away, disposed of, or sold. Notice shall be made by one of the following methods:

(1) By delivering a copy of the notice to the tenant or his authorized agent at least two days before the time stated in the notice for serving the writ;

(2) By leaving a copy of the notice at the tenant's dwelling or usual place of abode with a person of suitable age and discretion who resides there at least two days before the time stated in the notice for serving the writ; or

(3) By mailing a copy of the notice by first-class mail to the tenant at his last known address at least five days before the time stated in the notice for serving the writ. (1983, c. 672, s. 1; 1995, c. 460, s. 6; 1999-278, ss. 3, 4.)

CASE NOTES

Attempted Delivery Held Sufficient. — An attempt to deliver notice was sufficient where the evidence showed that the sheriff's department attempted to deliver notice of the writ two days prior to its execution and the party to be evicted evaded or prevented the delivery of the notice. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

Conversion Not Found. — Where the evidence sufficiently demonstrated that defendant obtained plaintiff's personal property in accord with statutorily mandated procedures under G.S. 45-21.29(1) and this section, it did not convert plaintiff's property by removing and storing it. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

ARTICLE 4.

Forms.

§ 42-37: Repealed by Session Laws 1971, c. 533, s. 11.

ARTICLE 4A.

Retaliatory Eviction.

§ 42-37.1. Defense of retaliatory eviction.

(a) It is the public policy of the State of North Carolina to protect tenants and other persons whose residence in the household is explicitly or implicitly known to the landlord, who seek to exercise their rights to decent, safe, and sanitary housing. Therefore, the following activities of such persons are protected by law:

(1) A good faith complaint or request for repairs to the landlord, his employee, or his agent about conditions or defects in the premises that the landlord is obligated to repair under G.S. 42-42;

(2) A good faith complaint to a government agency about a landlord's alleged violation of any health or safety law, or any regulation, code, ordinance, or State or federal law that regulates premises used for dwelling purposes;

(3) A government authority's issuance of a formal complaint to a landlord concerning premises rented by a tenant;

(4) A good faith attempt to exercise, secure or enforce any rights existing under a valid lease or rental agreement or under State or federal law; or

(5) A good faith attempt to organize, join, or become otherwise involved with, any organization promoting or enforcing tenants' rights.

(b) In an action for summary ejectment pursuant to G.S. 42-26, a tenant may raise the affirmative defense of retaliatory eviction and may present evidence that the landlord's action is substantially in response to the occurrence within 12 months of the filing of such action of one or more of the protected acts described in subsection (a) of this section.

(c) Notwithstanding subsections (a) and (b) of this section, a landlord may prevail in an action for summary ejectment if:

(1) The tenant breached the covenant to pay rent or any other substantial covenant of the lease for which the tenant may be evicted, and such breach is the reason for the eviction; or

(2) In a case of a tenancy for a definite period of time where the tenant has no option to renew the lease, the tenant holds over after expiration of the term; or

(3) The violation of G.S. 42-42 complained of was caused primarily by the willful or negligent conduct of the tenant, member of the tenant's household, or their guests or invitees; or

(4) Compliance with the applicable building or housing code requires demolition or major alteration or remodeling that cannot be accomplished without completely displacing the tenant's household; or

(5) The landlord seeks to recover possession on the basis of a good faith notice to quit the premises, which notice was delivered prior to the occurrence of any of the activities protected by subsections (a) and (b) of this section; or

(6) The landlord seeks in good faith to recover possession at the end of the tenant's term for use as the landlord's own abode, to demolish or make major alterations or remodeling of the dwelling unit in a manner that requires the complete displacement of the tenant's household, or to terminate for at least six months the use of the property as a rental dwelling unit. (1979, c. 807.)

Legal Periodicals. — For comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 Act to Clarify Landlord Eviction Remedies in Residential Tenancies, see 60 N.C.L. Rev. 885 (1982).

For article discussing self-help residential eviction by landlords in light of the Landlord Eviction Remedies Act, see 13 N.C. Cent. L.J. 195 (1982).

For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina," see 21 N.C. Cent. L.J. 79 (1995).

CASE NOTES

Cited in Sides v. Duke Hosp., 74 N.C. App. 331, 328 S.E.2d 818 (1985).

§ 42-37.2. Remedies.

(a) If the court finds that an ejectment action is retaliatory, as defined by this Article, it shall deny the request for ejectment; provided, that a dismissal of the request for ejectment shall not prevent the landlord from receiving payments for rent due or any other appropriate judgment.

(b) The rights and remedies created by this Article are supplementary to all existing common law and statutory rights and remedies. (1979, c. 807.)

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina," see 21 N.C. Cent. L.J. 79 (1995).

§ 42-37.3. Waiver.

Any waiver by a tenant or a member of his household of the rights and remedies created by this Article is void as contrary to public policy. (1979, c. 807.)

Article 5.

Residential Rental Agreements.

§ 42-38. Application.

This Article determines the rights, obligations, and remedies under a rental agreement for a dwelling unit within this State. (1977, c. 770, s. 1.)

Legal Periodicals. — For article, "North Carolina's Residential Rental Agreements Act: New Developments for Contract and Tort Liability in Landlord-Tenant Relations," see 56 N.C.L. Rev. 785 (1978).

For a survey of 1977 law on property, see 56 N.C.L. Rev. 1111 (1978).

For comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 Act to Clarify Landlord Eviction Remedies in Residential Tenancies, see 60 N.C.L. Rev. 885 (1982).

For article discussing self-help residential eviction by landlords in light of the Landlord Eviction Remedies Act, see 13 N.C. Cent. L.J. 195 (1982).

For note, "Property Law — A Fresh Look at Contractual Tenant Remedies Under the North Carolina Residential Rental Agreements Act," see 10 Campbell L. Rev. 167 (1987).

For note, "North Carolina Adopts Expansive Tenant Remedies for Violations of the Implied Warranty of Habitability," see 66 N.C.L. Rev. 1276 (1988).

For note, "An Update on Contract Damages When the Landlord Breaches the Implied Warranty of Habitability: Surratt v. Newton and Allen v. Simmons," 69 N.C.L. Rev. 1699 (1991).

For note, "When A Hotel Is Your Home, Is There Protection?," see 15 Campbell L. Rev. 295 (1993).

For essay, "Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act," see 78 N.C.L. Rev. 539 (2000).

CASE NOTES

Article Creates New Standard of Care. — Passage of this Article, the Residential Rental Agreements Act, created a new standard of care owed by landlord to tenant in this State. Brooks v. Francis, 57 N.C. App. 556, 291 S.E.2d 889 (1982).

Implied warranty of habitability is coextensive with this Article. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Implied Warranty of Habitability and Commercial Tenancy. — Doctrine of implied warranty of habitability did not apply to case involving commercial tenancy. K & S Enters. v. Kennedy Office Supply Co., 135 N.C. App. 260, 520 S.E.2d 122 (1999), aff'd, 351 N.C. 470, 527 S.E.2d 644 (2000).

Residents of Hotel. — Where each plaintiff resided in hotel pursuant to an oral lease and leased his apartment as his sole and permanent residence, some plaintiffs had resided in the building for as long as six years, and the payments for the apartments were made weekly and were referred to by each party as "rent," at a minimum, the evidence presented genuine issues of material fact regarding plaintiffs' status as residential tenants, and for this reason, summary judgment was improperly granted. Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

The evidence that premises rented to tenant never met city code standard was sufficient to allow the jury to decide whether tenant was entitled to rent abatement. Allen v. Simmons, 99 N.C. App. 636, 394 S.E.2d 478 (1990).

Cited in Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994); Lenz v. Ridgewood Assocs., 55 N.C. App. 115, 284 S.E.2d 702 (1981); Simmons v. C.W. Myers Trading Post, Inc., 56 N.C. App. 549, 290 S.E.2d 710 (1982); Borders v. Newton, 68 N.C. App. 768, 315 S.E.2d 731 (1984); Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990).

Governmental Official Can Be Sued in Both Official and Individual Capacity. — A government employee in his official capacity is not in privity with himself in his individual capacity for purposes of res judicata; therefore, a prior lawsuit against an individual in his official capacity does not bar later relitigation of claims against that same individual in his personal capacity. Andrews v. Daw, 201 F.3d 521, 2000 U.S. App. LEXIS 999 (4th Cir. 2000).

§ 42-39. Exclusions.

(a) The provisions of this Article shall not apply to transient occupancy in a hotel, motel, or similar lodging subject to regulation by the Commission for Public Health.

(a1) The provisions of this Article shall not apply to vacation rentals entered into under Chapter 42A of the General Statutes.

(b) Nothing in this Article shall apply to any dwelling furnished without charge or rent. (1973, c. 476, s. 128; 1977, c. 770, ss. 1, 2; 1999-420, s. 3; 2007-182, s. 2.)

Effect of Amendments. — Session Laws 2007-182, s. 2, effective July 5, 2007, substituted "Commission for Public Health" for "Commission for Health Services" in subsection (a).

Legal Periodicals. — For note, "When A Hotel Is Your Home, Is There Protection?," see 15 Campbell L. Rev. 295 (1993).

CASE NOTES

This Article expressly excludes from its application "transient occupancy in a hotel, motel, or similar lodging subject to the regulation by the Commissioner for Health

Services." Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

Residents of Hotel. — Where each plaintiff resided in hotel pursuant to an oral lease and leased his apartment as his sole and permanent residence, some plaintiffs had resided in the building for as long as six years, and the payments for the apartments were made weekly and were referred to by each party as "rent," at a minimum, the evidence presented genuine issues of material fact regarding plaintiffs' status as residential tenants, and for this reason, summary judgment was improperly granted. Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

§ 42-40. Definitions.

For the purpose of this Article, the following definitions shall apply:

(1) "Action" includes recoupment, counterclaim, defense, setoff, and any other proceeding including an action for possession.

(2) "Premises" means a dwelling unit, including mobile homes or mobile home spaces, and the structure of which it is a part and facilities and appurtenances therein and grounds, areas, and facilities normally held out for the use of residential tenants.

(3) "Landlord" means any owner and any rental management company, rental agency, or any other person having the actual or apparent authority of an agent to perform the duties imposed by this Article.

(4) "Protected tenant" means a tenant or household member who is a victim of domestic violence under Chapter 50B of the General Statutes or sexual assault or stalking under Chapter 14 of the General Statutes. (1977, c. 770, s. 1; 1979, c. 880, ss. 1, 2; 1999-420, s. 2; 2005-423, s. 5.)

Editor's Note. — Subdivision (4), added by Session Laws 2005-423, s. 5, effective October 1, 2005, is applicable to leases entered into or renewed on or after that date.

Legal Periodicals. — For note, "When A Hotel Is Your Home, Is There Protection?," see 15 Campbell L. Rev. 295 (1993).

For essay, "Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act," see 78 N.C.L. Rev. 539 (2000).

CASE NOTES

This Article provides protection to those persons occupying "a dwelling unit ... normally held out for the use of residential tenants who are using the dwelling as their primary residence." Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

Residents of Hotel. — Where each plaintiff resided in hotel pursuant to an oral lease and leased his apartment as his sole and permanent residence, some plaintiffs had resided in the building for as long as six years, and the payments for the apartments were made weekly and were referred to by each party as "rent," at a minimum, the evidence presented genuine issues of material fact regarding plaintiffs' status as residential tenants, and for this reason, summary judgment was improperly granted. Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

This section did not apply to an action involving personal injuries suffered by tenants when the deck of a rented beach cottage collapsed, as the house was not the tenants' primary residence. Conley v. Emerald Isle Realty, Inc., 350 N.C. 293, 513 S.E.2d 556 (1999).

Liability of Agent. — The broad, statutory definition of landlord makes irrelevant in determining the liability of an agent the common law distinction between disclosed and undisclosed principals. Thus a "person having the actual or apparent authority of an agent to perform the duties imposed" by this Article, would be subject to individual liability for plaintiffs' claim for breach of the implied warranty of habitability. Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

Whether agent who supervised the on-site manager of the building, gave him instructions on the daily operation of the premises, and had authority to order repairs and to put and keep the premises in a fit and habitable condition was "a person with the actual or apparent authority of an agent to perform the duties imposed" by this Article was a genuine issue of material fact. This evidence could support a finding that agent was a landlord as defined by this Article. Baker v. Rushing, 104 N.C. App. 240, 409 S.E.2d 108 (1991).

As agent/manager of property defendant had actual authority to repair and keep the premises in a fit and habitable condition and had failed to do so during plaintiff's tenancy; therefore, as landlord, defendant's violation of G.S. 42-42 subjected him to liability for rent abatement. Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990).

Plaintiff had a claim for rent abatement against landlord for the amount of rent paid, and no lesser measure of damages was recoverable against landlord merely because he was not the owner but was an agent. Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990).

Applicability to Vacation Home. — Subdivision (2) did not apply to a furnished vacation home as the home was not the tenants' primary residence. Conley v. Emerald Isle Realty, Inc., 130 N.C. App. 309, 502 S.E.2d 688 (1998), rev'd on other grounds, 350 N.C. 293, 513 S.E.2d 556 (1999).

Cited in Lenz v. Ridgewood Assocs., 55 N.C. App. 115, 284 S.E.2d 702 (1981).

§ 42-41. Mutuality of obligations.

The tenant's obligation to pay rent under the rental agreement or assignment and to comply with G.S. 42-43 and the landlord's obligation to comply with G.S. 42-42(a) shall be mutually dependent. (1977, c. 770, s. 1.)

CASE NOTES

Rent Abatement Allowed for Unfit Apartment. — A tenant is liable only for the reasonable value, if any, of his use of the property in its defective condition while he remains in possession. Accordingly, a tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with G.S. 42-42(a)) and the fair rental value of the premises in their unfit condition, for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Where the landlord breached the implied warranty of habitability under G.S. 42-42(a)(2), (3), the tenant was entitled to rent abatement under G.S. 42-41, and the trial court was to calculate the damages suffered by the tenant. Dean v. Hill, 171 N.C. App. 479, 615 S.E.2d 699, 2005 N.C. App. LEXIS 1275 (2005).

Punitive Damages Recoverable Only Where Conduct Is Tortious. — Punitive damages are not recoverable in an action for a contractual remedy based on breach of an implied warranty of habitability when the breach neither constitutes nor is accompanied by tortious conduct. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

§ 42-42. Landlord to provide fit premises.

(a) The landlord shall:

(1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code.

(2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.

(3) Keep all common areas of the premises in safe condition.

(4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord provided that notification of needed repairs is made to the landlord in writing by the tenant, except in emergency situations.

(5) Provide operable smoke detectors, either battery-operated or electrical, having an Underwriters' Laboratories, Inc., listing or other equivalent national testing laboratory approval, and install the smoke detectors in accordance with either the standards of the National Fire Protection Association or the minimum protection designated in the

manufacturer's instructions, which the landlord shall retain or provide as proof of compliance. The landlord shall replace or repair the smoke detectors within 15 days of receipt of notification if the landlord is notified of needed replacement or repairs in writing by the tenant. The landlord shall ensure that a smoke detector is operable and in good repair at the beginning of each tenancy. Unless the landlord and the tenant have a written agreement to the contrary, the landlord shall place new batteries in a battery-operated smoke detector at the beginning of a tenancy and the tenant shall replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord.

(6) If the landlord is charging for the cost of providing water or sewer service pursuant to G.S. 42-42.1 and has actual knowledge from either the supplying water system or other reliable source that water being supplied to tenants within the landlord's property exceeds a maximum contaminant level established pursuant to Article 10 of Chapter 130A of the General Statutes, provide notice that water being supplied exceeds a maximum contaminant level.

(b) The landlord is not released of his obligations under any part of this section by the tenant's explicit or implicit acceptance of the landlord's failure to provide premises complying with this section, whether done before the lease was made, when it was made, or after it was made, unless a governmental subdivision imposes an impediment to repair for a specific period of time not to exceed six months. Notwithstanding the provisions of this subsection, the landlord and tenant are not prohibited from making a subsequent written contract wherein the tenant agrees to perform specified work on the premises, provided that said contract is supported by adequate consideration other than the letting of the premises and is not made with the purpose or effect of evading the landlord's obligations under this Article. (1977, c. 770, s. 1; 1995, c. 111, s. 2; 1998-212, s. 17.16(i); 2004-143, s. 3.)

Legal Periodicals. — For note, "An Update on Contract Damages When the Landlord Breaches the Implied Warranty of Habitability: Surratt v. Newton and Allen v. Simmons," see 69 N.C.L. Rev. 1699 (1991).

For note, "When A Hotel Is Your Home, Is There Protection?," see 15 Campbell L. Rev. 295 (1993).

For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina," see 21 N.C. Cent. L.J. 79 (1995).

For essay, "Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act," see 78 N.C.L. Rev. 539 (2000).

CASE NOTES

Nature of Landlord's Duty. — The duty owed by a landlord is not the duty to warn of unsafe conditions, but rather the duty to correct unsafe conditions. Allen v. Equity & Investors Mgt. Corp., 56 N.C. App. 706, 289 S.E.2d 623 (1982).

Subdivision (a)(2) of this section imposes not a duty to warn, but a duty to correct unfit conditions. Brooks v. Francis, 57 N.C. App. 556, 291 S.E.2d 889 (1982).

This section did not supplant the landlords' common law duty to warn tenants of hazardous conditions of which landlords know or should know; therefore, the trial court erred when it dismissed plaintiff's claim against defendant-landlords where, prior to the house fire which killed one child and injured another, defendant-landlords never warned the tenants of the potential fire hazard and where they also failed to advise the tenants to vacate the premises because of the hazardous conditions. Prince v. Wright, 141 N.C. App. 262, 541 S.E.2d 191, 2000 N.C. App. LEXIS 1389 (2000).

Compliance with subdivision (a)(1) insulates landlords from liability for building design or construction. Collingwood v. General Elec. Real Estate Equities, Inc., 89 N.C. App. 656, 366 S.E.2d 901 (1988), rev'd on other grounds, 324 N.C. 63, 376 S.E.2d 425 (1989).

Subdivision (a)(2) of this section does

not alter the common law standard of ordinary and reasonable care. Bolkhir v. North Carolina State Univ., 321 N.C. 706, 365 S.E.2d 898 (1988).

Subdivisions (a)(2) and (a)(3) contemplate the repair or maintenance function and have no relevance to the construction and design of rented dwellings. Collingwood v. General Elec. Real Estate Equities, Inc., 89 N.C. App. 656, 366 S.E.2d 901 (1988), rev'd on other grounds, 324 N.C. 63, 376 S.E.2d 425 (1989).

North Carolina cases construing subdivision (a)(3) have applied it in context of safety maintenance of common areas. Collingwood v. General Elec. Real Estate Equities, Inc., 89 N.C. App. 656, 366 S.E.2d 901 (1988), rev'd on other grounds, 324 N.C. 63, 376 S.E.2d 425 (1989).

Where the conditions enumerated in subsection (a)(4) of this section are the same conditions which render the premises unfit and uninhabitable no written notice is required under the statute. Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990).

While subdivision (a)(4) of this section does require written notification of needed repairs involving electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by the landlord, the statute does not require written notification of these needed repairs if the repairs are necessary to put the premises in a fit and habitable condition or if the conditions constitute an emergency. Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990).

No Waiver of Right to Recover for Defect by Taking Possession. — The trial court's suggestion that defendant had waived any right to recover for the defect by taking possession of the premises with the knowledge of the heater's defect and repairs constituted an incorrect statement of the law under this section. Mendenhall-Moore Realtors v. Sedoris, 89 N.C. App. 486, 366 S.E.2d 534 (1988).

Defendant's subsequent acceptance of the premises while hot water heater had not been repaired did not waive defendant's rights to recover for the defect. Mendenhall-Moore Realtors v. Sedoris, 89 N.C. App. 486, 366 S.E.2d 534 (1988).

Tenant is entitled to decline taking possession of leased premises where a landlord fails to provide and maintain any services agreed upon at the time the lease was contracted. Mendenhall-Moore Realtors v. Sedoris, 89 N.C. App. 486, 366 S.E.2d 534 (1988).

Subdivisions (a)(2) and (a)(4) mean that when landlord has either expressed or implicitly agreed to provide service to or an appliance in demised property, same must be supplied or repaired in time for the tenant to take possession. In other words, this section entitles a tenant to the value of the bargain contained in the lease which includes full and adequate operation of services promised by the landlord. Mendenhall-Moore Realtors v. Sedoris, 89 N.C. App. 486, 366 S.E.2d 534 (1988).

The statute does not per se require the furnishing of hot water in residential premises. Mendenhall-Moore Realtors v. Sedoris, 89 N.C. App. 486, 366 S.E.2d 534 (1988).

A landlord has a duty to exercise due care in making repairs to leased premises. Bolkhir v. North Carolina State Univ., 321 N.C. 706, 365 S.E.2d 898 (1988).

Rental of premises for price that is "fair" or below fair rental value does not absolve the landlord of his statutory obligation to provide fit premises. The implied warranty of habitability entitles a tenant in possession of leased premises to the value of the premises as warranted, which may be greater than the rent agreed upon or paid. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

"Switching" of Screen and Glass Panels in Door of Apartment. — In action brought by plaintiff as guardian ad litem for his injured son for injuries suffered when he pushed through a glass panel installed by defendant's employee on storm door of an apartment rented by plaintiff, the Industrial Commission could find and conclude that the replacement of the screen panel with glass by defendant's employee was not reasonably prudent conduct under the circumstances presented, as defendant's employee had actual knowledge that plaintiff's children habitually opened the door in question by pushing forcefully on the middle panel, and the Court of Appeals erred in reversing the Commission's resolution of the question. Bolkhir v. North Carolina State Univ., 321 N.C. 706, 365 S.E.2d 898 (1988).

Violation as Evidence of Negligence. — A violation of the duty to maintain the premises in a fit and habitable condition is evidence of negligence. Brooks v. Francis, 57 N.C. App. 556, 291 S.E.2d 889 (1982).

A residential landlord in North Carolina owes his tenant a statutory duty of exercising ordinary or reasonable care to maintain common areas of the leased premises in a safe condition, and a violation of that duty is evidence of negligence. O'Neal v. Kellett, 55 N.C. App. 225, 284 S.E.2d 707 (1981).

Since the duty to keep the common areas in a safe condition implies the duty to make reasonable inspection and to correct an unsafe condition which a reasonable inspection might reveal, such a breach of duty would constitute actionable negligence on defendants' part and would support a verdict for plaintiff. Lenz v. Ridgewood Assocs., 55 N.C. App. 115, 284 S.E.2d 702 (1981), cert. denied, 305 N.C. 300, 290 S.E.2d 702 (1982).

Violations of this section are evidence of negligence. Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985), aff'd, 316 N.C. 259, 341 S.E.2d 523 (1986).

A violation of this statute amounts to evidence of negligence, not negligence per se, and as such requires the application of common law principles of negligence to determine a landlord's liability. Bradley v. Wachovia Bank & Trust Co., 90 N.C. App. 581, 369 S.E.2d 86 (1988).

Standard of Care Was Not Mere Compliance with Subdivision (a)(1). — Where complaint alleged that defendants were negligent in design and construction of apartment, where defendant argued standard of care was compliance with state and local building and housing codes, and where defendant pointed out that apartment's plans, specifications, materials, and construction conformed in all respects to subdivision (a)(1), compliance with statutory standard was only evidence of due care, and compliance with this section did not insulate landlords from liability for defects in building design or construction. Collingwood v. General Elec. Real Estate Equities, Inc., 324 N.C. 63, 376 S.E.2d 425 (1989).

Standard of reasonable care in the inspection and maintenance of leased property did not impose upon defendant lessor the duty to tear down walls for purposes of inspection without notice or any suggestion of a defective condition which allegedly was the cause of a house-destroying fire. Bradley v. Wachovia Bank & Trust Co., 90 N.C. App. 581, 369 S.E.2d 86 (1988).

Standard of Care as to Habitability. — Absent an express agreement to install or repair protective window screens, landlord not liable for injuries to child falling through window. Landlord has no common law duty to provide or maintain such screens. Mudusar v. V.G. Murray & Co., 100 N.C. App. 395, 396 S.E.2d 325 (1990).

As agent/manager of property defendant had actual authority to repair and keep the premises in a fit and habitable condition and had failed to do so during plaintiff's tenancy; therefore, as landlord, defendant's violation of this section subjected him to liability for rent abatement. Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990).

Breach of the Implied Warranty of Habitability. — Court's conclusion that the amount of rent owed by defendant abated in compensation for plaintiff's violations of housing code, pursuant to this section, mandated a further conclusion that plaintiff violated subsections (a)(1), (2), and (3) and hence breached the implied warranty of habitability. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

Trial court should have found in favor of the tenant in the tenant's breach of the implied warranty of habitability claim, pursuant to G.S. 42-42(a)(2), (3), as the flooring was unstable and there was a large hole in the floor, a large sewage leak from the neighbor caused a noxious smell, sparks emitted from a breaker box, and these problems violated the housing code. Dean v. Hill, 171 N.C. App. 479, 615 S.E.2d 699, 2005 N.C. App. LEXIS 1275 (2005).

No Breach of Implied Warranty of Habitability. — Failure of landlord or building manager to install or maintain window screens not a breach of implied warranty of habitability since screens did comply with local housing code. Mudusar v. V.G. Murray & Co., 100 N.C. App. 395, 396 S.E.2d 325 (1990).

The proper measure of damages in a rent abatement action based on a breach of the implied warranty of habitability is the difference between the fair rental value of the property in a warranted condition and the fair rental value of the property in its unwarranted condition, provided, however, the damages do not exceed the total amount of rent paid by the tenant; and the tenant is entitled to any special and consequential damages alleged and proved. Von Pettis Realty, Inc. v. McKoy, 135 N.C. App. 206, 519 S.E.2d 546 (1999).

Implied Warranty of Habitability and Commercial Tenancy. — Doctrine of implied warranty of habitability did not apply to case involving commercial tenancy. K & S Enters. v. Kennedy Office Supply Co., 135 N.C. App. 260, 520 S.E.2d 122 (1999), aff'd, 351 N.C. 470, 527 S.E.2d 644 (2000).

Tenant's Contributory Negligence Held a Jury Question. — In a civil action wherein a tenant was injured when he stepped into a hole under the landlord's control, it could not be said as a matter of law whether the surrounding circumstances — darkness, a growth of grass around the hole, the lapse of time between the tenant's prior awareness of the hole and his injury — were sufficient to excuse the tenant's alleged contributory negligence, and the issue of contributory negligence should have been decided by the jury. Baker v. Duhan, 75 N.C. App. 191, 330 S.E.2d 53 (1985).

Rent Abatement Allowed for Unfit Apartment. — A tenant is liable only for the reasonable value, if any, of his use of the property in its defective condition while he remains in possession. Accordingly, a tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with subsection (a)) and the fair rental value of the premises in their unfit condition, for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Tenants may bring an action for breach of the implied warranty of habitability, seeking rent abatement, based on their landlord's noncompliance with subsection (a). The rent abatement is calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with subsection (a)) and the fair rental value of the premises in their unfit condition ("as is") plus any special and consequential damages alleged and proved. Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692, cert. denied, 321 N.C. 296, 362 S.E.2d 779 (1987).

Where the court should have found that plaintiff breached the implied warranty of habitability it was error to not award abatement damages to defendants for that breach. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

Where the landlord breached the implied warranty of habitability under G.S. 42-42(a)(2), (3), the tenant was entitled to rent abatement under G.S. 42-41, and the trial court was to calculate the damages suffered by the tenant. Dean v. Hill, 171 N.C. App. 479, 615 S.E.2d 699, 2005 N.C. App. LEXIS 1275 (2005).

Efforts to Repair Did Not Preclude Rent Abatement. — Where plaintiff violated this section, the trial court could not deny rent abatements for two months because of plaintiff's reasonable efforts to repair during those months. Creekside Apts. v. Poteat, 116 N.C. App. 26, 446 S.E.2d 826, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

Determination of Fair Rental Value of Premises in Calculating Rent Abatement. — The fair rental value of property may be determined by proof of what the premises would rent for in the open market, or by evidence of other facts from which the fair rental value of the premises may be determined; the "other facts" include the dilapidated condition of the premises — indirect evidence of fair rental value. Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692, cert. denied, 321 N.C. 296, 362 S.E.2d 779 (1987).

Direct evidence of fair rental value is an opinion of what the premises would rent for on the open market from either an expert or a witness qualified by familiarity with the specific piece of property. Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692, cert. denied, 321 N.C. 296, 362 S.E.2d 779 (1987).

A party is not required to put on direct evidence to show fair rental value. Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692, cert. denied, 321 N.C. 296, 362 S.E.2d 779 (1987).

The rent agreed upon by the parties when entering into the lease is some evidence of the property's "as warranted" fair rental value, but it is not binding. Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692, cert. denied, 321 N.C. 296, 362 S.E.2d 779 (1987).

The illegality of re-renting a unit on the open market does not automatically reduce the unit's fair rental value to zero. The measure of the unit's fair rental value is not the price at which the owner could lawfully rent the unit to a new tenant in the open market, but the price at which he could rent it if it were lawful for him to do so; thus, the trial court did not err by refusing to find the fair rental value of the plaintiffs' units was zero during the period of time between the repair deadline and the date of repair. Cotton v. Stanley, 86 N.C. App. 534, 358 S.E.2d 692, cert. denied, 321 N.C. 296, 362 S.E.2d 779 (1987).

Three-Year Statute of Limitations Governs Rent Abatement. — Rent abatement sought by plaintiffs under the Residential Rental Agreements Act, G.S. 42-38 et seq., a remedy which is not spelled out but which is implied from the statute, and which is not punitive but rather in the nature of a restitutionary remedy, was governed by three-year statute of limitations pursuant to G.S. 1-52(1) and (2). Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Damages for Rent Abatement. — Damages for rent abatement can only include those amounts actually paid by plaintiff for substandard housing. Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990).

Nothing in the Residential Rental Agreement Act precludes a tenant from recovering damages for breach of the covenant of habitability where she has withheld rent; however, damages for rent abatement can only include those amounts actually paid by defendant for substandard housing. Allen v. Simmons, 99 N.C. App. 636, 394 S.E.2d 478 (1990).

Plaintiff had a claim for rent abatement against landlord for amount of rent paid, and no lesser measure of damages was recoverable against landlord merely because he was not the owner but was an agent. Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990).

Jury's award of $6,400.00 fell within the permissible range of damages in a rent abatement case, and the trial court therefore correctly denied plaintiff's motion for a new trial on the issue of damages. Von Pettis Realty, Inc. v. McKoy, 135 N.C. App. 206, 519 S.E.2d 546 (1999).

Consequential or Special Damages. — Damages for rent abatement are limited to the amount of rent actually paid by the tenant for the substandard housing, plus any additional special or consequential damages alleged and proved. Foy v. Spinks, 105 N.C. App. 534, 414 S.E.2d 87 (1992).

Punitive Damages Recoverable Only Where Conduct Is Tortious. — Punitive damages are not recoverable in an action for a contractual remedy based on breach of an implied warranty of habitability when the breach neither constitutes nor is accompanied by tortious conduct. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Violations of subsection (a) constitute a continuing offense. Thus, plaintiffs would be entitled to recover for any period of their occupancy (following the three-year limit of the statute of limitations) during which they could establish that the condition of the premises was substandard as measured by the statute, regardless of whether the conditions complained of first existed prior to that time. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Violation of Housing Code. — Where tenant found many of the conditions in her residence were in violation of the housing code at the time she moved in the house and that landlord's attempts at correcting those conditions were either unsuccessful or temporary, on these facts there was sufficient evidence to go to the jury on whether the house was uninhabitable during the period in which tenant did in fact pay rent. Allen v. Simmons, 99 N.C. App. 636, 394 S.E.2d 478 (1990).

The evidence that premises rented to tenant never met city code standard was sufficient to allow the jury to decide whether tenant was entitled to rent abatement. Allen v. Simmons, 99 N.C. App. 636, 394 S.E.2d 478 (1990).

Damage to Tenant's Personal Property. — Trial court did not err when it awarded damages for a broken windshield where a tenant informed the landlord that a tree in the yard of a rented home was rotten and that it posed a danger to her and her family; thereafter, the landlord took no action to remove the defective tree from the property, and during a storm, a limb broke off the tree and damaged the windshield of the tenant's car. Pierce v. Reichard, 163 N.C. App. 294, 593 S.E.2d 787, 2004 N.C. App. LEXIS 382 (2004).

Cited in Jackson v. Housing Auth., 73 N.C. 363, 341 S.E.2d 523 (1986); Conley v. Emerald Isle Realty, Inc., 350 N.C. 293, 513 S.E.2d 556 (1999); Wilson v. Jefferson-Green, Inc., 136 N.C. App. 824, 526 S.E.2d 506, 2000 N.C. App. LEXIS 161 (2000).

§ 42-42.1. Water Conservation.

(a) For the purpose of encouraging water conservation, pursuant to a written rental agreement, a landlord may charge for the cost of providing water or sewer service to tenants who occupy the same contiguous premises pursuant to G.S. 62-110(g).

(b) The landlord may not disconnect or terminate the tenant's water or sewer services due to the tenant's nonpayment of the amount due for water or sewer services. (2004-143, s. 4.)

§ 42-42.2. Victim protection — nondiscrimination.

A landlord shall not terminate a tenancy, fail to renew a tenancy, refuse to enter into a rental agreement, or otherwise retaliate in the rental of a dwelling based substantially on: (i) the tenant, applicant, or a household member's status as a victim of domestic violence, sexual assault, or stalking; or (ii) the tenant or applicant having terminated a rental agreement under G.S. 42-45.1. Evidence provided to the landlord of domestic violence, sexual assault, or stalking may include any of the following:

(1) Law enforcement, court, or federal agency records or files.
(2) Documentation from a domestic violence or sexual assault program.
(3) Documentation from a religious, medical, or other professional. (2005-423, s. 6.)

Editor's Note. — Session Laws 2005-423, s. 12, made this section effective October 1, 2005, and applicable to leases entered into or renewed on or after that date.

This section was originally enacted by Session Laws 2005-423, s. 6, as G.S. 42-42.1 and was recodified as this section at the direction of the Revisor of Statutes.

§ 42-42.3. Victim protection — change locks.

(a) If the perpetrator of domestic violence, sexual assault, or stalking is not a tenant in the same dwelling unit as the protected tenant, a tenant of a dwelling may give oral or written notice to the landlord that a protected tenant is a victim of domestic violence, sexual assault, or stalking and may request that the locks to the dwelling unit be changed. A protected tenant is not required to provide documentation of the domestic violence, sexual assault, or stalking to initiate the changing of the locks, pursuant to this subsection. A landlord who receives a request under this subsection shall change the locks to the protected tenant's dwelling unit or give the protected tenant permission to change the locks within 48 hours.

(b) If the perpetrator of the domestic violence, sexual assault, or stalking is a tenant in the same dwelling unit as the victim, any tenant or protected tenant of a dwelling unit may give oral or written notice to the landlord that a protected tenant is a victim of domestic violence, sexual assault, or stalking and may request that the locks to the dwelling unit be changed. In these circumstances, the following shall apply:

(1) Before the landlord or tenant changes the locks under this subsection, the tenant must provide the landlord with a copy of an order issued by a court that orders the perpetrator to stay away from the dwelling unit.

(2) Unless a court order allows the perpetrator to return to the dwelling to retrieve personal belongings, the landlord has no duty under the rental agreement or by law to allow the perpetrator access to the dwelling unit, to provide keys to the perpetrator, or to provide the perpetrator access to the perpetrator's personal property within the dwelling unit once the landlord has been provided with a court order requiring the perpetrator to stay away from the dwelling. If a landlord complies with this section, the landlord is not liable for civil damages, to a perpetrator excluded from the dwelling unit, for loss of use of the dwelling unit or loss of use or damage to the perpetrator's personal property.

(3) The perpetrator who has been excluded from the dwelling unit under this subsection remains liable under the lease with any other tenant of the dwelling unit for rent or damages to the dwelling unit.

A landlord who receives a request under this subsection shall change the locks to the protected tenant's dwelling unit or give the protected tenant permission to change the locks within 72 hours.

(c) The protected tenant shall bear the expense of changing the locks. If a landlord fails to act within the required time, the protected tenant may change the locks without the landlord's permission. If the protected tenant changes the locks, the protected tenant shall give a key to the new locks to the landlord within 48 hours of the locks being changed. (2005-423, s. 6.)

Editor's Note. — Session Laws 2005-423, s. 12, made this section effective October 1, 2005, and applicable to leases entered into or renewed on or after that date.

This section was originally enacted by Session Laws 2005-423, s. 6, as G.S. 42-42.2 and was recodified as this section at the direction of the Revisor of Statutes.

§ 42-43. Tenant to maintain dwelling unit.

(a) The tenant shall:

(1) Keep that part of the premises that the tenant occupies and uses as clean and safe as the conditions of the premises permit and cause no unsafe or unsanitary conditions in the common areas and remainder of the premises that the tenant uses.

(2) Dispose of all ashes, rubbish, garbage, and other waste in a clean and safe manner.
(3) Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits.
(4) Not deliberately or negligently destroy, deface, damage, or remove any part of the premises, nor render inoperable the smoke detector provided by the landlord, or knowingly permit any person to do so.
(5) Comply with any and all obligations imposed upon the tenant by current applicable building and housing codes.
(6) Be responsible for all damage, defacement, or removal of any property inside a dwelling unit in the tenant's exclusive control unless the damage, defacement or removal was due to ordinary wear and tear, acts of the landlord or the landlord's agent, defective products supplied or repairs authorized by the landlord, acts of third parties not invitees of the tenant, or natural forces.
(7) Notify the landlord, in writing, of the need for replacement of or repairs to a smoke detector. The landlord shall ensure that a smoke detector is operable and in good repair at the beginning of each tenancy. Unless the landlord and the tenant have a written agreement to the contrary, the landlord shall place new batteries in a battery-operated smoke detector at the beginning of a tenancy and the tenant shall replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered as negligence on the part of the tenant or the landlord.

(b) The landlord shall notify the tenant in writing of any breaches of the tenant's obligations under this section except in emergency situations. (1977, c. 770, s. 1; 1995, c. 111, s. 3; 1998-212, s. 17.16(j).)

CASE NOTES

Cited in Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

§ 42-44. General remedies, penalties, and limitations.

(a) Any right or obligation declared by this Chapter is enforceable by civil action, in addition to other remedies of law and in equity.

(a1) If a landlord fails to provide, install, replace, or repair a smoke detector under the provisions of G.S. 42-42(a)(5) within 30 days of having received written notice from the tenant or any agent of State or local government of the landlord's failure to do so, the landlord shall be responsible for an infraction and shall be subject to a fine of not more than two hundred fifty dollars ($250.00) for each violation. The landlord may temporarily disconnect a smoke detector in a dwelling unit or common area for construction or rehabilitation activities when such activities are likely to activate the smoke detector or make it inactive.

(a2) If a smoke detector is disabled or damaged, other than through actions of the landlord, the landlord's agents, or acts of God, the tenant shall reimburse the landlord the reasonable and actual cost for repairing or replacing the smoke detector within 30 days of having received written notice from the landlord or any agent of State or local government of the need for the tenant to make such reimbursement. If the tenant fails to make reimbursement within 30 days, the tenant shall be responsible for an infraction and subject to a fine of not more than one hundred dollars ($100.00) for each violation. The tenant may temporarily disconnect a smoke detector in a dwelling unit to replace the batteries or when it has been inadvertently activated.

(b) Repealed by Session Laws 1979, c. 820, s. 8.

(c) The tenant may not unilaterally withhold rent prior to a judicial determination of a right to do so.

(d) A violation of this Article shall not constitute negligence per se. (1977, c. 770, s. 1; 1979, c. 820, s. 8; 1998-212, s. 17.16(k).)

CASE NOTES

Common-Law Standards of Care Retained. — By providing that a violation of this Article does not constitute negligence per se, the General Assembly left intact established common-law standards of ordinary and reasonable care. Brooks v. Francis, 57 N.C. App. 556, 291 S.E.2d 889 (1982).

By providing that a violation of this article does not constitute negligence per se, the General Assembly left intact established common-law standards of ordinary and reasonable care, the violation being only evidence of negligence. Lenz v. Ridgewood Assocs., 55 N.C. App. 115, 284 S.E.2d 702 (1981), cert. denied, 305 N.C. 300, 290 S.E.2d 702 (1982).

Violation as Evidence of Negligence. — Violation of the duty to maintain premises in fit and habitable condition is evidence of negligence. Brooks v. Francis, 57 N.C. App. 556, 291 S.E.2d 889 (1982).

Rent Abatement Allowed for Unfit Apartment. — A tenant is liable only for the reasonable value, if any, of his use of the property in its defective condition while he remains in possession. Accordingly, a tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with subsection (a)) and the fair rental value of the premises in their unfit condition, for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Damages for Rent Abatement. — Nothing in the Residential Rental Agreement Act precludes a tenant from recovering damages for breach of the covenant of habitability where she has withheld rent; however, damages for rent abatement can only include those amounts actually paid by defendant for substandard housing. Allen v. Simmons, 99 N.C. App. 636, 394 S.E.2d 478 (1990).

Three-Year Statute of Limitations Governs Rent Abatement. — Rent abatement sought by plaintiffs under the Residential Rental Agreements Act, G.S. 42-38 et seq., a remedy which is not spelled out but which is implied from the statute, and which is not punitive but rather in the nature of a restitutionary remedy, was governed by three-year statute of limitations pursuant to G.S. 1-52(1) and (2). Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Punitive Damages Recoverable Only Where Conduct Is Tortious. — Punitive damages are not recoverable in an action for a contractual remedy based on breach of an implied warranty of habitability when the breach neither constitutes nor is accompanied by tortious conduct. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

Directed Verdict Properly Entered on Issue of Fraud. — Where, prior to tenant's agreement to rent a house landlord's agent represented that he would make the needed repairs, and where the evidence showed that landlord agent did in fact make the repairs albeit not to the satisfaction of defendant, the court found no evidence that at the time of his promise landlord intended not to make the repairs he was promising to make, and properly entered directed verdict on the issue of fraud. Allen v. Simmons, 99 N.C. App. 636, 394 S.E.2d 478 (1990).

Housing Code Violations. — Where tenant found many of the conditions in her residence were in violation of the housing code at the time she moved in the house and that landlord's attempts at correcting those conditions were either unsuccessful or temporary, on these facts there was sufficient evidence to go to the jury on whether the house was uninhabitable during the period in which tenant did in fact pay rent. Allen v. Simmons, 99 N.C. App. 636, 394 S.E.2d 478 (1990).

The evidence that premises rented to tenant never met city code standard was sufficient to allow the jury to decide whether tenant was entitled to rent abatement. Allen v. Simmons, 99 N.C. App. 636, 394 S.E.2d 478 (1990).

Rent Money Paid by Tenants Under a Lease Belonged to the Owners. — Rent money paid by tenants under a lease belonged to the owners of the leased property; lawyers who agreed to receive the rent payment on behalf of their clients, the owners, were obligated to disburse the owners' funds to them on request and to not disclose the disbursement to the tenants. Thus, the tenants' suit against the lawyers, alleging a breach of a fiduciary obligation based on the disbursement of the rent money to the owners, was properly dismissed.

Noblot v. Timmons, 177 N.C. App. 258, 628 S.E.2d 413, 2006 N.C. App. LEXIS 861 (2006).

Applied in Jackson v. Housing Auth., 73 N.C. App. 363, 326 S.E.2d 295 (1985).

Cited in Collingwood v. General Elec. Real Estate Equities, Inc., 324 N.C. 63, 376 S.E.2d 425 (1989).

§ 42-45. Early termination of rental agreement by military personnel.

(a) Any member of the United States Armed Forces who (i) is required to move pursuant to permanent change of station orders to depart 50 miles or more from the location of the dwelling unit, or (ii) is prematurely or involuntarily discharged or released from active duty with the United States Armed Forces, may terminate his rental agreement for a dwelling unit by providing the landlord with a written notice of termination to be effective on a date stated in the notice that is at least 30 days after the landlord's receipt of the notice. The notice to the landlord must be accompanied by either a copy of the official military orders or a written verification signed by the member's commanding officer.

(a1) Any member of the United States Armed Forces who is deployed with a military unit for a period of not less than 90 days may terminate his rental agreement for a dwelling unit by providing the landlord with a written notice of termination. The notice to the landlord must be accompanied by either a copy of the official military orders or a written verification signed by the member's commanding officer. Termination of a lease pursuant to this subsection is effective 30 days after the first date on which the next rental payment is due or 45 days after the landlord's receipt of the notice, whichever is shorter, and payable after the date on which the notice of termination is delivered.

(a2) Upon termination of a rental agreement under this section, the tenant is liable for the rent due under the rental agreement prorated to the effective date of the termination payable at such time as would have otherwise been required by the terms of the rental agreement. The tenant is not liable for any other rent or damages due to the early termination of the tenancy except the liquidated damages provided in subsection (b) of this section. If a member terminates the rental agreement pursuant to this section 14 or more days prior to occupancy, no damages or penalties of any kind shall be due.

(b) In consideration of early termination of the rental agreement, the tenant is liable to the landlord for liquidated damages provided the tenant has completed less than nine months of the tenancy and the landlord has suffered actual damages due to loss of the tenancy. The liquidated damages shall be in an amount no greater than one month's rent if the tenant has completed less than six months of the tenancy as of the effective date of termination, or one-half of one month's rent if the tenant has completed at least six but less than nine months of the tenancy as of the effective date of termination.

(c) The provisions of this section may not be waived or modified by the agreement of the parties under any circumstances. Nothing in this section shall affect the rights established by G.S. 42-3. (1987, c. 478, s. 1; 2005-445, s. 4.1.)

§ 42-45.1. Early termination of rental agreement by victims of domestic violence, sexual assault, or stalking.

(a) Any protected tenant may terminate his or her rental agreement for a dwelling unit by providing the landlord with a written notice of termination to be effective on a date stated in the notice that is at least 30 days after the landlord's receipt of the notice. The notice to the landlord shall be accompanied by either: (i) a copy of a valid order of protection issued by a court pursuant to Chapter 50B or 50C of the General Statutes, other than an ex parte order, (ii) a criminal order that restrains a person from contact with a protected tenant, or (iii) a valid Address Confidentiality Program card issued pursuant to G.S. 15C-4 to the victim or a minor member of the tenant's household. A victim of domestic violence or sexual assault must submit a copy of a safety plan with the notice to terminate. The safety plan, dated during the term of the tenancy to be terminated, must be provided by a domestic violence or sexual assault program which substantially complies with the requirements set forth in G.S. 50B-9 and must recommend relocation of the protected tenant.

(b) Upon termination of a rental agreement under this section, the tenant who is released from the rental agreement pursuant to subsection (a) of this section is liable for the rent due under the rental agreement prorated to the effective date of the termination and payable at the time that would have been required by the terms of the rental agreement. The tenant is not liable for any other rent or fees due only to the early termination of the tenancy. If, pursuant to this section, a tenant terminates the rental agreement 14 days or more before occupancy, the tenant is not subject to any damages or penalties.

(c) Notwithstanding the release of a protected tenant from a rental agreement under subsection (a) of this section, or the exclusion of a perpetrator of domestic violence, sexual assault, or stalking by court order, if there are any remaining tenants residing in the dwelling unit, the tenancy shall continue for those tenants. The perpetrator who has been excluded from the dwelling unit under court order remains liable under the lease with any other tenant of the dwelling unit for rent or damages to the dwelling unit.

(d) The provisions of this section may not be waived or modified by agreement of the parties. (2005-423, s. 7.)

Editor's Note. — Session Laws 2005-423, s. 12, made this section effective October 1, 2005, and applicable to leases entered into or renewed on or after that date.

§ 42-45.2. Early termination of rental agreement by military and tenants residing in certain foreclosed property.

Any tenant who resides in residential real property containing less than 15 rental units that is being sold in a foreclosure proceeding under Article 2A of Chapter 45 of the General Statutes may terminate the rental agreement for the dwelling unit after receiving notice pursuant to G.S. 45-21.17(4) by providing the landlord with a written notice of termination to be effective on a date stated in the notice that is at least 10 days after the date of the notice of sale. Upon termination of a rental agreement under this section, the tenant is liable for the rent due under the rental agreement prorated to the effective date of the termination payable at the time that would have been required by the terms of the rental agreement. The tenant is not liable for any other rent or damages due only to the early termination of the tenancy. (2007-353, s. 3.)

Editor's Note. — Session Laws 2007-353, s. 6, made this section effective October 1, 2007, and applicable to residential rental agreements entered into or renewed on or after that date.

§ 42-46. Late fees.

(a) In all residential rental agreements in which a definite time for the payment of the rent is fixed, the parties may agree to a late fee not inconsistent with the provisions of this subsection, to be chargeable only if any rental payment is five days or more late. If the rent:

(1) Is due in monthly installments, a landlord may charge a late fee not to exceed fifteen dollars ($15.00) or five percent (5%) of the monthly rent, whichever is greater.

(2) Is due in weekly installments, a landlord may charge a late fee not to exceed four dollars ($4.00) or five percent (5%) of the weekly rent, whichever is greater.

(3) Is subsidized by the United States Department of Housing and Urban Development, by the United States Department of Agriculture, by a State agency, by a public housing authority, or by a local government, any late fee shall be calculated in accordance with subdivisions (1) and (2) of this subsection on the tenant's share of the contract rent only, and the rent subsidy shall not be included.

(b) A late fee under this section may be imposed only one time for each late rental payment. A late fee for a specific late rental payment may not be deducted from a subsequent rental payment so as to cause the subsequent rental payment to be in default.

(c) Any provision of a residential rental agreement contrary to the provisions of this section is against the public policy of this State and therefore void and unenforceable.

(d) A lessor shall not charge a late fee to a lessee because of the lessee's failure to pay for water or sewer services provided pursuant to G.S. 62-110(g). (1987, c. 530, s. 1; 2001-502, s. 4; 2003-370, s. 1; 2004-143, s. 5.)

CASE NOTES

Administration Fees. — When a residential lease provided for an administrative fee to be charged to a tenant if legal papers were filed against the tenant, this was not a late fee governed by G.S. 42-46(a), as it was reasonably related to the additional expense incurred by the landlord and did not relate solely to the rent being late. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Excessive Late Fees. — Residential lease providing for a late fee greater than five percent of the rental obligation violated G.S. 42-46(a), even though the late fees that the tenant was actually charged did not violate the statute; the late fee provision was void and unenforceable as against public policy. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Residential lease provision stating a late fee exceeding five percent of the rent payment, which, therefor, violated the statutory limitation on late fees in G.S. 42-46(a), could support a finding that the landlord violated G.S. 75-54(4) by falsely representing the amount of a debt against the tenant when the landlord requested that late fee in three summary ejectment complaints, or "legal proceedings," against the tenant. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

Residential lease provision stating a late fee exceeding five percent of the rent payment, which, therefore, violated the statutory limitation on late fees in G.S. 42-46(a), could support a finding that the landlord violated G.S. 75-55(2) by collecting or attempting to collect a charge incidental to the principal debt to which the landlord was not legally entitled. Friday v. United Dominion Realty Trust, Inc., 155 N.C. App. 671, 575 S.E.2d 532, 2003 N.C. App. LEXIS 22 (2003).

§§ 42-47 through 42-49: Reserved for future codification purposes.

ARTICLE 6.

Tenant Security Deposit Act.

§ 42-50. Deposits from the tenant.

Security deposits from the tenant in residential dwelling units shall be deposited in a trust account with a licensed and insured bank or savings institution located in the State of North Carolina or the landlord may, at his option, furnish a bond from an insurance company licensed to do business in North Carolina. The security deposits from the tenant may be held in a trust account outside of the State of North Carolina only if the landlord provides the tenant with an adequate bond in the amount of said deposits. The landlord or his agent shall notify the tenant within 30 days after the beginning of the lease term of the name and address of the bank or institution where his deposit is currently located or the name of the insurance company providing the bond. (1977, c. 914, s. 1.)

Legal Periodicals. — For a survey of 1977 law on property, see 56 N.C.L. Rev. 1111 (1978).

For comment on landlords' eviction remedies in the light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), and the 1981 Act to Clarify Landlord Eviction Remedies in Residential Tenancies, see 60 N.C.L. Rev. 885 (1982).

For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina," see 21 N.C. Cent. L.J. 79 (1995).

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Defendants' unequivocal admission in their answer that they did "accept a security deposit" constituted a judicial admission conclusively establishing the fact, despite defendants' contention that the deposit was not a security deposit, but was simply to "hold the house." Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984), overruled on other grounds, Stanley v. Moore, 339 N.C. 717, 454 S.E.2d 225 (1995).

Cited in Borders v. Newton, 68 N.C. App. 768, 315 S.E.2d 731 (1984).

§ 42-51. Permitted uses of the deposit.

Security deposits for residential dwelling units shall be permitted only for the tenant's possible nonpayment of rent and costs for water or sewer services provided pursuant to G.S. 62-110(g), damage to the premises, nonfulfillment of rental period, any unpaid bills that become a lien against the demised property due to the tenant's occupancy, costs of re-renting the premises after breach by the tenant, costs of removal and storage of tenant's property after a summary ejectment proceeding or court costs in connection with terminating a tenancy. The security deposit shall not exceed an amount equal to two weeks' rent if a tenancy is week to week, one and one-half months' rent if a tenancy is month to month, and two months' rent for terms greater than month to month. These deposits must be fully accounted for by the landlord as set forth in G.S. 42-52. (1977, c. 914, s. 1; 1983, c. 672, s. 3; 2001-502, s. 5; 2004-143, s. 6.)

CASE NOTES

Applied in Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984); Cla-Mar Mgt. v. Harris, 76 N.C. App. 300, 332 S.E.2d 495 (1985).

§ 42-52. Landlord's obligations.

Upon termination of the tenancy, money held by the landlord as security may be applied as permitted in G.S. 42-51 or, if not so applied, shall be refunded to the tenant. In either case the landlord in writing shall itemize any damage and mail or deliver same to the tenant, together with the balance of the security deposit, no later than 30 days after termination of the tenancy and delivery of possession by the tenant. If the tenant's address is unknown the landlord shall apply the deposit as permitted in G.S. 42-51 after a period of 30 days and the landlord shall hold the balance of the deposit for collection by the tenant for at least six months. The landlord may not withhold as damages part of the security deposit for conditions that are due to normal wear and tear nor may the landlord retain an amount from the security deposit which exceeds his actual damages. (1977, c. 914, s. 1.)

§ 42-53. Pet deposits.

Notwithstanding the provisions of this section, the landlord may charge a reasonable, nonrefundable fee for pets kept by the tenant on the premises. (1977, c. 914, s. 1.)

§ 42-54. Transfer of dwelling units.

Upon termination of the landlord's interest in the dwelling unit in question, whether by sale, assignment, death, appointment of receiver or otherwise, the landlord or his agent shall, within 30 days, do one of the following acts, either of which shall relieve him of further liability with respect to such payment or deposit:

(1) Transfer the portion of such payment or deposit remaining after any lawful deductions made under this section to the landlord's successor in interest and thereafter notify the tenant by mail of such transfer and of the transferee's name and address; or

(2) Return the portion of such payment or deposit remaining after any lawful deductions made under this section to the tenant. (1977, c. 914, s. 1.)

§ 42-55. Remedies.

If the landlord or the landlord's successor in interest fails to account for and refund the balance of the tenant's security deposit as required by this Article, the tenant may institute a civil action to require the accounting of and the recovery of the balance of the deposit. In addition to other remedies at law and equity, the tenant may recover damages resulting from noncompliance by the landlord; and upon a finding by the court that the party against whom judgment is rendered was in willful noncompliance with this Article, the court may, in its discretion, allow a reasonable attorney's fee to the duly licensed attorney representing the prevailing party, such attorney's fee to be taxed as part of the cost of court. (1977, c. 914, s. 1.)

§ 42-56. Application of Article.

The provisions of this Article shall apply to all persons, firms, or corporations engaged in the business of renting or managing residential dwelling units, excluding single rooms, on a weekly, monthly or annual basis. (1977, c. 914, s. 2.)

Legal Periodicals. — For article, "Who Is a Tenant? The Correct Definition of the Status in North Carolina," see 21 N.C. Cent. L.J. 79 (1995).

§§ 42-57, 42-58: Reserved for future codification purposes.

ARTICLE 7.

Expedited Eviction of Drug Traffickers and Other Criminals.

§ 42-59. Definitions.

As used in this Article:

(1) "Complete eviction" means the eviction and removal of a tenant and all members of the tenant's household.

(2) "Criminal activity" means (i) activity that would constitute a violation of G.S. 90-95 other than a violation of G.S. 90-95(a)(3), or a conspiracy to violate any provision of G.S. 90-95 other than G.S. 90-95(a)(3); or (ii) other criminal activity that threatens the health, safety, or right of peaceful enjoyment of the entire premises by other residents or employees of the landlord.

(3) "Entire premises" or "leased residential premises" means a house, building, mobile home, or apartment, whether publicly or privately owned, which is leased for residential purposes. These terms include the entire building or complex of buildings or mobile home park and all real property of any nature appurtenant thereto and used in connection therewith, including all individual rental units, streets, sidewalks, and common areas. These terms do not include a hotel, motel, or other guest house or part thereof rented to a transient guest.

(4) "Felony" means a criminal offense that constitutes a felony under North Carolina law.

(5) "Guest" means any natural person who has been given express or implied permission by a tenant, a member of the tenant's household, or another guest of the tenant to enter an individual rental unit or any portion of the entire premises.

(6) "Individual rental unit" means an apartment or individual dwelling or accommodation which is leased to a particular tenant, whether or not it is used or occupied or intended to be used or occupied by a single family or household.

(7) "Landlord" means a person, entity, corporation, or governmental authority or agency who or which owns, operates, or manages any leased residential premises.

(8) "Partial eviction" means the eviction and removal of specified persons from a leased residential premises.

(9) "Resident" means any natural person who lawfully resides in a leased residential premises who is not a signatory to a lease or otherwise has no contractual relationship to a landlord. The term includes members of the household of a tenant.

(10) "Tenant" means any natural person or entity who is a named party or signatory to a lease or rental agreement, and who occupies, resides in, or has a legal right to possess and use an individual rental unit. (1995, c. 419, s. 1.)

§ 42-59.1. Statement of Public Policy.

The General Assembly recognizes that the residents of this State have the right to the peaceful, safe, and quiet enjoyment of their homes. The General Assembly further recognizes that these rights, as well as the health, safety, and welfare of residents, are often jeopardized by the criminal activity of other residents of rented residential property, but that landlords are often unable to remove those residents engaged in criminal activity. In order to ensure that residents of this State can have the peaceful, safe, and quiet enjoyment of their homes, the provisions of this Article are deemed to apply to all residential rental agreements in this State. (1995, c. 419, s. 1.)

§ 42-60. Nature of actions and jurisdiction.

The causes of action established in this Article are civil actions to remove tenants or other persons from leased residential premises. These actions shall be brought in the district court of the county where the individual rental unit is located. If the plaintiff files the complaint as a small claim, the parties shall not be entitled to discovery from the magistrate. However, if such a case is filed originally in the district court or is appealed from the judgment of a magistrate for a new trial in the district court, all of the procedures and remedies in this Article shall be applicable. (1995, c. 419, s. 1.)

§ 42-61. Standard of proof.

The civil causes of action established in this Article shall be proved by a preponderance of the evidence, except as otherwise expressly provided in G.S. 42-64. (1995, c. 419, s. 1.)

§ 42-62. Parties.

(a) Who May Bring Action. — A civil action pursuant to this Article may be brought by the landlord of a leased residential premises, or the landlord's agent, as provided for in G.S. 1-57 of the General Statutes and in Article 3 of this Chapter.

(b) Defendants to the Action. — A civil action pursuant to this Article may be brought against any person within the jurisdiction of the court, including a tenant, adult or minor member of the tenant's household, guest, or resident of the leased residential premises. If any defendant's true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient to identify him or her.

(c) Notice to Defendants. — A complaint initiating an action pursuant to this Article shall be served in the same manner as serving complaints in civil actions pursuant to G.S. 1A-1, Rule 4 and G.S. 42-29. (1995, c. 419, s. 1.)

§ 42-63. Remedies and judicial orders.

(a) Grounds for Complete Eviction. — Subject to the provisions of G.S. 42-64 and pursuant to G.S 42-68, the court shall order the immediate eviction of a tenant and all other residents of the tenant's individual unit where it finds that:

(1) Criminal activity has occurred on or within the individual rental unit leased to the tenant; or

(2) The individual rental unit leased to the tenant was used in any way in furtherance of or to promote criminal activity; or

(3) The tenant, any member of the tenant's household, or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or

(4) The tenant has given permission to or invited a person to return or reenter any portion of the entire premises, knowing that the person has been removed and barred from the entire premises pursuant to this Article or the reasonable rules and regulations of a publicly assisted landlord; or

(5) The tenant has failed to notify law enforcement or the landlord immediately upon learning that a person who has been removed and barred from the tenant's individual rental unit pursuant to this Article has returned to or reentered the tenant's individual rental unit.

(b) Grounds for Partial Eviction and Issuance of Removal Orders. — The court shall, subject to the provisions of G.S. 42-64, order the immediate removal from the entire premises of any person other than the tenant, including an adult or minor member of the tenant's household, where the court finds that such person has engaged in criminal activity on or in the immediate vicinity of any portion of the leased residential premises. Persons removed pursuant to this section shall be barred from returning to or reentering any portion of the entire premises.

(c) Conditional Eviction Orders Directed Against the Tenant. — Where the court finds that a member of the tenant's household or a guest of the tenant has engaged in criminal activity on or in the immediate vicinity of any portion of the leased residential premises, but such person has not been named as a party defendant, has not appeared in the action or otherwise has not been subjected to the jurisdiction of the court, a conditional eviction order issued pursuant to subsection (b) of this section shall be directed against the tenant, and shall provide that as an express condition of the tenancy, the tenant shall not give permission to or invite the barred person or persons to return to or reenter any portion of the entire premises. The tenant shall acknowledge in writing that the tenant understands the terms of the court's order, and that the tenant further understands that the failure to comply with the court's order will result in the mandatory termination of the tenancy pursuant to G.S. 42-68. (1995, c. 419, s. 1.)

§ 42-64. Affirmative defense or exemption to a complete eviction.

(a) Affirmative Defense. — The court shall refrain from ordering the complete eviction of a tenant pursuant to G.S. 42-63(a) where the tenant has established that the tenant was not involved in the criminal activity and that:

(1) The tenant did not know or have reason to know that criminal activity was occurring or would likely occur on or within the individual rental unit, that the individual rental unit was used in any way in furtherance of or to promote criminal activity, or that any member of the tenant's household or any guest has engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or

(2) The tenant had done everything that could reasonably be expected under the circumstances to prevent the commission of the criminal activity, such as requesting the landlord to remove the offending household member's name from the lease, reporting prior criminal activity to appropriate law enforcement authorities, seeking assistance from social service or counseling agencies, denying permission, if feasible, for the offending household member to reside in the unit, or seeking assistance from church or religious organizations.

Notwithstanding the court's denial of eviction of the tenant, if the plaintiff has proven that an evictable offense under G.S. 42-63 was committed by someone other than the tenant, the court shall order such other relief as the court deems appropriate to protect the interests of the landlord and neighbors of the tenant, including the partial eviction of the culpable household members pursuant to G.S. 42-63(b) and conditional eviction orders under G.S. 42-63(c).

(b) Subsequent Affirmative Defense to a Complete Eviction. — The affirmative defense set forth in subsection (a) of this section shall not be available to a tenant in a subsequent action brought pursuant to this Article unless the tenant can establish by clear and convincing evidence that no reasonable person could have foreseen the occurrence of the subsequent criminal activity or that the tenant had done everything reasonably expected under the circumstances to prevent the commission of the second criminal activity.

(c) Exemption. — Where the grounds for a complete eviction have been established, the court shall order the eviction of the tenant unless, taking into account the circumstances of the criminal activity and the condition of the tenant, the court is clearly convinced that immediate eviction or removal would be a serious injustice, the prevention of which overrides the need to protect the rights, safety, and health of the other tenants and residents of the leased residential premises. The burden of proof for the exemption set forth shall be by clear and convincing evidence. (1995, c. 419, s. 1.)

§ 42-65. Obstructing the execution or enforcement of a removal or eviction order.

Any person who knowingly violates any order issued pursuant to this Article or who knowingly interferes with, obstructs, impairs, or prevents any law enforcement officer from enforcing or executing any order issued pursuant to this Article, shall be subject to criminal contempt under Article 1 of Chapter 5A of the General Statutes. Nothing in this section shall be construed in any way to preclude or preempt prosecution for any other criminal offense. (1995, c. 419, s. 1.)

§ 42-66. Motion to enforce eviction and removal orders.

(a) A motion to enforce an eviction or removal order issued pursuant to G.S. 42-63(b) or (c) shall be heard on an expedited basis and within 15 days of the service of the motion.

(b) Mandatory Eviction. — The court shall order the immediate eviction of the tenant where it finds that:

(1) The tenant has given permission to or invited any person removed or barred from the leased residential premises pursuant to this Article to return to or reenter any portion of the premises; or

(2) The tenant has failed to notify appropriate law enforcement authorities or the landlord immediately upon learning that any person who had been removed and barred pursuant to this Article has returned to or reentered the tenant's individual rental unit; or

(3) The tenant has otherwise knowingly violated an express term or condition of any order issued by court pursuant to this Article. (1995, c. 419, s. 1.)

§ 42-67. Impermissible defense.

It shall not be a defense to an action brought pursuant to this Article that the criminal activity was an isolated incident or otherwise has not recurred. Nor is it a defense that the person who actually engaged in the criminal activity no longer resides in the tenant's individual rental unit. However, evidence of such facts may be admissible if offered to support affirmative defenses or grounds for an exemption pursuant to G.S. 42-64. (1995, c. 419, s. 1.)

§ 42-68. Expedited proceedings.

Where the complaint is filed as a small claim, the expedited process for summary ejectment, as provided in Article 3 of this Chapter and Chapter 7A of the General Statutes, applies. Where the complaint is filed initially in the district court or a judgment by the magistrate is appealed to the district court, the procedure in G.S. 42-34(b) through (g), if applicable, and the following procedures apply:

(1) Expedited Hearing. — When a complaint is filed initiating an action pursuant to this Article, the court shall set the matter for a hearing which shall be held on an expedited basis and within the first term of court falling after 30 days from the service of the complaint on all defendants or from service of notice of appeal from a magistrate's judgment, unless either party obtains a continuance. However, where

a defendant files a counterclaim, the court shall reset the trial for the first term of court falling after 30 days from the defendant's service of the counterclaim.

(2) Standards for Continuances. — The court shall not grant a continuance, nor shall it stay the civil proceedings pending the disposition of any related criminal proceedings, except as required to complete permitted discovery, to have the plaintiff reply to a counterclaim, or for compelling and extraordinary reasons or on application of the district attorney for good cause shown.

(3) When Presented. — The defendant in an action brought in district court pursuant to this Article shall serve an answer within 20 days after service of the summons and complaint, or within 20 days after service of the appeal to district court when the action was initially brought in small claims court. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer.

(4) Extensions of Time for Filing. — The parties to an action brought pursuant to this Article shall not be entitled to an extension of time for completing an act required by subdivision (3) of this section, except for compelling and extraordinary reasons.

(5) Default. — A party to an action brought pursuant to this Article who fails to plead in accordance with the time periods in subdivision (3) of this section shall be subject to the provisions of G.S. 1A-1, Rule 55.

(6) Rules of Civil Procedure. — Unless otherwise provided for in this Article, G.S. 1A-1, the Rules of Civil Procedure, shall apply in the district court to all actions brought pursuant to this Article. (1995, c. 419, s. 1.)

§ 42-69. Relation to criminal proceedings.

(a) Criminal Proceedings, Conviction, or Adjudication Not Required. — The fact that a criminal prosecution involving the criminal activity is not commenced or, if commenced, has not yet been concluded or has terminated without a conviction or adjudication of delinquency shall not preclude a civil action or the issuance of any order pursuant to this Article.

(b) Effect of Conviction or Adjudication. — Where a criminal prosecution involving the criminal activity results in a final criminal conviction or adjudication of delinquency, such adjudication or conviction shall be considered in the civil action as conclusive proof that the criminal activity occurred.

(c) Admissibility of Criminal Trial Recordings or Transcripts. — Any evidence or testimony admitted in the criminal proceeding, including recordings or transcripts of the adult or juvenile criminal proceedings, whether or not they have been transcribed, may be admitted in the civil action initiated pursuant to this Article.

(d) Use of Sealed Criminal Proceeding Records. — In the event that the evidence or records of a criminal proceeding which did not result in a conviction or adjudication of delinquency have been sealed by court order, the court in a civil action brought pursuant to this Article may order such evidence or records, whether or not they have been transcribed, to be unsealed if the court finds that such evidence or records would be relevant to the fair disposition of the civil action. (1995, c. 419, s. 1.)

§ 42-70. Discovery.

(a) The parties to an action brought pursuant to this Article shall be entitled to conduct discovery, if the action is filed originally in or appealed to the district court, only in accordance with this section.

(b) Any defendant must initiate all discovery within the time allowed by this Article for the filing of an answer or counterclaim.

(c) The plaintiff must initiate all discovery within 20 days of service of an answer or counterclaim by a defendant.

(d) All parties served with interrogatories, requests for production of documents, and requests for admissions under G.S. 1A-1, Rules 33, 34, and 36 shall serve their responses within 20 days.

(e) Upon application by the plaintiff, or agreement of the parties, the court shall issue a preliminary injunction against all alleged illegal activity by the defendant or other identified parties who are residents of the individual rental unit or guests of defendants, pending the completion of discovery and any other wait before the trial has occurred. (1995, c. 419, s. 1.)

§ 42-71. Protection of threatened witnesses or affiants.

If proof necessary to establish the grounds for eviction depends, in whole or in part, upon the affidavits or testimony of witnesses who are not peace officers, the court may, upon a showing of prior threats of violence or acts of violence by any defendant or any other person, issue orders to protect those witnesses, including the nondisclosure of the name, address, or any other information which may identify those witnesses. (1995, c. 419, s. 1.)

§ 42-72. Availability of law enforcement resources to plaintiffs or potential plaintiffs.

A law enforcement agency may make available to any person or entity authorized to bring an action pursuant to this Article any police report or edited portion thereof, or forensic laboratory report or edited portion thereof, concerning criminal activity committed on or in the immediate vicinity of the leased residential premises. A law enforcement agency may also make any officer or officers available to testify as a fact witness or expert witness in a civil action brought pursuant to this Article. The agency shall not disclose such information where, in the agency's opinion, such disclosure would jeopardize an investigation, prosecution, or other proceeding, or where such disclosure would violate any federal or State statute. (1995, c. 419, s. 1.)

§ 42-73. Collection of rent.

A landlord shall be entitled to collect rent due and owing with knowledge of any illegal acts that violate the provisions of this act without such collection constituting a waiver of the alleged defaults. (1995, c. 419, s. 1.)

§ 42-74. Preliminary or emergency relief.

The district court shall have the authority at any time to issue a temporary restraining order, grant a preliminary injunction, or take such other actions as the court deems necessary to enjoin or prevent the commission of criminal activity on or in the immediate vicinity of leased residential premises, or otherwise to protect the rights and interests of all tenants and residents. A violation of any such duly issued order or preliminary relief shall subject the violator to civil or criminal contempt. (1995, c. 419, s. 1.)

§ 42-75. Cumulative remedies.

The causes of action and remedies authorized by this Article shall be cumulative with each other and shall be in addition to, not in lieu of, any other causes of action or remedies which may be available at law or equity, including causes of action and remedies based on express provisions of the lease not contrary to this Article. (1995, c. 419, s. 1.)

§ 42-76. Civil immunity.

Any person or organization who, in good faith, institutes, participates in, or encourages a person or entity to institute or participate in a civil action brought pursuant to this Article, or who in good faith provides any information relied upon by any person or entity in instituting or participating in a civil action pursuant to this Article shall have immunity from any civil liability that might otherwise be incurred or imposed. Any such person or organization shall have the same immunity from civil liability with respect to testimony given in any judicial proceeding conducted pursuant to this Article. (1995, c. 419, s. 1.)

Chapter 42A.

Vacation Rental Act.

Article 1.

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ARTICLE 1.

Vacation Rentals.

§ 42A-1. Title.

This Chapter shall be known as the North Carolina Vacation Rental Act. (1999-420, s. 1.)

Legal Periodicals. — For essay, "Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act," see 78 N.C.L. Rev. 539 (2000).

§ 42A-2. Purpose and scope of act.

The General Assembly finds that the growth of the tourism industry in North Carolina has led to a greatly expanded market of privately owned residences that are rented to tourists for vacation, leisure, and recreational purposes. Rental transactions conducted by the owners of these residences or licensed real estate brokers acting on their behalf present unique situations not normally found in the rental of primary residences for long terms, and therefore make it necessary for the General Assembly to enact laws regulating the competing interests of landlords, real estate brokers, and tenants. (1999-420, s. 1.)

§ 42A-3. Application; exemptions.

(a) The provisions of this Chapter shall apply to any person, partnership, corporation, limited liability company, association, or other business entity who acts as a landlord or real estate broker engaged in the rental or management of residential property for vacation rental as defined in this Chapter.

(b) The provisions of this Chapter shall not apply to:
(1) Lodging provided by hotels, motels, tourist camps, and other places subject to regulation under Chapter 72 of the General Statutes.
(2) Rentals to persons temporarily renting a dwelling unit when traveling away from their primary residence for business or employment purposes.
(3) Rentals to persons having no other place of primary residence.
(4) Rentals for which no more than nominal consideration is given. (1999-420, s. 1.)

§ 42A-4. Definitions.

The following definitions apply in this Chapter:
(1) Real estate broker. — A real estate broker as defined in G.S. 93A-2(a).
(2) Residential property. — An apartment, condominium, single-family home, townhouse, cottage, or other property that is devoted to residential use or occupancy by one or more persons for a definite or indefinite period.
(3) Vacation rental. — The rental of residential property for vacation, leisure, or recreation purposes for fewer than 90 days by a person who has a place of permanent residence to which he or she intends to return.
(4) Vacation rental agreement. — A written agreement between a landlord or his or her real estate broker and a tenant in which the tenant agrees to rent residential property belonging to the landlord for a vacation rental. (1999-420, s. 1.)

§§ 42A-5 through 42A-9: Reserved for future codification purposes.

ARTICLE 2.

Vacation Rental Agreements.

§ 42A-10. Written agreement required.

(a) A landlord or real estate broker and tenant shall execute a vacation rental agreement for all vacation rentals subject to the provisions of this Chapter. No vacation rental agreement shall be valid and enforceable unless the tenant has accepted the agreement as evidenced by one of the following:
(1) The tenant's signature on the agreement.
(2) The tenant's payment of any monies to the landlord or real estate broker after the tenant's receipt of the agreement.
(3) The tenant's taking possession of the property after the tenant's receipt of the agreement.

(b) Any real estate broker who executes a vacation rental agreement that does not conform to the provisions of this Chapter or fails to execute a vacation rental agreement shall be guilty of an unfair trade practice in violation of G.S. 75-1.1, and shall be prohibited from commencing an expedited eviction proceeding as provided in Article 4 of this Chapter. (1999-420, s. 1.)

Legal Periodicals. — For essay, "Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act," see 78 N.C.L. Rev. 539 (2000).

§ 42A-11. Vacation rental agreements.

(a) A vacation rental agreement executed under this Chapter shall contain the following notice on its face which shall be set forth in a clear and conspicuous manner that distinguishes it from other provisions of the agreement: "THIS IS A VACATION RENTAL AGREEMENT UNDER THE NORTH CAROLINA VACATION RENTAL ACT. THE RIGHTS AND OBLIGATIONS OF THE PARTIES TO THIS AGREEMENT ARE DEFINED BY LAW AND INCLUDE UNIQUE PROVISIONS PERMITTING THE DISBURSEMENT OF RENT PRIOR TO TENANCY AND EXPEDITED EVICTION OF TENANTS. YOUR SIGNATURE ON THIS AGREEMENT, OR PAYMENT OF MONEY OR TAKING POSSESSION OF THE PROPERTY AFTER RECEIPT OF THE AGREEMENT, IS EVIDENCE OF YOUR ACCEPTANCE OF THE AGREEMENT AND YOUR INTENT TO USE THIS PROPERTY FOR A VACATION RENTAL."

(b) The vacation rental agreement shall contain provisions separate from the requirements of subsection (a) of this section which shall describe the following as permitted or required by this Chapter:

(1) The manner in which funds shall be received, deposited, and disbursed in advance of the tenant's occupancy of the property.
(2) Any processing fees permitted under G.S. 42A-17(c).
(3) The rights and obligations of the landlord and tenant under G.S. 42A-17(b).
(4) The applicability of expedited eviction procedures.
(5) The rights and obligations of the landlord or real estate broker and the tenant upon the transfer of the property.
(6) The rights and obligations of the landlord or real estate broker and the tenant under G.S. 42A-36.
(7) Any other obligations of the landlord and tenant. (1999-420, s. 1.)

§§ 42A-12 through 42A-14: Reserved for future codification purposes.

ARTICLE 3.

Handling and Accounting of Funds.

§ 42A-15. Trust account uses.

A landlord or real estate broker may require a tenant to pay all or part of any required rent, security deposit, or other fees permitted by law in advance of the commencement of a tenancy under this Chapter if these payments are expressly authorized in the vacation rental agreement. If the tenant is required to make any advance payments, other than a security deposit, whether the payment is denominated as rent or otherwise, the landlord or real estate broker shall deposit these payments in a trust account in an insured bank or savings and loan association in North Carolina no later than three banking days after the receipt of the these payments. These payments deposited in a trust account shall not earn interest unless the landlord and tenant agree in the vacation rental agreement that the payments may be deposited in an interest-bearing account. The landlord and tenant shall also provide in the agreement to whom the accrued interest shall be disbursed. (1999-420, s. 1.)

§ 42A-16. Advance payments uses.

(a) A landlord or real estate broker shall not disburse prior to the occupancy of the property by the tenant an amount greater than fifty percent (50%) of the total rent except as permitted pursuant to this subsection. A landlord or real estate broker may disburse prior to the occupancy of the property by the tenant any fees owed to third parties to pay for goods, services, or benefits procured by the landlord or real estate broker for the benefit of the tenant, including administrative fees permitted by G.S. 42A-17(c), if the disbursement is expressly authorized in the vacation rental agreement. The funds remaining after any disbursement permitted under this subsection shall remain in the trust account and may not be disbursed until the occurrence of one of the following:

(1) The commencement of the tenancy, at which time the remaining funds may be disbursed in accordance with the terms of the agreement.
(2) The tenant commits a material breach, at which time the landlord may retain an amount sufficient to defray the actual damages suffered by the landlord as a result of the breach.
(3) The landlord or real estate broker refunds the money to the tenant.
(4) The funds in the trust account are transferred in accordance with G.S. 42A-19(b) upon the termination of the landlord's interest in the property.

(b) Funds collected for sales or occupancy taxes and tenant security deposits shall not be disbursed from the trust account prior to termination of the tenancy or material breach of the agreement by the tenant, except as a refund to the tenant.

(c) The tenant's execution of a vacation rental agreement in which he or she agrees to the advance disbursement of payments shall not constitute a waiver or loss of any of the tenant's rights to reimbursement of such payments if the tenant is lawfully entitled to reimbursement. (1999-420, s. 1.)

§ 42A-17. Accounting; reimbursement.

(a) A vacation rental agreement shall identify the name and address of the bank or savings and loan association in which the tenant's security deposit and other advance payments are held in a trust account, and the landlord and real estate broker shall provide the tenant with an accounting of such deposit and payments if the tenant makes a reasonable request for an accounting prior to the tenant's occupancy of the property.

(b) Except as provided in G.S. 42A-36, if, at the time the tenant is to begin occupancy of the property, the landlord or real estate broker cannot provide the property in a fit and habitable condition or substitute a reasonably comparable property in such condition, the landlord and real estate broker shall refund to the tenant all payments made by the tenant.

(c) A vacation rental agreement may include administrative fees, the amounts of which shall be provided in the agreement, reasonably calculated to cover the costs of processing the tenant's reservation, transfer, or cancellation of a vacation rental. (1999-420, s. 1; 2005-292, s. 1.)

§ 42A-18. Applicability of the Residential Tenant Security Deposit Act.

(a) Except as may otherwise be provided in this Chapter, all funds collected from a tenant and not identified in the vacation rental agreement as occupancy or sales taxes, fees, or rent payments shall be considered a tenant security deposit and shall be subject to the provisions of the Residential Tenant Security Deposit Act, as codified in Article 6 of Chapter 42 of the General Statutes. Funds collected as a tenant security deposit in connection with a vacation rental shall be deposited into a trust account as required by G.S. 42-50. The landlord or real estate broker shall not have the option of obtaining a bond in lieu of maintaining security deposit funds in a trust account. In addition to the permitted uses of tenant security deposit monies as provided in G.S. 42-51, a landlord or real estate broker may, after the termination of a tenancy under this Chapter, deduct from any tenant security deposit the amount of any long distance or per call telephone charges and cable television charges that are the obligation of the tenant under the vacation rental agreement and are left unpaid by the tenant at the conclusion of the tenancy. The landlord or real estate broker shall apply, account for, or refund tenant security deposit monies as provided in G.S. 42-51 within 45 days following the conclusion of the tenancy.

(b) A vacation rental agreement shall not contain language compelling or permitting the automatic forfeiture of all or part of a tenant security deposit in case of breach of contract by the tenant, and no such forfeiture shall be allowed. The vacation rental agreement shall provide that a tenant security deposit may be applied to actual damages caused by the tenant as permitted under Article 6 of Chapter 42 of the General Statutes. (1999-420, s. 1.)

§ 42A-19. Transfer of property subject to a vacation rental agreement.

(a) The grantee of residential property voluntarily transferred by a landlord who has entered into a vacation rental agreement for the use of the property shall take title to the property subject to the vacation rental agreement if the vacation rental is to end not later than 180 days after the grantee's interest in the property is recorded in the office of the register of deeds. If the vacation rental is to end more than 180 days after the recording of the grantee's interest, the tenant shall have no right to enforce the terms of the agreement unless the grantee has agreed in writing to honor those terms, but the tenant shall be entitled to a refund of payments made by him or her, as provided in subsection (b) of this section.

Prior to entering into any contract of sale, the landlord shall disclose to the grantee the time periods that the property is subject to a vacation rental agreement. Not later than 10 days after transfer of the property, the landlord shall disclose to the grantee each tenant's name and address and shall provide the grantee with a copy of each vacation rental agreement. In lieu of providing the grantee a copy of each vacation rental agreement, where the landlord or the landlord's agent utilizes a standard form vacation rental agreement, the landlord may provide the grantee with a copy of the part of each vacation rental agreement that contains information unique to the tenancy, the amount to be paid by the tenant, and the parties' signatures, along with one copy of the rest of the standard form vacation rental agreement. However, the landlord shall not be required to provide the grantee with copies of the vacation rental agreements if in anticipation of acquiring the property the grantee has engaged the landlord's rental agent to continue to manage the property after the transfer and the landlord authorizes the rental agent to provide the information to the grantee and the grantee approves. Not later than 20 days after transfer of the property, the grantee or the grantee's agent shall:

(1) Notify each tenant in writing of the property transfer, the grantee's name and address, and the date the grantee's interest was recorded.

(2) Advise each tenant whether he or she has the right to occupy the property subject to the terms of the vacation rental agreement and the provisions of this section.

(3) Advise each tenant of whether he or she has the right to receive a refund of any payments made by him or her.

Notwithstanding any other provision of this section, if the grantee engages as the grantee's broker and rental agent for the property the broker who procured the tenant's vacation rental agreement for the landlord, the grantee shall have no obligation under subdivisions (1), (2), and (3) of this subsection with regard to those tenants whose vacation rental agreements must be honored under this section or with regard to those tenants whose vacation rental agreements the grantee has agreed in writing to honor.

(b) Except as otherwise provided in this subsection, upon termination of the landlord's interest in the residential property subject to a vacation rental agreement, whether by sale, assignment, death, appointment of receiver or otherwise, the landlord or the landlord's agent, or the real estate broker, shall, within 30 days, transfer all advance rent paid by the tenant, and the portion of any fees remaining after any lawful deductions made under G.S. 42A-16, to the landlord's successor in interest and thereafter notify the tenant by mail of such transfer and of the transferee's name and address. For vacation rentals that end more than 180 days after the recording of the interest of the landlord's successor in interest, unless the landlord's successor in interest has agreed in writing to honor the vacation rental agreement, the landlord or the landlord's agent, or the real estate broker, shall, within 30 days, transfer all advance rent paid by the tenant, and the portion of any fees remaining after any lawful deductions made under G.S. 42A-16, to the tenant. Compliance with this subsection shall relieve the landlord or real estate broker of further liability with respect to any payment of rent or fees. Funds held as a security deposit shall be disbursed in accordance with G.S. 42A-18.

(c) Repealed by Session Laws 2000-140, s. 41, effective July 21, 2000.

(d) The failure of a landlord to comply with the provisions of this section shall constitute an unfair trade practice in violation of G.S. 75-1.1. A landlord who complies with the requirements of this section shall have no further obligations to the tenant. (1999-420, s. 1; 2000-140, s. 41; 2005-292, s. 2.)

Editor's Note. — Subsection (a), as amended by Session Laws 2005-292, s. 2, effective October 1, 2005, is applicable to vacation rental agreements entered into on or after that date.

§§ 42A-20 through 42A-22: Reserved for future codification purposes.

ARTICLE 4.

Expedited Eviction Proceedings.

§ 42A-23. Grounds for eviction.

(a) Any tenant who leases residential property subject to a vacation rental agreement under this Chapter for 30 days or less may be evicted and removed from the property in an expedited eviction proceeding brought by the landlord, or real estate broker as agent for the landlord, as provided in this Article if the tenant does one of the following:

(1) Holds over possession after his or her tenancy has expired.
(2) Has committed a material breach of the terms of the vacation rental agreement that, according to the terms of the agreement, results in the termination of his or her tenancy.
(3) Fails to pay rent as required by the agreement.
(4) Has obtained possession of the property by fraud or misrepresentation.

(b) Only the right to possession shall be relevant in an expedited eviction proceeding. All other issues related to the rental of the residential property shall be presented in a separate civil action. (1999-420, s. 1.)

§ 42A-24. Expedited eviction.

(a) Before commencing an expedited eviction proceeding, the landlord or real estate broker shall give the tenant at least four hours' notice, either orally or in writing, to quit the premises. If reasonable efforts to personally give oral or written notice have failed, written notice may be given by posting the notice on the front door of the property.

(b) An expedited eviction proceeding shall commence with the filing of a complaint and issuance of summons in the county where the property is located. If the office of the clerk of superior court is closed, the complaint shall be filed with, and the summons issued by, a magistrate. The service of the summons and complaint for expedited eviction shall be made by a sworn law enforcement officer on the tenant personally or by posting a copy of the summons and complaint on the front door of the property. The officer, upon service, shall promptly file a return therefor. A hearing on the expedited eviction shall be held before a magistrate in the county where the property is located not sooner than 12 hours after service upon the tenant and no later than 48 hours after such service. To the extent that the provisions of this Article are in conflict with the Rules of Civil Procedure, Chapter 1A of the General Statutes, with respect to the commencement of an action or service of process, this Article controls.

(c) The complaint for expedited eviction shall allege and the landlord or real estate broker shall prove the following at the hearing:

(1) The vacation rental is for a term of 30 days or less.
(2) The tenant entered into and accepted a vacation rental agreement that conforms to the provisions of this Chapter.
(3) The tenant committed one or more of the acts listed in G.S. 42A-23(a) as grounds for eviction.
(4) The landlord or real estate broker has given notice to the tenant to vacate as a result of the breach as provided in subsection (a) of this section.

The rules of evidence shall not apply in an expedited eviction proceeding, and the court shall allow any reasonably reliable and material statements, documents, or other exhibits to be admitted as evidence. The provisions of G.S. 7A-218, 7A-219, and 7A-220, except any provisions regarding amount in controversy, shall apply to an expedited eviction proceeding held before the magistrate. These provisions shall not be construed to broaden the scope of an expedited eviction proceeding to issues other than the right to possession.

(d) If the court finds for the landlord or real estate broker, the court shall immediately enter a written order granting the landlord or real estate broker possession and stating the time when the tenant shall vacate the property. In no case shall this time be less than 2 hours or more than 8 hours after service of the order on the tenant. The court's order shall be served on the tenant at the hearing. If the tenant does not appear at the hearing or leaves before the order is served, the order shall be served by delivering the order to the tenant or by posting the order on the front door of the property by any sworn law enforcement officer. The officer, upon service, shall file a return therefor.

If the court finds for the landlord or real estate broker, the court shall determine the amount of the appeal bond that the tenant shall be required to post should the tenant seek to appeal the court order. The amount of the bond shall be an estimate of the rent that will become due while the tenant is prosecuting the appeal and reasonable damages that the landlord may suffer, including damage to property and damages arising from the inability of the landlord or real estate broker to honor other vacation rental agreements due to the tenant's possession of the property. (1999-420, s. 1.)

§ 42A-25. Appeal.

A tenant or landlord may appeal a court order issued pursuant to G.S. 42A-24(d) to district court for a trial de novo. A tenant may petition the district court to stay the eviction order and shall post a cash or secured bond with the court in the amount determined by the court pursuant to G.S. 42A-24(d). (1999-420, s. 1.)

§ 42A-26. Violation of court order.

If a tenant fails to remove personal property from a residential property subject to a vacation rental after the court has entered an order of eviction, the landlord or real estate broker shall have the same rights as provided in G.S. 42-36.2(b) as if the sheriff had not removed the tenant's property. The failure of a tenant or the guest of a tenant to vacate a residential property in accordance with a court order issued pursuant to G.S. 42A-24(d) shall constitute a criminal trespass under G.S. 14-159.13. (1999-420, s. 1.)

§ 42A-27. Penalties for abuse.

A landlord or real estate broker shall undertake to evict a tenant pursuant to an expedited eviction proceeding only when he or she has a good faith belief that grounds for eviction exists under the provisions of this Chapter. Otherwise, the landlord or real estate broker shall be guilty of an unfair trade practice under G.S. 75-1.1 and a Class 1 misdemeanor. (1999-420, s. 1.)

§§ 42A-28 through 42A-30: Reserved for future codification purposes.

ARTICLE 5.

Landlord and Tenant Duties.

§ 42A-31. Landlord to provide fit premises.

A landlord of a residential property used for a vacation rental shall:

(1) Comply with all current applicable building and housing codes.

(2) Make all repairs and do whatever is reasonably necessary to put and keep the property in a fit and habitable condition.

(3) Keep all common areas of the property in safe condition.

(4) Maintain in good and safe working order and reasonably and promptly repair all electrical, plumbing, sanitary, heating, ventilating, and other facilities and major appliances supplied by him or her upon written notification from the tenant that repairs are needed.

(5) Provide operable smoke detectors. The landlord shall replace or repair the smoke detectors if the landlord is notified by the tenant in writing that replacement or repair is needed. The landlord shall annually place new batteries in a battery-operated smoke detector, and the tenant shall replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered negligence on the part of the tenant or landlord.

These duties shall not be waived; however, the landlord and tenant may make additional covenants not inconsistent herewith in the vacation rental agreement. (1999-420, s. 1.)

Legal Periodicals. — For essay, "Confusion Worse Confounded: The North Carolina Residential Rental Agreements Act," see 78 N.C.L. Rev. 539 (2000).

§ 42A-32. Tenant to maintain dwelling unit.

The tenant of a residential property used for a vacation rental shall:

(1) Keep that part of the property which he or she occupies and uses as clean and safe as the conditions of the property permit and cause no unsafe or unsanitary conditions in the common areas and remainder of the property that he or she uses.

(2) Dispose of all ashes, rubbish, garbage, and other waste in a clean and safe manner.

(3) Keep all plumbing fixtures in the property or used by the tenant as clean as their condition permits.

(4) Not deliberately or negligently destroy, deface, damage, or remove any part of the property or render inoperable the smoke detector provided by the landlord or knowingly permit any person to do so.

(5) Comply with all obligations imposed upon the tenant by current applicable building and housing codes.

(6) Be responsible for all damage, defacement, or removal of any property inside the property that is in his or her exclusive control unless the damage, defacement, or removal was due to ordinary wear and tear, acts of the landlord or his or her agent, defective products supplied or repairs authorized by the landlord, acts of third parties not invitees of the tenant, or natural forces.

(7) Notify the landlord of the need for replacement of or repairs to a smoke detector. The landlord shall annually place new batteries in a battery-operated smoke detector, and the tenant shall replace the batteries as needed during the tenancy. Failure of the tenant to replace the batteries as needed shall not be considered negligence on the part of the tenant or the landlord.

These duties shall not be waived; however, the landlord and tenant may make additional covenants not inconsistent herewith in the vacation rental agreement. (1999-420, s. 1.)

§§ 42A-33 through 42A-35: Reserved for future codification purposes.

ARTICLE 6.

General Provisions.

§ 42A-36. Mandatory evacuations.

If State or local authorities, acting pursuant to Article 36A of Chapter 14 or Article 1 of Chapter 166A of the General Statutes, order a mandatory evacuation of an area that includes the residential property subject to a vacation rental, the tenant under the vacation rental agreement, whether in possession of the property or not, shall comply with the evacuation order. Upon compliance, the tenant shall be entitled to a refund from the landlord of the prorated rent for each night that the tenant is unable to occupy the property because of the mandatory evacuation order. The tenant shall not be entitled to a refund if: (i) prior to the tenant taking possession of the property, the tenant refused insurance offered by the landlord or real estate broker that would have compensated the tenant for losses or damages resulting from loss of use of the property due to a mandatory evacuation order; or (ii) the tenant purchased insurance offered by the landlord or real estate broker. The insurance offered shall be provided by an insurance company duly authorized by the North Carolina Department of Insurance, and the cost of the insurance shall not exceed eight percent (8%) of the total rent charged for the vacation rental to the tenant. (1999-420, s. 1; 2005-292, s. 3.)

§§ **42A-37 through 42A-40:** Reserved for future codification purposes.

Chapter 43.

Land Registration.

Article 1.

Nature of Proceeding.

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ARTICLE 1.

Nature of Proceeding.

§ 43-1. Jurisdiction in superior court.

For the purpose of enabling all persons owning real estate within this State to have the title thereto settled and registered, as prescribed by the provisions of this Chapter, the superior court of the county in which the land lies in the State shall have exclusive original jurisdiction of all petitions and proceedings had thereupon, under the rules of practice and procedure prescribed for special proceedings except as herein otherwise provided. (1913, c. 90, s. 1; C.S., s. 2377.)

Editor's Note. — This Chapter is known generally as the Torrens Law. The principle of the "Torrens System" is conveyance by registration and certificate instead of by deed, and assimilates the transfer of land to the transfer of stocks in corporations.

Legal Periodicals. — For discussion of the history and development of the law of this chapter, and of Cape Lookout Co. v. Gold, 167 N.C. 63, 83 S.E. 3 (1914), see 10 N.C.L. Rev. 329 (1932).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

For article, "North Carolina's Real Estate Recording Laws: The Ghost of 1885," see 28 N.C. Cent. L.J. 199 (2006).

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Chapter to Be Liberally Construed. — This statute is of a remedial character, and should be liberally construed according to its intent. Cape Lookout Co. v. Gold, 167 N.C. 63, 83 S.E. 3 (1914); Dillon v. Brocker, 178 N.C. 65, 100 S.E. 191 (1919); Perry v. Morgan, 219 N.C. 377, 14 S.E.2d 46 (1941).

The Torrens Act manifests a purpose on the part of the General Assembly to establish a title in the registered owner, impregnable against attack at the time of the decree, and also to protect him against all claims or demands not noted on the book for the registration of titles, and to make that book a complete record and the only conclusive evidence of the title. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

The basic principle of this system is the registration of the official and conclusive evidence of the title of land, instead of registering, as the old system requires, the wholly private and inconclusive evidences of such title. State v.

Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

The principle of the "Torrens System" is conveyance by registration and certificate instead of by deed, and assimilates the transfer of land to the transfer of stocks in corporations. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

The purpose of a proceeding under the Torrens Law is to remove clouds from title and resolve controversies with regard thereto, not to validate title to lands which under the law of the State, which everyone is presumed to know, are not subject to private ownership. Swan Island Club, Inc. v. Yarbrough, 209 F.2d 698 (4th Cir. 1954).

The general purpose of the Torrens System is to secure by a decree of court, or other similar proceedings, a title impregnable against attack; to make a permanent and complete record of the exact status of the title, with the certificate of registration showing at a glance all liens, encumbrances, and claims against the title; and to protect the registered owner against all claims or demands not noted on the book for the registration of titles. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

The judge of the superior court is given authority over the whole proceedings before the clerk, and may require reformation of the process, pleadings or decrees or entries, and therefore he has authority to allow parties defendant to be made and to enlarge the time within which answers may be filed. Empire Mfg. Co. v. Spruill, 169 N.C. 618, 86 S.E. 522 (1915).

Registered land is subject to the jurisdiction of the courts, except as otherwise specially provided in this Chapter, in the same manner as if not so registered. Harrison v. Darden, 223 N.C. 364, 26 S.E.2d 860 (1943).

Determining Value of Improvements. — There is nothing in this Chapter, known as the Torrens Law, which prevents the courts from proceeding to determine the value of improvements claimed by defendants who have been evicted under plaintiff's superior title, in accordance with the terms of an unassailed judgment to which plaintiff was a party, and ascertained by a consent reference. Harrison v. Darden, 223 N.C. 364, 26 S.E.2d 860 (1943).

Court Has No Jurisdiction to Render Judgment Affecting Title to Lands Under Navigable Waters. — In a Torrens proceeding the court is without jurisdiction to render any judgment affecting title to land covered by navigable waters, and with respect to such lands such a decree is a nullity, and is subject to collateral attack, although it may be valid with respect to other lands therein embraced. Swan Island Club, Inc. v. Yarbrough, 209 F.2d 698 (4th Cir. 1954).

Arbitration of Foreclosure Actions. — In an arbitration clause in a loan agreement, a requirement excluding from arbitration any foreclosure actions was mutual, and the clause was not unconscionable. In view of the fact that under G.S. 43-1, North Carolina superior courts had exclusive jurisdiction to actions affecting a title to land was a good reason for excluding foreclosure actions from arbitration clauses and agreements. Tillman v. Commer. Credit Loans, Inc., 177 N.C. App. 568, 629 S.E.2d 865, 2006 N.C. App. LEXIS 1186 (2006).

Cited in National Bank v. Greensboro Motor Co., 264 N.C. 568, 142 S.E.2d 166 (1965); International Serv. Ins. Co. v. Iowa Nat'l Mut. Ins. Co., 276 N.C. 243, 172 S.E.2d 55 (1970).

§ 43-2. Proceedings in rem; vests title.

The proceedings under any petition for the registration of land, and all proceedings in the court in relation to registered land, shall be proceedings in rem against the land, and the decrees of the court shall operate directly on the land, and vest and establish title thereto in accordance with the provisions of this Chapter. (1913, c. 90, s. 2; C.S., s. 2378.)

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Proceeding Is in Rem. — A proceeding under the Torrens Law is a proceeding in rem. Davis v. Morgan, 228 N.C. 78, 44 S.E.2d 593 (1947).

Consolidation of Proceedings. — A proceeding for the purpose of registering title and an injunction to prevent trespass, involving the same land and the same parties, may be consolidated. Blount v. Sawyer, 189 N.C. 210, 126 S.E. 512 (1925).

Cited in Brinson v. Lacy, 195 N.C. 394, 142 S.E. 317 (1928).

§ 43-3. Rules of practice prescribed by Attorney General.

The Attorney General, with the approval of the Supreme Court, shall from time to time make, change, revise and revoke rules of practice in the superior court for the administration of this Chapter. He shall in like manner prescribe forms for use in such court, and in the notation of the registry of titles of memorials, claims, liens, lis pendens, and all other involuntary charges upon and to such registered lands. Whenever a question shall arise in the administration of this Chapter as to the proper method of protecting or asserting any right or interest under the law, and the method of procedure is in doubt, it shall be the duty of the clerk or register of deeds to notify the Attorney General, who, with the approval of the Supreme Court, shall prescribe a rule covering such case. (1913, c. 90, s. 31; C.S., s. 2379.)

CASE NOTES

Cited in Harrison v. Darden, 223 N.C. 364, 26 S.E.2d 860 (1943).

ARTICLE 2.

Officers and Fees.

§ 43-4. Examiners appointed by clerk.

The clerk of the superior court of each county shall appoint three or more examiners of titles, who shall be licensed attorneys-at-law, residing in the State of North Carolina. They shall qualify by taking oath before the clerk to faithfully discharge the duties of such office, which oath shall be filed in the office of the clerk. The term of office shall be two years. Examiners of titles shall have and exercise the jurisdiction and perform the duties hereinafter prescribed, and receive the fees herein provided. They shall not appear in or have any connection with any proceeding instituted under the provisions of this Chapter, and they shall be subject to removal at will by such clerk or judge of the superior court. (1913, c. 90, s. 3; 1917, c. 63; C.S., s. 2380.)

§ 43-5. Fees of officers.

The examiner provided for in G.S. 43-4 shall be compensated as provided in G.S. 1-408. All plats required by this Chapter shall comply with G.S. 47-30 and shall be recorded in the office of the register of deeds, and the recording fee shall be that specified in G.S. 161-10 for recording plats. The fee for recording new certificates under this Chapter shall be that specified in G.S. 161-10 for recording instruments in general. The fee for issuing the certificate and new certificates under this Chapter shall be that specified in G.S. 161-10 for issuing certified copies. The fee for noting the entries or memorandum required and for the entries noting the cancellation of mortgages and all other entries, if any, herein provided for shall be that specified in G.S. 161-10 for recording instruments in general.

There shall be no other fees allowed of any nature except as herein provided, and the bonds of the register and clerk shall be liable in case of any mistake, malfeasance, or misfeasance as to the duties imposed upon them by this Chapter in as full a manner as such bond is now liable by law. (1913, c. 90, s. 30; C.S., s. 2381; 1971, c. 1185, s. 1; 1977, c. 774; 1999-59, s. 1.)

ARTICLE 3.

Procedure for Registration.

§ 43-6. Who may institute proceedings.

Any person, firm, or corporation, including the State of North Carolina or any political subdivision thereof, being in the peaceable possession of land within the State and claiming an estate of inheritance therein, may prosecute a special proceeding in rem against all the world in the superior court for the county in which such land is situate, to establish his title thereto, to determine all adverse claims and have the title registered. Any number of the separate parcels of land claimed by the petitioner may be included in the same proceeding, and any one parcel may be established in several parts, each of which shall be clearly and accurately described and registered separately, and the decree therein shall operate directly upon the land and establish and vest an indefeasible title thereto. Any person in like possession of lands within the State, claiming an interest or estate less than the fee therein, may have his title thereto established under the provisions of this Chapter, without the registration and transfer features herein provided. (1913, c. 90, s. 4; C.S., s. 2382; 1963, c. 946, s. 1.)

CASE NOTES

Applied in Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

Cited in Brinson v. Lacy, 195 N.C. 394, 142 S.E. 317 (1928); State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-7. Land lying in two or more counties.

In every proceeding to register title, in which it is alleged in the petition or made to appear that the land therein described, whether in one or more parcels, is situated partly in one county and partly in another, or is situated in two or more counties, that is to say, when an entire tract, or two or more entire tracts, are situated in two or more counties (but not separate or several tracts in different counties) it shall be competent to institute the proceedings before the clerk of the superior court of any county in which any part of such tract lying in two or more counties is situated, and said clerk shall have jurisdiction both of the parties and of the subject matter as fully as if said land was situated wholly in his county; but upon the entry of a final decree of registration of title, the clerk by or before whom the same was rendered shall certify a copy thereof to the register of deeds of every county in which said land or any part thereof is situated, and the same shall be there filed and recorded; and every such register of deeds, upon demand of the person entitled and payment of requisite fees therefor, shall issue and deliver a certificate of title for that part of said land situated in his county. This section shall apply and become effective in all cases or proceedings heretofore conducted before any clerk of the superior court of this State for registration of title, as in this Chapter authorized, when the land described in the petition as an entire tract was situated in two or more counties, as aforesaid; and upon the filing and recording of a certified copy of the final decree or decree of registration therein, the register of deeds shall issue and deliver a certificate of title to the present owner or person entitled to the same, for that part of the land situated in his county, as aforesaid, upon payment or tender of proper fees therefor. (1919, c. 82, s. 1; C.S., s. 2383.)

§ 43-8. Petition filed; contents; State to be named as respondent; service on State.

Suit for registration of title shall be begun by a petition to the court by the persons claiming, singly or collectively, to own or have the power of appointing or disposing of an estate in fee simple in any land, whether subject to liens or not. Infants and other persons under disability may sue by guardian or trustee, as the case may be, and corporations as in other cases now provided by law; but the person in whose behalf the petition is made shall always be named as petitioner. The petition shall be signed and sworn to by each petitioner, and shall contain a full description of the land to be registered as hereinafter provided, together with a plot of same by metes and bounds, corners to be marked by permanent markers of iron, stone or cement; it shall show when, how and from whom it was acquired, and whether or not it is now occupied, and if so, by whom; and it shall give an account of all known liens, interests, equities and claims, adverse or otherwise, vested or contingent, upon such land. Full names and addresses, if known, of all persons who may be interested by marriage or otherwise, including adjoining owners and occupants, shall be given. If any person shall be unable to state the metes and bounds, the clerk may order a preliminary survey.

Except when the State of North Carolina is the petitioner, all special proceedings filed pursuant to this Article shall name the State of North Carolina as a respondent to the action. Service of process upon the State shall be made in accordance with G.S. 1A-1, Rule 4(j)(3). (1913, c. 90, s. 5; C.S., s. 2384; 1979, c. 73, s. 1.)

CASE NOTES

Attack on Proceedings Because Clerk Did Not Sign Jurat. — Where petitioner seeking to have his title to land registered under the provisions of the Torrens Law signed an oath reciting that he had been duly sworn, he could not contend that the oath lacked validity on grounds that the clerk of the court had not signed the jurat, and that in consequence the proceedings which followed were absolutely void, and thereafter, upon his own motion, have such proceedings set aside. Morgan v. Beaufort & W.R.R., 197 N.C. 568, 150 S.E. 30 (1929).

Cited in Brinson v. Lacy, 195 N.C. 394, 142 S.E. 317 (1928); State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-9. Summons issued and served; disclaimer.

Summons shall be issued and shall be returnable as in other cases of special proceedings, except that the return shall be at least 60 days from the date of the summons. The summons shall be served at least 10 days before the return thereof and the return recorded in the same manner as in other special proceedings; and all parties under disabilities shall be represented by guardian, either general or ad litem. If the persons named as interested are not residents of the State of North Carolina, and their residence is known, which must appear by affidavit, the summons must be served on such nonresidents as is now prescribed by law for service of summons on nonresidents.

Any party defendant to such proceeding may file a disclaimer of any claim or interest in the land described in the petition, which shall be deemed an admission of the allegations of the petition, and the decree shall bar such party and all persons thereafter claiming under him, and such party shall not be liable for any costs or expenses of the proceeding except such as may have been incurred by reason of his delay in pleading. (1913, c. 90, s. 6; C.S., s. 2385; 1967, c. 954, s. 3.)

CASE NOTES

Cited in Cape Lookout Co. v. Gold, 167 N.C. 63, 83 S.E. 3 (1914); State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-10. Notice of petition published.

In addition to the summons issued, prescribed in the foregoing section [§ 43-9], the clerk of the court shall, at the time of issuing such summons, publish a notice of the filing thereof containing the names of the petitioners, the names of all persons named in the petition, together with a short but accurate description of the land and the relief demanded, in some secular newspaper published in the county wherein the land is situate, and having general circulation in the county; and if there be no such paper, then in a newspaper in the county nearest thereto and having general circulation in the county wherein the land lies, once a week for eight issues of such paper. The notice shall set forth the title of the cause and in legible or conspicuous type the words "To whom it may concern," and shall give notice to all persons of the relief demanded and the return day of the summons: Provided, that no final order or judgment shall be entered in the cause until there is proof and adjudication of publication as in other cases of publication of notice of summons. The provisions of this section, in respect to the issuing and service of summons and the publication of the notice, shall be mandatory and essential to the jurisdiction of the court to proceed in the cause: Provided, that the recital of the service of summons and publication in the decree or in the final judgment in the cause, and in the certificate issued to the petitioner as hereinafter provided, shall be conclusive evidence thereof. The clerk of the court shall also record a copy of said notice in the lis pendens docket of his office and cross-index same as other notices of lis pendens and shall also certify a copy thereof to the superior court of each county in which any part of said land lies, and the clerk thereof shall record and cross-index same in the lis pendens records of his office as other notices of lis pendens are recorded and cross-indexed. (1913, c. 90, s. 7; 1915, c. 128, s. 1; 1919, c. 82, s. 2; C.S., s. 2386; 1925, c. 287.)

Legal Periodicals. — For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

CASE NOTES

Sufficiency of Short Form of Description. — Where notice is required to contain a short form of description of the property, it is sufficient if it clearly calls the attention of adjoining owners or others who might be interested to the particular property intended, and it need not contain all the elements of a full description. Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

Reference to County Public Registry for Description Held Insufficient. — Where a notice published in a county newspaper under this section simply stated where in the county public registry a description of the land in question could be found, the notice by publication was inadequate to give the notice required by statute. Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

Sufficiency of Publication. — Where the summons in proceedings to register lands has been issued and served under the provisions of G.S. 43-9, it is not necessary to the validity of the proceedings that the publication of notice of filing should have been made on exactly the day the summons was issued, if the publication has been made in the designated paper once a week for eight successive weeks as directed by this section. Cape Lookout Co. v. Gold, 167 N.C. 63, 83 S.E. 3 (1914).

Conclusive Evidence of Publication. — The recital in a final Torrens decree of registration that "publication of notice has been duly made" is conclusive evidence of the fact, and any attack on the decree is foreclosed by the limitation imposed in G.S. 43-26. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

When viewed in light of the purpose of the Torrens Act, it is clear that the proviso that recital of service of summons and publication in the decree and the certificate shall be conclusive evidence thereof is intended to cure any jurisdictional defect with respect to issuance and service of summons and the publication of notice so as to foreclose all jurisdictional attacks on a Torrens title. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

Waiver of Objection to Publication. — In proceedings to register a title to lands, a party claiming an interest in the lands waives his right to object on the grounds of irregularity in the publication of notice by appearing and answering the petition. Cape Lookout Co. v. Gold, 167 N.C. 63, 83 S.E. 3 (1914).

Cited in Brinson v. Lacy, 195 N.C. 394, 142

S.E. 317 (1928); Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

§ 43-11. Hearing and decree.

(a) Referred to Examiner. — Upon the return day of the summons the petition shall be set down for hearing upon the pleadings and exhibits filed. If any person claiming an interest in the land described in the petition, or any lien thereon, shall file an answer, the petition and answer, together with all exhibits filed, shall be referred to the examiner of titles, who shall proceed, after notice to the petitioner and the persons who have filed answer or answered, to hear the cause upon such parol or documentary evidence as may be offered or called for and taken by him, and in addition thereto make such independent examination of the title as may be necessary. Upon his request the clerk shall issue a commission under the seal of the court for taking such testimony as shall be beyond the jurisdiction of such examiner.

(b) Examiner's Report. — The examiner shall, within 30 days after such hearing, unless for good cause the time shall be extended, file with the clerk a report of his conclusions of law and fact, setting forth the state of such title, any liens or encumbrances thereon, by whom held, amount due thereon, together with an abstract of title to the lands and any other information in regard thereto affecting its validity.

(c) Exceptions to Report. — Any of the parties to the proceeding may, within 20 days after such report is filed, file exceptions, either to the conclusions of law or fact. Whereupon the clerk shall transmit the record to the judge of the superior court for his determination thereof; such judge may on his own motion certify any issue of fact arising upon any such exceptions to the superior court of the county in which the proceeding is pending, for a trial of such issue by jury, and he shall so certify such issue of fact for trial by jury upon the demand of any party to the proceeding. If, upon consideration of such record, or the record and verdict of issues to be certified and tried by jury, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations, liens, etc., declaring the land entitled to registration accordingly, and the same, together with the record, shall be docketed by the clerk of the court as in other cases, and a copy of the decree certified to the register of deeds of the county for registration as hereinafter provided. Any of the parties may appeal from such judgment to the appellate division, as in other special proceedings.

(d) No Judgment by Default. — No judgment in any proceeding under this Chapter shall be given by default, but the court must require an examination of the title in every instance except as respects the rights of parties who, by proper pleadings, admit the petitioner's claim. If, upon the return day of the summons and the day upon which the petition is set down for hearing, no answer be filed, the clerk shall refer the same to the examiner of titles, who shall, after notice to the petitioner, proceed to examine the title, together with all liens or encumbrances set forth or referred to in the petition and exhibits, and shall examine the registry of deeds, mortgages, wills, judgments, mechanic liens and other records of the county, and upon such examination he shall, as hereinbefore provided, report to the clerk the condition of the title, with a notice of liens or encumbrances thereon. The examiner shall have power to take and call for evidence in such case as fully as if the application were being contested. If the title shall be found to be in the petitioner, the clerk shall enter a decree to that effect and declaring the land entitled to registration, with entry of any limitations, liens, etc., and shall certify the same for registration, as hereinbefore provided, after approval by the judge of the superior court. (1913, c. 90, s. 8; C.S., s. 2387; 1969, c. 44, s. 48.)

Legal Periodicals. — For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

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Subsection (c) requires the trial judge to certify issues of fact for trial by jury upon demand of any party. Wilkinson v. Weyerhaeuser Corp., 67 N.C. App. 154, 312 S.E.2d 531 (1984).

Proof of Title in Contested Proceedings. — Contested proceedings for the registration of land titles under the Torrens Law are triable in the mode prescribed by this section, under the same rules for proving title as apply in actions of ejectment and other actions involving the establishment of land titles. West Virginia Pulp & Paper Co. v. Richmond Cedar Works, 239 N.C. 627, 80 S.E.2d 665 (1954); Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976); Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

Evidence Sufficient for Jury. — Defendants' evidence of claim under a prior State grant and parol evidence in explanation of a latent ambiguity as to the location of the land embraced in the grant was sufficient to raise an issue of fact as to the location of the land claimed by defendants for the determination of the jury, and defendants' exception to the refusal of the court to submit an issue to the jury as to whether petitioners were the owners of the land and entitled to have title thereto registered was properly sustained. Perry v. Morgan, 219 N.C. 377, 14 S.E.2d 46 (1941).

Cited in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-12. Effect of decree; approval of judge.

Every decree rendered as hereinbefore provided shall bind the land and bar all persons and corporations claiming title thereto or interest therein; quiet the title thereto, and shall be forever binding and conclusive upon and against all persons and corporations, whether mentioned by name in the order of publication, or included under the general description, "to whom it may concern"; and every such decree so rendered, or a duly certified copy thereof, as also the certificate of title issued thereon to the person or corporation therein named as owner, or to any subsequent transferee or purchaser, shall be conclusive evidence that such person or corporation is the owner of the land therein described, and no other evidence shall be required in any court of this State of his or its right or title thereto. It shall not be an exception to such conclusiveness that the person is an infant, lunatic or is under any disability, but such person may have recourse upon the indemnity fund hereinafter provided for, for any loss he may suffer by reason of being so concluded. Notwithstanding the provisions of G.S. 43-10, such decrees shall not be binding on and include the State of North Carolina or any of its agencies unless the State of North Carolina is made a party to the proceeding and notice of said proceeding and copy of petition, etc., are served upon the State of North Carolina as provided in this Chapter. Such decrees shall, in addition to being signed by the clerk of the court, be approved by the judge of the superior court, who shall review the whole proceeding and have power to require any reformation of the process, pleading, decrees or entries. (1913, c. 90, s. 9; 1919, c. 82, s. 3; C.S., s. 2388; 1925, c. 263; 1979, c. 73, s. 2.)

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Cited in Brinson v. Lacy, 195 N.C. 394, 142 S.E. 317 (1928); State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971); Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

ARTICLE 4.

Registration and Effect.

§ 43-13. Manner of registration.

(a) The register of deeds shall register and index, as hereinafter provided, the decree of title before mentioned and all subsequent transfers of title, and note all voluntary and involuntary transactions in any wise affecting the title to the land, authorized to be entered thereon in the real property records and indexes. The certificate of title and the entries for voluntary and involuntary transactions shall be indexed on the grantor index in the name "Registered estate no. ________" and on the grantee index in the name of the registered owner. If the title be subject to trust, condition, encumbrance or the like, the words "in trust," "upon condition," "subject to encumbrance," "life estate," or like appropriate insertion shall indicate the fact and fix any person dealing with such certificate with notice of the particulars of such limitations upon the title as appears upon the registry, and no new or additional certificate number shall be issued in such circumstances. No erasure, alteration, or amendment shall be made upon the registry after entry and issuance of a certificate of title except by order of a court of competent jurisdiction.

(b) When a voluntary or involuntary transaction is entered on a certificate of title, the certificate with the new entry shall be copied and recorded and indexed in the real property records and indexes. The copied certificate shall be indexed on the grantor index in the name "Registered estate no. ________" and on the grantee index in the name of the registered owner. (1913, c. 90, s. 10; 1919, c. 236, s. 1; C.S., s. 2389; 1999-59, s. 2.)

Cross References. — As to the use and confidential nature of actual addresses of Address Confidentiality Program participants by boards of elections for election-related purposes, see G.S. 15C-8.

CASE NOTES

Cited in Haw River Land & Timber v. Lawyers Title Ins., 152 F.3d 275 (4th Cir. 1998).

§ 43-14. Cross-indexing of lands by registers of deeds.

Where any land is brought into the Torrens System and under said System is registered in the public records of the register's office, said register shall cross-index the registration in the general cross index for deeds in his office. (1931, c. 286, s. 2.)

§ 43-15. Certificate issued.

Upon the registration of such decree the register of deeds shall issue an owner's certificate of title, under the seal of his office, which shall be delivered to the owner or his agent duly authorized, and shall be substantially as follows:

State of North Carolina — County of ________________________________

The certificate of ____

I hereby certify that the title is registered in the name of ____________ to and situate in said county and State, described as follows: (Here describe land as in decree.)

Estate ____________ (here name the estate and any limitation or encumbrance thereon, as fee simple, upon condition, in trust, subject to encumbrance, and the like).

Under decree of the land court of ____________ county, entitled ____________.

Registered No. ____, Book No. ____, page ____.

Witness my hand and seal, at office at ________ this ____________________ day of ________, A.D. ________

(Seal) ____________________
Register of Deeds

(1913, c. 90, s. 10; C.S., s. 2390; 1999-456, s. 59.)

CASE NOTES

Cited in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-16. Certificates numbered; entries thereon.

All certificates of title to land in the county shall be numbered consecutively, which number shall be retained as long as the boundaries of the land remain unchanged, and a separate page or more, with appropriate space for subsequent entries, shall be devoted to each title in the registration of titles book for the county. Every entry made upon any certificate of title in such book or upon the owner's certificate, under any of the provisions of this Chapter, shall be signed by the register of deeds and minutely dated in conformity with the dates shown by the entry book. (1913, c. 90, s. 11; C.S., s. 2391.)

CASE NOTES

Cited in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-17. New certificate issued, if original lost.

Whenever an owner's certificate of title is lost or destroyed, the owner or his personal representative may petition the court for the issuance of a new certificate. Notice of such petition shall be published once a week for four successive weeks, under the direction of the court, in some convenient newspaper, and noted upon the registry of titles, and upon satisfactory proof having been exhibited before it that the certificate has been lost or destroyed the court may direct the issuance of a new certificate, which shall be appropriately designated and take the place of the original, but at least 30 full days shall elapse between the filing of the petition and making the decree for such new certificate. (1913, c. 90, s. 24; C.S., s. 2392.)

CASE NOTES

Cited in Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

§ 43-17.1. Issuance of certificate upon death of registered owner; petition and contents; dissolution of corporation; certificate lost or not received by grantee.

Upon the death of any person who is the registered owner of any estate or interest in land which has been brought under this Chapter, a petition may be filed with the clerk of the superior court of the county in which the title to such land is registered by anyone having any estate or interest in the land, or any part thereof, the title to which has been registered under the terms of this Chapter, attaching thereto the registered certificate of title issued to the deceased holder and setting forth the nature and character of the interest or estate of such petitioner in said land, the manner in which such interest or estate was acquired by the petitioner from the deceased person — whether by descent, by will, or otherwise, and setting forth the names and addresses of any and all other persons, firms or corporations which may have any interest or estate therein, or any part thereof, and the names and addresses of all persons known to have any claims or liens against the said land; and setting forth the changes which are necessary to be made in the registered certificate of title to land in order to show the true owner or owners thereof occasioned by the death of the registered owner of said certificate. Such petition shall contain all such other information as is necessary to fully inform the court as to the status of the title and the condition as to all liens and encumbrances against said land existing at the time the petition is filed, and shall contain a prayer for such relief as the petitioner may be entitled to under the provisions hereof. Such petition shall be duly verified.

Like procedure may be followed as herein set forth upon the dissolution of any corporation which is the registered owner of any estate or interest in the land which has been brought under this Chapter.

In the event the registered certificate of title has been lost and after due diligence cannot be found, and this fact is made to appear by allegation in the petition, such registered certificate of title need not be attached to the petition as hereinabove required, but the legal representatives of the deceased registered owner shall be made parties to the proceeding. If such persons are unknown or, if known cannot after due diligence be found within the State, service of summons upon them may be made by publication of the notice prescribed in G.S. 43-17.2. In case the registered owner is a corporation which has been dissolved, service of summons upon such corporation and any others who may have or claim any interest in such land thereunder shall be made by publication of the notice containing appropriate recitals as required by G.S. 43-17.2.

If any registered owner has by writing conveyed or attempted to convey a title to any registered land without the surrender of the certificate of title issued to him, the person claiming title to said lands under and through said registered owner by reason of his or its conveyance may file a petition with the clerk of the superior court of the county in which the land is registered and in the proceeding under which the title was registered praying for the cancellation of the original certificate and the issuance of the new certificate. Upon the filing of such petition notice shall be published as prescribed in G.S. 43-17.2. The clerk of the superior court with whom said petition is filed shall by order determine what additional notice, if any, shall be given to registered owners. If the registered owner is a natural person, deceased, or a corporation dissolved the court may direct what additional notice, if any, shall be given. The clerk shall hear the evidence, make findings of fact, and if found as a fact that the original certificate of the registered owner has been lost and cannot be found, shall enter his order directing the register of deeds to cancel the same and to issue a new certificate to such person or persons as may be entitled thereto, subject to such claims or liens as the court may find to exist.

Any party within 10 days from the rendition of such judgment or order by the clerk of superior court of the county in which said land is registered may appeal to the superior court during a session of court, where the cause shall be heard de novo by the judge, unless a jury trial be demanded, in which event the issues of fact shall be submitted to a jury. From any order or judgment entered by the superior court during a session of court an appeal may be taken to the appellate division in the manner provided by law. (1943, c. 466, s. 1; 1945, c. 44; 1969, c. 44, s. 49; 1971, c. 1185, s. 2.)

CASE NOTES

Cited in Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

§ 43-17.2. Publication of notice; service of process.

Upon the filing of such duly verified petition, the petitioner shall cause to be published once a week for four weeks, in some newspaper having a general circulation in the county in which the land is situated, a notice signed by the clerk of the superior court, setting forth in substance the nature of the petition, a description of the land affected thereby, and the relief therein prayed for, and notifying all persons having or claiming any interest or estate in the land to appear at a time therein specified, which shall be at least 30 days after the first publication of said notice, to show cause, if any exists, why the relief prayed for in the petition should not be granted. An affidavit shall be filed by the publisher with the clerk of the court, showing a full compliance of this requirement. Upon a filing of said petition, the petitioner shall cause the summons, with a copy of the petition, to be served upon all persons, firms or corporations known to have any interest or estate in the lands referred to in the petition, and the personal representative, the devisees, if any, and all heirs at law of the deceased registered owner of said land. In the event any of the persons upon whom service of summons is to be made are nonresidents of the State of North Carolina, service may be made by publication in the manner prescribed by law for the service of summons in special proceedings. (1943, c. 466, s. 1.)

§ 43-17.3. Answer by person claiming interest.

Any person asserting a claim or any interest in such registered land may, at any time prior to the hearing provided for in G.S. 43-17.4, file such answer or other pleadings as may be proper, asserting his rights or claims to the property referred to in the petition. (1943, c. 466, s. 1.)

§ 43-17.4. Hearing by clerk of superior court; orders and decrees; cancellation of old certificate and issuance of new certificate.

The clerk of the superior court shall hear and determine all matters presented upon the petition and such pleadings as may be filed in this proceeding, and shall make such orders and decrees therein as may be found to be proper from the facts as ascertained and determined by the court. The court is authorized and empowered to order and direct that the outstanding registered certificate of title to the land shall be surrendered and cancelled in the office of the register of deeds, and that a new certificate of title shall be issued, showing therein the owner or owners of the land described in the original certificate and the nature and character of such ownership: Provided, the clerk of the superior court shall not authorize the issuance of the new certificate of title until the fees provided in G.S. 43-49 have been paid. Upon the surrender and cancellation by the register of deeds of the outstanding certificate of title, the new certificate of title shall be registered and cross-indexed in the same manner provided for the registration of the original certificate, and the register of deeds shall issue a new certificate of title in the same manner and form as provided for the original certificate. The said new certificate shall have the same force and effect as the original certificate of title and shall be subject to the same provisions of law with reference thereto. (1943, c. 466, s. 1.)

§ 43-17.5. Issuance of new certificate validated.

Whenever heretofore any registered certificate of title has been surrendered by the heirs or devisees of any deceased registered owner of any registered title and the registered certificate of title of such deceased owner has been surrendered and canceled and a new certificate of title issued to a purchaser or to such heirs or devisees, the same is hereby validated and confirmed and made effectual to the same extent as though such new certificate had been issued in compliance with the provisions of this Chapter. (1943, c. 466, s. 1.)

§ 43-18. Registered owner's estate free from adverse claims; exceptions.

Every registered owner of any estate or interest in land brought under this Chapter shall, except in cases of fraud to which he is a party or in which he is a privy, without valuable consideration paid in good faith, and except when any registration has been procured through forgery, hold the land free from any and all adverse claims, rights or encumbrances not noted on the certificate of title, except

(1) Liens, claims or rights arising or existing under the laws or Constitution of the United States which the statutes of this State cannot require to appear of record under registry laws;
(2) Taxes and assessments thereon due the State or any county, city or town therein, but not delinquent;
(3) Any lease for a term not exceeding three years, under which the land is actually occupied. (1913, c. 90, s. 25; C.S., s. 2393.)

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

This section modifies the common-law rule of lis pendens. Its purpose is to stabilize titles by requiring recordation of all deeds, mortgages, or other paper-writings which transfer or encumber the title to land. Whitehurst v. Abbott, 225 N.C. 1, 33 S.E.2d 129 (1945).

Unrecorded Deed Does Not Affect Lands Covered by Torrens Title. — Where title to lands was registered under the provisions of the Torrens Law, and the deed seeking to establish a boundary line and reserve a right-of-way across the lands was not recorded in the registration of titles book, and no notice of the existence thereof was made in said registration of titles book or upon the certificate of title, the deed and purported reservation of right-of-way had no effect whatever on the lands covered by the Torrens title. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-19. Adverse claims existing at initial registry; affidavit; limitation of action.

Any person making any claim to or asserting any lien or charge upon registered land, existing at the initial registry of the same and not shown upon the register or adverse to the title of the registered owner, and for which no other provision is herein made for asserting the same in the registry of titles, may make an affidavit thereof setting forth his interest, right, title, lien or demand, and how and under whom derived, and the character and nature thereof. The affidavit shall state his place of residence and designate a place at which all notices relating thereto may be served. Upon the filing of such affidavit in the office of the clerk of the superior court, the clerk shall order a note thereof as in the case of charges or encumbrances, and the same shall be entered by the register of deeds. Action shall be brought upon such claim within six months after the entry of such note, unless for cause shown the clerk shall extend the time. Upon failure to commence such action within the time prescribed therefor, the clerk shall order a cancellation of such note. If any person shall wantonly or maliciously or without reasonable cause procure such notation to be entered upon the registry of titles, having the effect of a cloud upon the registered owner's title, he shall be liable for all damages the owner may suffer thereby. (1913, c. 90, s. 25; C.S., s. 2394.)

§ 43-20. Decree and registration run with the land.

The obtaining of a decree of registration and the entry of a certificate of title shall be construed as an agreement running with the land, and the same shall ever remain registered land, subject to the provisions of this Chapter and all amendments thereof. (1913, c. 90, s. 26; C.S., s. 2395.)

§ 43-21. No right by adverse possession.

No title to nor right or interest in registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession. (1913, c. 90, s. 27; C.S., s. 2396.)

Legal Periodicals. — For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Cited in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971); Board of Transp. v. Pelletier, 38 N.C. App. 533, 248 S.E.2d 413 (1978).

§ 43-22. Jurisdiction of courts; registered land affected only by registration.

Except as otherwise specially provided by this Chapter, registered land and ownership therein shall be subject to the jurisdiction of the courts in the same manner as if it had not been registered; but the registration shall be the only operative act to transfer or affect the title to registered land, and shall date from the time the writing, instrument or record to be registered is duly filed in the office of the register of deeds, subject to the provisions of this Chapter; no voluntary or involuntary transaction shall affect the title to registered lands until registered in accordance with the provisions of this Chapter: Provided, that all mortgages, deeds, surrendered and canceled certificates, when new certificates are issued for the land so deeded, the other paper-writings, if any, pertaining to and affecting the registered estate or estates herein referred to, shall be filed by the register of deeds for reference and information, but the consolidated real property records shall be and constitute sole and conclusive legal evidence of title, except in cases of mistake and fraud, which shall be corrected in the methods now provided for the correction of papers authorized to be registered. (1913, c. 90, s. 28; C.S., s. 2397; 2000-140, s. 42(a).)

CASE NOTES

No Distinction Between Original Parties and Creditors or Purchasers. — The statute draws no distinction between the original parties to deeds or contracts affecting the title of lands registered under its provisions and creditors or purchasers, and in respect to such registration they stand upon the same footing. Dillon v. Broeker, 178 N.C. 65, 100 S.E. 191 (1919).

Unrecorded Deed Does Not Affect Lands Covered by Torrens Title. — Where title to lands was registered under the provisions of the Torrens Law, and deed seeking to establish a boundary line and to reserve a right-of-way across the lands was not recorded in the registration of titles book, and no notice of the existence thereof was made in said registration of titles book or upon the certificate of title, the deed and purported reservation of right-of-way had no effect whatever on the lands covered by the Torrens title. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

Cited in Haw River Land & Timber v. Lawyers Title Ins., 152 F.3d 275 (4th Cir. 1998).

§ 43-23. Priority of right.

In case of conflicting claims between the registered owners the right, title or estate derived from or held under the older certificate of title shall prevail. (1913, c. 90, s. 29; C.S., s. 2398.)

§ 43-24. Compliance with this Chapter due registration.

When the provisions of this Chapter have been complied with, all conveyances, deeds, contracts to convey or leases shall be considered duly registered, as against creditors and purchasers, in the same manner and as fully as if the same had been registered in the manner heretofore provided by law for the registration of conveyances. (1913, c. 90, s. 32; C.S., s. 2399.)

§ 43-25. Release from registration.

Whenever the record owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of this Chapter, desires to have such estate released from the provisions of said Chapter insofar as said Chapter relates to the form of conveyance, so that such estate may ever thereafter be conveyed, either absolutely or upon condition or trust, by the use of any desired form of conveyance other than the certificate of title prescribed by said Chapter, such owner may present his owner's certificate of title to such registered estate to the register of deeds of the county wherein such land lies, with a memorandum or statement written by him on the margin thereof in the words following, or words of similar import, to wit: "I (or we),..............., being the owner (or owners) of the registered estate evidenced by this certificate of title, do hereby release said estate from the provisions of Chapter 43 of the General Statutes of North Carolina insofar as said Chapter relates to the form of conveyance, so that hereafter the said estate may, and shall be forever until again hereafter registered in accordance with the provisions of said Chapter and acts amendatory thereof, conveyed, either absolutely or upon condition or trust, by any form of conveyance other than the certificate of title prescribed by said Chapter, and in the same manner as if said estate had never been registered." Which said memorandum or statement shall further state that it is made pursuant to the provisions of this section, and shall be signed by such record owner and attested by the register of deeds under his hand and official seal, and a like memorandum or statement so entered, signed and attested upon the margin of the record of the said owner's certificate of title in the consolidated real property records in said register's office, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the consolidated real property records showing that such entry has been made upon the owner's certificate of title; and thereafter any conveyance of such registered estate, or any part thereof, by such owner, his heirs or assigns, by means of any desired form of conveyance other than such certificate of title shall be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance in the same manner and to the same extent as if such estate had never been so registered. (Ex. Sess. 1924, c. 40; 2000-140, s. 42(b).)

Legal Periodicals. — As to the effect of this section, see 3 N.C.L. Rev. 19 (1925).

ARTICLE 5.

Adverse Claims and Corrections after Registration.

§ 43-26. Limitations.

No decree of registration heretofore entered, and no certificate of title heretofore issued pursuant thereto, shall be adjudged invalid, revoked, or set aside, unless the action or proceeding in which the validity of such decree of registration or certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within 12 months from March 10, 1919.

No decree of registration hereafter entered and no certificate of title hereafter issued pursuant thereto shall be adjudged invalid or revoked or set aside, unless the action or proceeding in which the validity of such decree or of the certificate of title issued pursuant thereto is attacked or called in question be commenced or the defense alleging the invalidity thereof be interposed within 12 months from the date of such decree.

No action or proceeding for the recovery of any right, title, interest, or estate in registered land adverse to the title established and adjudicated by any decree of registration heretofore entered shall be maintained unless such action or proceeding be commenced within 12 months from the date last mentioned; and no action or proceeding for the recovery of any right, title, interest, estate in registered land, adverse to the right established by any decree of registration hereafter shall be maintained unless such action or proceeding be commenced within 12 months from the date of such decree.

No action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land which existed at the date when any decree of registration was heretofore entered, and which was not recognized or established by such decree, shall be maintained, unless such action or proceeding be commenced within 12 months from the date above mentioned; and no action or proceeding for the enforcement or foreclosure of any lien upon or charge against registered land in existence at the date of any decree of registration hereafter entered, and which is not recognized and established by such decree, shall be maintained, unless such action or proceeding be commenced within 12 months from the date of such decree. (1919, c. 236, s. 1; C.S., s. 2400.)

Legal Periodicals. — For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

CASE NOTES

Conclusive Evidence of Publication. — The recital in a final Torrens decree of registration that "publication of notice has been duly made" was conclusive evidence of the fact, and any attack on the decree was foreclosed by the limitation imposed in this section. State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

Cited in Richmond Cedar Works v. Farmers Mfg. Co., 41 N.C. App. 233, 254 S.E.2d 673 (1979).

§ 43-27. Adverse claim subsequent to registry; affidavit of claim prerequisite to enforcement; limitation.

Any person claiming any right, title, or interest in registered land adverse to the registered owner thereof, arising subsequent to the date of the original decree of registration, may, if no other provision is made for registering the same, file with the register of deeds of the county in which such decree was rendered or certificate of title thereon was issued, a verified statement in writing, setting forth fully the right, title, or interest so claimed, how or from whom it was acquired, and a reference to the number, book, and page of the certificate of title of the registered owner, together with a description of the land by metes and bounds, the adverse claimant's place of residence and his post-office address, and, if a nonresident, he shall designate or appoint the said register of deeds to receive all notices directed to or to be served upon such adverse claimant in connection with the claim by him made, and such statement shall be noted and filed by said register of deeds as an adverse claim; but no action or proceeding to enforce such adverse claim shall be maintained unless the same be commenced within six months of the filing of the statement thereof. (1919, c. 236, s. 1; C.S., s. 2401.)

CASE NOTES

Cited in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-28. Suit to enforce adverse claim; summons and notice necessary.

Upon the institution of any action or proceeding to enforce such adverse claim, notice thereof shall be served upon the register of deeds, who shall enter upon the registry a memorandum that suit has been brought or proceeding instituted to determine the validity of such adverse claim; and summons or notice shall be served upon the holder or claimant of the registered title or certificate or other person against whom such adverse claim is alleged, as provided by law for the institution of suits or proceedings in the courts of this State.

If no notice of the institution of an action or proceeding to enforce an adverse claim be served upon the register of deeds and upon the holder of the registered title or certificate, or other person, as aforesaid, within seven months from the date of filing the statement of adverse claim, the register of deeds shall cancel upon the registry the adverse claim so filed and make a memorandum setting out that no notice of suit or proceeding to enforce the same had been served upon him within seven months as herein required, and that such adverse claim was therefore canceled; and thereafter no action or proceeding shall be begun or maintained to enforce such adverse claim in any of the courts of this State. (1919, c. 236, s. 1; C.S., s. 2402.)

CASE NOTES

Cited in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-29. Judgment in suit to enforce adverse claim; register to file.

The court shall certify its judgment to the register of deeds; if such adverse claim be held valid, the register of deeds shall make such entry upon the registry and upon the owner's certificate of title as may be directed by the court, or he may file and record a certified copy of the judgment or order of the court thereon; if such adverse claim be held invalid the register of deeds shall cancel such adverse claim upon the registry, noting thereon that the same was done by order or judgment of the court, or he may file and record a certified copy of the judgment or order of the court thereon. (1919, c. 236, s. 1; C.S., s. 2403.)

§ 43-30. Correction of registered title; limitation of adverse claims.

Any registered owner or other claimant under the registered title may at any time apply to the court in which the original decree was entered, by petition, setting out that registered interests of any description, whether vested, contingent, expectant or inchoate, have terminated and ceased, or that new interests have arisen or been created which do not appear upon the certificate, or that any error or omission was made in entering or issuing the certificate or any duplicate thereof, or that the name of any person on the certificate has been changed, or that the registered owner had married or, if registered as married, that the marriage has been terminated, or that a corporation which owned registered lands has been dissolved, without conveying the same or transferring its certificate within three years after the dissolution, or any other reasonable and proper ground of correction or relief; and such court may hear and determine the petition after notice to all parties in interest, and may make such order or decree as may be appropriate and lawful in the premises; but nothing in this section shall be construed to authorize any such court to open any original decree of registration which was entered more than 12 months prior to the filing of such petition, and nothing shall be done or ordered by the court to divest or impair the title or other interest of a purchaser who holds a transfer or certificate of title for value and in good faith. No action or proceeding shall be commenced or maintained to set up or establish any right, claim, interest or estate adverse to the order or decree or certificate of title issued thereon made or entered upon any petition or other proceeding authorized by this section, unless the same shall be brought and instituted within six months from the date of such order or decree authorized by this section. (1919, c. 236, s. 1; C.S., s. 2404.)

ARTICLE 6.

Method of Transfer.

§ 43-31. When whole of land conveyed.

Whenever the whole of any registered estate is transferred or conveyed the same shall be done by a transfer or conveyance attached to the certificate substantially as follows:

The owners (giving the names of the parties owning land described in the certificate) hereby, in consideration of ________________ dollars, sell and convey to the purchaser (giving name of purchaser) the lot or tract of land, as the case may be, described in the certificate of title hereto attached. The transfer shall be indexed on the grantor and grantee indexes in the same manner as deeds are indexed.

The same shall be signed and properly acknowledged by the parties and shall have the full force and effect of a deed in fee simple: Provided, that if the sale shall be in trust, upon condition, with power to sell or other unusual form of conveyance, the same shall be set out in the transfer, and shall be entered upon the consolidated real property records as hereinafter provided; that upon presentation of the transfer, together with the certificate of title, to the register of deeds, the transaction shall be duly noted and registered in accordance with the provisions of this Chapter, and certificate of title so presented shall be canceled and a new certificate with the same number issued to the purchaser thereof, which new certificate shall fully refer by number and also by name of holder to former certificate just canceled. (1913, c. 90, s. 12; C.S., s. 2405; 1999-59, s. 3; 2000-140, s. 42(c).)

CASE NOTES

Necessity of Affidavit and Notation. — A contract to convey lands, where the owner has registered it, under the Torrens Law, cannot be specifically enforced until the complainant has filed an affidavit and had notation made on the books as required by this section. Dillon v. Broeker, 178 N.C. 65, 100 S.E. 191 (1919).

Cited in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-32. Conveyance of part of registered land.

The transfer of any part of a registered estate, either of an undivided interest therein or of a separate lot or parcel thereof, shall be made by an instrument of the transfer or conveyance similar in form to that herein provided for the transfer of the whole of any registered estate, to which shall be attached the certificate of title of such registered estate. In case of the transfer of an undivided interest in a registered estate, such instrument of transfer or conveyance shall accurately specify and describe the extent and amount of the interest transferred and of the interest retained, respectively. In case of a transfer of a separate lot or parcel of a registered estate, such instrument of transfer or conveyance shall describe the lot or parcel transferred either by metes and bounds or by reference to the map or plat attached thereto, and shall in every case be accompanied by a map or plat having clearly indicated thereon the boundaries of the whole of the registered estate and of the lot or parcel to be transferred, but a new survey of the original registered estate shall not be required. The transfer shall be indexed on the grantor and grantee indexes in the same manner as deeds are indexed. (1919, c. 82, s. 4; C.S., s. 2406; 1999-59, s. 4.)

CASE NOTES

Cited in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-33. Duty of register of deeds upon part conveyance.

Upon presentation to the register of deeds of an instrument of transfer or conveyance of an undivided interest in a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of title attached thereto and to issue to each owner a new certificate of title, each bearing the same number as the original certificate of title and accurately specifying and describing the extent and the amount of the interest retained or of the interest transferred, as the case may be. Upon presentation to the register of deeds of an instrument of transfer or conveyance of a separate lot or parcel of a registered estate, in proper form as above prescribed, it shall be his duty to cancel the certificate of the title attached thereto and to issue to each owner a new certificate of title bearing a new number and describing the separate lot or parcel retained or transferred, as the case may be, either by metes and bounds or by reference to a map or plat thereto attached. The register of deeds is responsible for determining that each new certificate of title contains a description of the property transferred or retained but not for verifying the accuracy of any description. (1919, c. 82, s. 4; C.S., s. 2407; 1999-59, s. 5.)

CASE NOTES

Cited in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-34. Subdivision of registered estate.

Any owner of a registered estate who may desire to subdivide the same may make application in writing to the register of deeds for the issuance of a new certificate of title for each subdivision, to which application shall be attached a map or plat having clearly indicated thereon the boundaries of the whole of the registered estate in question and of each lot or parcel for which he desires a new certificate of title. Thereupon it shall be the duty of the register of deeds, upon payment by such applicant of necessary surveyor's fees, if any are required, and of the amount herein provided for issuing the certificates of title and recording the map, to cancel the certificate of title attached to said application and to issue to such owner new certificates of title, each bearing a new number, for each lot or parcel shown upon the said map, describing such lot or parcel in such certificates either by metes and bounds or by reference to a map or plat attached thereto. (1919, c. 82, s. 4; C.S., s. 2408.)

§ 43-35. References and cross references entered on register.

In all cases the register of deeds shall place upon the consolidated real property records and upon the certificate of title of such registered estate therein, references and cross references to the new certificates issued as above provided, in accordance with the provisions of this Article, and the new certificates issued shall fully refer by number and by name of the holder to the canceled certificate in place of which they are issued. (1919, c. 82, s. 4; C.S., s. 2409; 2000-140, s. 42(d).)

§ 43-36. When land conveyed as security.

(a) Whole Land Conveyed. — Whenever the owner of any registered estate shall desire to convey same as security for debt, it may be done in the following manner, by a short form of transfer, substantially as follows, to wit:

A.B. and wife (giving names of all owners or holders of certificates and their wives) hereby transfer to C.D. the tract or lot of land described as No. ________ in registration of titles book for ________ County, a certificate for the title for same being hereto attached, to secure a debt of ________ dollars, due to ________, of ____________ County and State, on the ________ day of ____________, ________, evidenced by bond (or otherwise as the case may be) dated the ________ day of ____________, ________. In case of default in payment of said debt with accrued interest, ________ days notice of sale required.

The same shall be signed and properly acknowledged by the parties making same, and shall be presented, together with the owner's certificate, to the register of deeds, whose duty it shall be to note upon the owner's certificate and upon the certificate of title in the consolidated real property records the name of the trustee, the amount of debt, and the date of maturity of same.

(b) Part of Land Conveyed. — When a part of the registered estate shall be so conveyed, the register of deeds shall note upon the consolidated real property records and owner's certificate the part so conveyed, and if the same be required and the proper fee paid by the trustee, shall issue what shall be known as a partial certificate, over his hand and seal, setting out the portion so conveyed.

(c) Effect of Transfer. — All transfers by such short form shall convey the power of sale upon due advertisement at the county courthouse and in some newspaper published in the county, or adjoining county, in the same manner and as fully as is now provided by law in the case of mortgages and deeds of trust and default therein.

(d) Other Encumbrances Noted. — All registered encumbrances, rights or adverse claims affecting the estate represented thereby shall continue to be noted, not only upon the certificate of title in the consolidated real property records, but also upon the owner's certificate, until same shall have been released or discharged. And in the event of second or other subsequent voluntary encumbrances the holder of the certificate may be required to produce such certificate for the entry thereon or attachment thereto of the note of such subsequent charge or encumbrance as provided in this Article.

(e) Other Forms of Conveyance May Be Used. — Nothing in this section nor this Chapter shall be construed to prevent the owner from conveying such land, or any part of the same, as security for a debt by deed of trust or mortgage in any form which may be agreed upon between the parties thereto, and having such deed of trust or mortgage recorded in the office of the register of deeds as other deeds of trust and mortgages are recorded: Provided, that the book and page of the record at which such deed of trust or mortgage is recorded shall be entered by the register of deeds upon the owner's certificate and also on the consolidated real property records.

(f) Sale under Lien; New Certification. — Upon foreclosure of such deed of trust or mortgage, or sale under execution for taxes or other lien on the land, the fact of such foreclosure or sale shall be reported by the trustee, mortgagee or other person authorized to make the same, to the register of deeds of the county in which the land lies, and, upon satisfactory evidence thereof, it shall be his duty to call in and cancel the outstanding certificate of title for the land, so sold, and to issue a new certificate in its place to the purchaser or other person entitled thereto; and the production of such outstanding certificate and its surrender by the holder thereof may be compelled, upon notice to him, by motion before and order of the clerk of the superior court in the original proceeding or the clerk of the superior court of the county in which the land lies; but the right of appeal from such order may be exercised and shall be allowed as in other special proceedings, and pending any such appeal the rights of all parties shall be preserved. (1913, c. 90, s. 14; 1915, c. 245; 1919, c. 82, s. 5; C.S., s. 2410; 1999-456, s. 59; 2000-140, s. 42(e).)

§ 43-37. Owner's certificate presented with transfer.

In voluntary transactions the owner's certificate of title must be presented along with the writing or instrument conveying or effecting the sale, and thereupon and not otherwise the register shall be authorized to register the conveyance or other transaction upon proof of payment of all delinquent taxes or liens, if any, or if such payment be not shown the entry and new certificate shall note such taxes or liens as having priority thereto. (1913, c. 90, s. 15; C.S., s. 2411.)

CASE NOTES

Cited in State v. Johnson, 278 N.C. 126, 179 S.E.2d 371 (1971).

§ 43-38. Transfers probated; partitions; contracts.

All transfers of registered land shall be duly executed and probated as required by law upon like conveyances of other lands, and in all cases of change in boundary by partition, subtraction or addition of land there shall be an accurate survey and permanent marking of boundaries and accurate plots, showing the courses, distances and markings of every portion thereof, which shall be duly proved and registered as upon the initial registration. Such transfers shall be presented to the register of deeds for entry upon the consolidated real property records and upon the owner's certificate within 30 days from the date thereof, or become subject to any rights which may accrue to any other person by a prior registration. All leases or contracts affecting land for a period exceeding three years shall be in writing, duly proved before the clerk of the superior court, recorded in the register's office, and noted upon the registry and upon the owner's certificate. (1913, c. 90, ss. 15, 32; C.S., s. 2412; 2000-140, s. 42(f).)

CASE NOTES

A partially executed contract to convey real estate is subject to the statute of frauds. Holt v. Holt, 47 N.C. App. 618, 267 S.E.2d 711 (1980), rev'd on other grounds, 304 N.C. 137, 282 S.E.2d 784 (1981).

Fully Executed Contract Not Subject to Statute of Frauds. — A fully executed contract to convey real estate is not subject to the statute of frauds. Holt v. Holt, 47 N.C. App. 618, 267 S.E.2d 711 (1980), rev'd on other grounds, 304 N.C. 137, 282 S.E.2d 784 (1981).

Signature Requirement. — When church officials sued seceders from the church to recover church property, the statute of frauds did not preclude the national or diocesan church's canons from establishing a valid trust in favor of the diocese as to church property without the signatures of the seceders because the seceders had previously accepted the canons as establishing a deed of trust in which the church's property would be held upon their withdrawal from the church. Daniel v. Wray, 158 N.C. App. 161, 580 S.E.2d 711, 2003 N.C. App. LEXIS 1038 (2003).

§ 43-39. Certified copy of order of court noted.

In voluntary transactions a certificate from the proper State, county or court officer, or certified copy of the order, decree or judgment of any court of competent jurisdiction shall be authority for him to order a proper notation thereof upon the consolidated real property records, and for the register of deeds to note the transaction under the direction of the court. (1913, c. 90, s. 16; C.S., s. 2413; 2000-140, s. 42(g).)

CASE NOTES

Applied in Harrison v. Darden, 223 N.C. 364, 26 S.E.2d 860 (1943).

§ 43-40. Production of owner's certificate required.

Whenever owner's certificate is not presented to the register along with any writing, instrument or record filed for registration under this Chapter, he shall forthwith send notice by registered mail to the owner of such certificate, requesting him to produce the same in order that a memorial of the transaction may be made thereon; and such production may be required by subpoena duces tecum or by other process of the court, if necessary. (1913, c. 90, s. 17; C.S., s. 2414.)

§ 43-41. Registration notice to all persons.

Every voluntary or involuntary transaction, which if recorded, filed or entered in any clerk's office would affect unregistered land, shall, if duly registered in the office of the proper register as the case may be, and not otherwise, be notice to all persons from the time of such registration, and operate, in accordance with law and the provisions of this Chapter, upon any registered land in the county of such registration. (1913, c. 90, s. 18; C.S., s. 2415.)

§ 43-42. Conveyance of registered land in trust.

Whenever a writing, instrument or record is filed for the purpose of transferring registered land in trust, or upon any equitable condition or limitation expressed therein, or for the purpose of creating or declaring a trust or other equitable interest in such land, the particulars of the trust, condition, limitation or other equitable interest shall not be entered on the certificate, but it shall be sufficient to enter in the consolidated real property records and upon the certificates a memorial thereof by the terms "in trust" or "upon condition" or in other apt words, and to refer by number to the writing, instrument or record authorizing or creating the same. And if express power is given to sell, encumber or deal with the land in any manner, such power shall be noted upon the certificates by the term "with power to sell" or "with power to encumber," or by other apt words. (1913, c. 90, s. 19; C.S., s. 2416; 2000-140, s. 42(h).)

§ 43-43. Authorized transfer of equitable interests registered.

No writing or instrument for the purpose of transferring, encumbering or otherwise dealing with equitable interests in registered land shall be registered unless the power thereto enabling has been expressly conferred by or has been reserved in the writing or instrument creating such equitable instrument, or has been declared to exist by the decree of some court of competent jurisdiction, which decree must also be registered. (1913, c. 90, s. 20; C.S., s. 2417.)

§ 43-44. Validating conveyance by entry on margin of certificate.

In all cases where the owner of any estate in lands, the title to which has been registered or attempted to be registered in accordance with the provisions of this Chapter, has before August 21, 1924, and subsequent to such registration made any conveyance of such estate, or any portion thereof, by any form of conveyance sufficient in law to pass the title thereto if the title to said lands had not been so registered, the record owner and holder of the certificate of title covering such registered estate may enter upon the margin of his certificate of title in the consolidated real property records a memorandum showing that such registered estate, or a portion thereof, has been so conveyed, and further showing the name of the grantee or grantees and the number of the book and the page thereof where such conveyance is recorded in the office of the register of deeds, and make a like entry upon the owner's certificate of title held by him, both of such entries to be signed by him and witnessed by the register of deeds, and attested by the seal of office of the register of deeds upon said owner's certificate, with the further notation made and signed by the register of deeds on the margin of the certificate of title in the consolidated real property records showing that such entry has been made upon the owner's certificate of title, and thereupon such conveyance shall become and be as valid and effectual to pass such estate of the owner according to the tenor and purport of such conveyance as if the title to said lands had never been so registered, whether such conveyance be in form absolute or upon condition of trust; and in all cases where such conveyance has been made before August 21, 1924, upon the making of the entries herein authorized by the record owner and holder of such owner's certificate of title, the grantee and his heirs and assigns shall thereafter have the same right to convey the said estate or any part of the same in all respects as if the title to said lands had never been so registered. (Ex. Sess. 1924, c. 41; 2000-140, s. 42(i).)

Legal Periodicals. — As to the effect of this section, see 3 N.C.L. Rev. 19 (1925).

Article 7.

Liens upon Registered Lands.

§ 43-45. Docketed judgments.

Whenever any judgment of the superior court of the county in which the registered estate is situated shall be duly docketed in the office of the clerk of the superior court, or any lien or notice of lis pendens is filed in the office of the clerk of the superior court, it shall be the duty of the clerk, upon the request of any interested party, to certify the same to the register of deeds. The register of deeds shall enter upon the certificate of title, the date, and the amount of the judgment, and the same shall be a lien upon such land as fully as such docketed judgment would be a lien upon unregistered lands of the judgment debtor, and the register of deeds is authorized to recover the certificate of title pursuant to G.S. 43-40. The register of deeds shall also enter notice of the judgment, lien, or lis pendens on the record copy of the certificate of title, and the encumbrance is valid against the registered estate from the time it is noted on the record copy. (1913, c. 90, s. 22; C.S., s. 2418; 1999-59, s. 6.)

CASE NOTES

Cited in In re Wallace, 212 N.C. 490, 193 S.E. 819 (1937); Haw River Land & Timber v. Lawyers Title Ins., 152 F.3d 275 (4th Cir. 1998).

§ 43-46. Notice of delinquent taxes filed.

It shall be the duty of the tax collector of each taxing unit, not later than June 30 following the date the taxes became delinquent, to file an exact memorandum of the delinquency, if any, of any registered land for the nonpayment of the taxes or assessments thereon, including interest, in the office of the register of deeds for registration; and if such officer fails to perform such duty, and there shall be subsequent to such day a transfer of the land as hereinbefore provided, the grantee shall acquire a good title free from any lien for such taxes and assessments, and the collector and his sureties shall be liable for the payment of the taxes and assessments with the interest thereon. The register of deeds shall enter the notice of delinquency on the record copy of the certificate of title, and the tax lien shall be valid against the registered estate from the time it is noted on the record copy. The register of deeds shall enter the notice of cancellation of the tax lien on the record copy of the certificate of title upon presentation of satisfactory evidence of payment. (1913, c. 90, s. 21; C.S., s. 2419; 1999-59, s. 7; 2000-140, s. 9.)

§ **43-47:** Repealed by Session Laws 1999-59, s. 8, effective January 1, 2000.

§ 43-48. Foreclosure of tax lien.

The lien for ad valorem taxes may be foreclosed and the property sold pursuant to G.S. 105-375. A note of the sale under this section shall be duly registered, and a certificate shall be entered and an owner's certificate issued in favor of the purchaser in whom title shall be thereby vested as registered owner, in accordance with the provisions of this Chapter. Nothing in this section shall be so construed as to affect or divert the title of a tenant in reversion or remainder to any real estate which has been returned delinquent and sold on account of the default of the tenant for life in paying the taxes or assessments thereon. (1913, c. 90, s. 23; C.S., s. 2421; 1999-59, s. 9.)

Article 8.

Assurance Fund.

§ 43-49. Assurance fund provided; investment.

Upon the original registration of land and also upon the entry of certificate showing the title as registered owners in heirs or devisees, there shall be paid to the clerk of the court one tenth of one percent (0.1%) of the assessed value of the land for taxes, as an assurance fund, which shall be paid over to the State Treasurer, who shall be liable therefor upon his official bond as for other moneys received by him in his official capacity. He shall keep all the principal and interest of such fund invested, except as required for the payment of indemnities, in bonds and securities of the United States, of this State, or of counties and other municipalities within the State. Such investment shall be made upon the advice and concurrence of the Governor and Council of State, and he shall make report of such funds and the investment thereof to the General Assembly biennially. When registration involves the State of North Carolina or any political subdivision thereof, the local tax collector shall assess the value of the land involved as if for tax purposes and the amount to be paid to the clerk shall be an amount equal to one tenth of one percent (0.1%) of such assessed value; provided, however, that no taxes shall be levied upon such land while title thereto remains in the State of North Carolina or any political subdivision thereof. (1913, c. 90, s. 33; C.S., s. 2422; 1963, c. 946, s. 2.)

§ 43-50. Action for indemnity.

Any person who, without negligence on his part, sustains loss or damage or is deprived of land, or of any estate or interest therein, through fraud or negligence or in consequence of any error, omission, mistake, misfeasance, or misdescription in any certificate of title or in any entry or memorandum in the registration book, and who, by the provisions of this Chapter, is barred or in any way precluded from bringing an action for the recovery of such land or interest or estate therein or claim upon same, may bring an action in the superior court of the county in which the land is situate for the recovery of compensation for such loss or damage from the assurance fund. Such action shall be against the State Treasurer and all other persons who may be liable for the fraud, negligence, omission, mistake or misfeasance; but if such claimant has the right of action or other remedy for the recovery of the land, or of the estate or interest therein, or of the claim upon same, he shall exhaust such remedy before resorting to the assurance fund. (1913, c. 90, s. 34; C.S., s. 2423.)

CASE NOTES

Negligence of Mortgagee Barring Recovery. — A proceeding under this chapter, duly commenced prior to the enactment of G.S. 1-117 and 1-118, constituted a "lis pendens." Such proceeding, while pending, was notice to a mortgagee of the land without the necessity of the filing of a formal lis pendens, and where the mortgagee failed to protect himself under the provisions of the statute, and the title to the land was assured by the State, and a holder thereof by proper transfer acquired the title, the negligence of the mortgagee was a complete defense in the mortgagee's action to recover damages against the State thereunder. Brinson v. Lacy, 195 N.C. 394, 142 S.E. 317 (1928).

§ 43-51. Satisfaction by third person or by Treasurer.

If there are defendants other than the State Treasurer, and judgment is rendered in favor of the plaintiff and against the Treasurer and some or all of the other defendants, execution shall first be issued against the other defendants, and if such execution is returned unsatisfied in whole or in part, and the officer returning the same shall certify that it cannot be collected from the property and effects of the other defendants, or if the judgment be against the Treasurer only, the clerk of the court shall certify the amount due on the execution to the State Treasurer, and the same shall be paid. In all such cases the Treasurer may employ counsel who shall receive reasonable compensation for his services from the assurance fund. (1913, c. 90, s. 35; C.S., s. 2424; 1993, c. 257, s. 1.)

§ 43-52. Payment by Treasurer, if assurance fund insufficient.

If the assurance fund shall be insufficient at any time to meet the amount called for by any such certificate, the Treasurer shall pay the same from any funds in the treasury not otherwise appropriated; and in such case any amount thereafter received by the Treasurer on account of the assurance fund shall be transferred to the general funds of the treasury until the amount advanced shall have been paid. (1913, c. 90, s. 36; C.S., s. 2425.)

§ 43-53. Treasurer subrogated to right of claimant.

In every case of payment by the Treasurer from the assurance funds under the provisions of this Chapter the Treasurer shall be subrogated to all the rights of the plaintiff against all and every other person or property or securities to a trustee, or by the improper exercise of any power of sale in benefit of the assurance fund. (1913, c. 90, s. 37; C.S., s. 2426.)

§ 43-54. Assurance fund not liable for breach of trust; limit of recovery.

The assurance fund shall not be liable to pay any loss, damage or deprivation occasioned by a breach of trust, whether expressed, constructive or implied, by any registered owner who is a trustee, or by the improper exercise of any power of sale in a mortgage or deed of trust. Nor shall any plaintiff recover as compensation under the provisions of this Chapter more than the fair market value of the land at the time when he suffered the loss, damage or deprivation thereof. (1913, c. 90, s. 38; C.S., s. 2427.)

§ 43-55. Statute of limitation as to assurance fund.

Action for compensation from the assurance fund shall be begun within three years from the time the cause of action accrued. In cases of infancy or other disability now recognized by law, persons under such disability shall have one year after the removal of such disability within which to begin the action. (1913, c. 90, s. 39; C.S., s. 2428.)

Article 9.

Removal of Land from Operation of Torrens Law.

§ 43-56. Proceedings.

Any land brought under the provisions and operation of this Chapter before April 16, 1931, may be removed and excluded therefrom by a motion in writing filed in the original cause wherein said land was brought under the provisions and operation of said Chapter, and upon the filing of a petition therein showing the names of all persons owning an interest in said land and of all lien holders, mortgagees and trustees of record, and the description of said land. Upon the filing of said petition the clerk of the superior court shall issue a citation to all parties interested and named in the petition, and upon the return date of said citation and upon the hearing of said motion, the said clerk of the superior court may enter a decree in said cause removing and excluding said land from the provisions and operation of this Chapter, and transfer and conveyance of said land may be made thereafter as other common-law conveyances. (1931, c. 286, s. 1.)

Legal Periodicals. — For discussion of this section, see 9 N.C.L. Rev. 392 (1931).

§ 43-57. Existing liens unaffected.

Nothing in G.S. 43-56 shall be construed to impair or remove any lien or encumbrance existing against said land. (1931, c. 286, s. 3.)

§§ 43-58 through 43-62: Reserved for future codification purposes.

ARTICLE 10.

Instruments Describing Party as Trustee or Agent.

§ 43-63. When instrument describing party as trustee or agent not to operate as notice of limitation upon powers of such party.

When any instrument affecting title to real estate describes a party as trustee or agent, or otherwise indicates that a party is or may be acting as trustee or agent, but does not indicate any beneficial interest, set forth his powers or specify some other recorded instrument setting forth such powers and the place in the public records where it is recorded, and there is no recorded instrument in the record chain of title to such real estate setting forth such powers, then the description or indication shall not be notice to any person thereafter dealing with the real estate of any limitation upon the powers of the party nor require any inquiry or investigation as to such trust or agency. Such trustee or agent shall be deemed to have full power to convey or otherwise dispose of the real estate; and no person interested under such trust or agency shall be entitled to make any claim against the real estate based upon notice given by such description or indication. This Article shall not prevent claims against the trustee or agent or against property other than the real estate. (1975, c. 181, s. 1.)

§ 43-64. Application of Article; filing notice of claim; application of § 47B-6.

This Article shall apply to instruments recorded before or after May 15, 1975, but shall not bar any claim based on notice given by any instrument if, within one year after May 15, 1975, a written notice of the claim is recorded, identifying the place in the public records where the reference to a fiduciary may be found, stating the powers of such fiduciary, and naming the person who is then the record owner of the real estate affected. Such notice of claim shall be signed and acknowledged by the person executing the same, and may be executed by any person interested under such trust or agency, or by his attorney, agent, guardian, conservator, parent, or any other person acting on his behalf, if for any reason he is unable to act. The notice of claim shall be recorded and indexed under the name of the person declared therein to be the record owner.

Registrations hereunder shall be subject to the provisions and penalties imposed by G.S. 47B-6. (1975, c. 181, ss. 2, 3.)

Chapter 44.

Liens.

Article 1.

Mechanics', Laborers', and Materialmen's Liens.

Sec.
44-1 through 44-5. [Repealed.]

Article 1A.

Wage Liens.

44-5.1. Wages for two months' lien on assets.

Article 2.

Subcontractors', etc., Liens and Rights against Owners.

44-6 through 44-14. [Repealed.]

Article 3.

Liens on Vessels.

44-15 through 44-27. [Repealed.]

Article 4.

Warehouse Storage Liens.

44-28, 44-29. [Repealed.]

Article 5.

Liens of Hotel, Boarding and Lodging House Keeper.

44-30 through 44-32. [Repealed.]

Article 6.

Liens of Livery Stable Keepers.

44-33 through 44-35. [Repealed.]

Article 7.

Liens on Colts, Calves and Pigs.

44-36 through 44-37.1. [Repealed.]

Article 8.

Perfecting, Recording, Enforcing and Discharging Liens.

44-38. Claim of lien to be filed; place of filing.
44-38.1 through 44-47. [Repealed.]
44-48. Discharge of liens.

Article 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

44-49. Lien created; applicable to persons non sui juris.
Sec.
44-49.1. [Recodified.]
44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.
44-50.1. Accounting of disbursements; attorney's fees to enforce lien rights.
44-51. Disputed claims to be settled before payments.

Article 9A.

Liens for Ambulance Service.

44-51.1. Lien on real property of recipient of ambulance service paid for or provided by county or municipality.
44-51.2. Filing within 90 days required.
44-51.3. Discharge of lien.

Article 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

44-51.4. Attachment or garnishment for county or city ambulance or county or city supported ambulance service.
44-51.5. General lien for county or city ambulance service.
44-51.6. Lien to be filed.
44-51.7. Discharging lien.
44-51.8. Counties to which Article applies.

Article 10.

Agricultural Liens for Advances.

44-52 through 44-64. [Repealed.]

Article 11.

Uniform Federal Tax Lien Registration Act.

44-65 through 44-68.7 [Repealed.]
44-68.8, 44-68.9. [Reserved.]

Article 11A.

Uniform Federal Lien Registration Act.

44-68.10. Short title.
44-68.11. Scope.
44-68.12. Place of filing.
44-68.13. Execution of notices and certificates.
44-68.14. Duties of filing officer.
44-68.15. Fees.
44-68.16. Uniformity of application and construction.

Sec.
44-68.17. Liens and notices filed before August 1, 1990.

Article 12.

Liens on Certain Agricultural Products.

44-69. Effective period for lien on leaf tobacco sold in auction warehouse.
44-69.1. Effective period for liens on peanuts, cotton and grains.
44-69.2. Effective period for liens on fruits and vegetables.
44-69.3. Liens on tangible and intangible assets of milk distributors.

Article 13.

Factors' Liens.

44-70 through 44-76. [Repealed.]

Article 14.

Assignment of Accounts Receivable and Liens Thereon.

Sec.
44-77 through 44-85. [Repealed.]

Article 15.

Liens for Overdue Child Support.

44-86. Lien on real and personal property of person owing past-due child support; definitions; filing required; discharge.
44-87. Discharge of lien; penalty for failure to discharge.

Article 1.

Mechanics', Laborers', and Materialmen's Liens.

§ 44-1: Repealed by Session Laws 1969, c. 1112, s. 4.

§§ 44-2 through 44-5: Repealed by Session Laws 1967, c. 1029, s. 2.

Cross References. — As to possessory liens on personal property, see G.S. 44A-1 et seq.

Article 1A.

Wage Liens.

§ 44-5.1. Wages for two months' lien on assets.

In case of the insolvency of a corporation, partnership or individual, all persons doing labor or service of whatever character in its regular employment have a lien upon the assets thereof for the amount of wages due to them for all labor, work, and services rendered within two months next preceding the date when proceedings in insolvency were actually instituted and begun against the corporation, partnership or individual, which lien is prior to all other liens that can be acquired against such assets: Provided, that the lien created by this section shall not apply to multiple unit dwellings, apartment houses, or other buildings for family occupancy except as to labor performed on the premises upon which the lien is claimed. This section shall not apply to any single unit family dwelling. (1901, c. 2, s. 87; Rev., s. 1206; C.S., s. 1197; 1937, c. 223; 1943, c. 501; 1955, c. 1345, s. 4.)

CASE NOTES

Section Gives Ancillary Remedy. — This section, giving to laborers of insolvent corporations a specific lien upon the assets of the company for two months' wages at least, was not intended to militate against rights that they might otherwise have under the existing law for debts due them, but gives them a special lien for certain wages. Union Trust Co. v.

Southern Sawmills & Lumber Co., 166 F. 193 (4th Cir. 1908), cert. denied, 215 U.S. 596, 30 S. Ct. 398, 54 L. Ed. 342 (1909).

The creditors favored by this section are laborers and workers and all persons doing labor or service of whatever character in the regular employment of certain corporations. Phoenix Iron Co. v. Roanoke Bridge Co., 169 N.C. 512, 86 S.E. 184 (1915).

This section grants a priority lien for the wages paid regular employees. First Citizens Bank & Trust Co. v. Academic Archives, Inc., 15 N.C. App. 186, 189 S.E.2d 551 (1972).

Priority does not extend to those who are independent contractors and not regular employees. First Citizens Bank & Trust Co. v. Academic Archives, Inc., 15 N.C. App. 186, 189 S.E.2d 551 (1972).

A contractor, who furnishes his own teams, labor, etc., in hauling materials for the building of a bridge by a corporation within the two months next preceding the date of the institution of proceedings in insolvency is not engaged in doing labor or performing "service of whatever character" within the meaning of this section. Phoenix Iron Co. v. Roanoke Bridge Co., 169 N.C. 512, 86 S.E. 184 (1915).

Independent Contractor Defined. — An independent contractor is one who (1) is engaged in an independent business, calling or occupation; (2) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (3) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (4) is not subject to discharge because he adopts one method of doing the work rather than another; (5) is not in the regular employ of the other contracting party; (6) is free to use such assistants as he may think proper; (7) has full control over such assistants; and, (8) selects his own time. First Citizens Bank & Trust Co. v. Academic Archives, Inc., 15 N.C. App. 186, 189 S.E.2d 551 (1972).

Test of Employee Status. — The vital test of who are regular employees and who are independent contractors is to be found in whether the employer has or has not retained the right of control or superintendence over the contractor or employee as to details. First Citizens Bank & Trust Co. v. Academic Archives, Inc., 15 N.C. App. 186, 189 S.E.2d 551 (1972).

A practicing attorney rendering professional services to a client is an independent contractor, and his claim is not entitled to a priority under this section. First Citizens Bank & Trust Co. v. Academic Archives, Inc., 15 N.C. App. 186, 189 S.E.2d 551 (1972).

Agent with Authority to Deduct Salary from Collections. — Under this section, an agent with authority to make collections and to deduct his salary and expenses from the sums collected has no lien for claims for salary earned and expenses incurred before his appointment to the position and more than two months before the appointment of a receiver. Cummer Lumber Co. v. Seminole Phosphate Co., 189 N.C. 206, 126 S.E. 511 (1925).

Claim Based on Contracts for Single Piece of Work. — The claim of an independent company which repaired machinery belonging to the insolvent partnership on a single occasion at a contract price fixed by mutual agreement could not constitute a preferred claim under this section, since the claim was for the unpaid contract price, and not wages. Moreover, the claim was based on a single piece of work. The company was not hired to do permanent or steady work in the usual course of the occupation of another, and this being true, it did not render the service in the regular employment of another. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

Work Done for Receiver. — Claims of laborers for wages due them for work done for the receiver of an insolvent partnership during the receivership cannot qualify for a preferred status under this section. National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952).

This section does not apply to any wages except those due "for labor, work, and services rendered within," i.e., inside the limits of, "two months next preceding the date when proceedings in insolvency were actually instituted and begun." National Sur. Corp. v. Sharpe, 236 N.C. 35, 57, 72 S.E.2d 109 (1952), disapproving the suggestion contained in Walker v. Linden Lumber Co., 170 N.C. 460, 87 S.E. 331 (1915), that the word "within" meant "subsequent," and that the statute, therefore, gave laborers "a first lien" for all their wages accruing "after 60 days prior to the insolvency," notwithstanding the supervening receivership.

Severance Pay Is Not Wages Earned. — Employees under a contract providing for severance pay are not entitled to a lien for such pay against the receiver, since severance pay is not wages earned. In re Port Publishing Co., 231 N.C. 395, 57 S.E.2d 366, 14 A.L.R.2d 842 (1950).

But employees under a contract providing for paid vacations have a lien against the receiver of the employer for one-sixth of their vacation pay, since this amount was earned during the two months next preceding the institution of insolvency proceedings. In re Port Publishing Co., 231 N.C. 395, 57 S.E.2d 366, 14 A.L.R.2d 842 (1950).

When Lien Arises. — The lien of the employees arises upon the sequestration of the property of the insolvent for the purpose of liquidation, or rather the institution of a proceeding for that purpose. The lien does not exist so long as the property remains in the hands of the insolvent. It arises when the property is taken in custodia legis for the purpose of distribution among the creditors. Leggett v. Southeastern People's College, 234 N.C. 595, 68 S.E.2d 263 (1951), commented on in 30 N.C.L. Rev. 442 (1952).

Prior Lienholders Protected. — Property acquired by a private corporation subject to a valid and registered mortgage does not become an asset of the corporation except as subject to the prior lien; and the lien given to laborers on the assets of an insolvent corporation for work done under the conditions stated in this section cannot affect the vested rights obtained by the prior lienholders. Roberts v. Bowen Mfg. Co., 169 N.C. 27, 85 S.E. 45 (1915).

Lienholder Taking Mortgage on Corporate Property Not Protected. — One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debts does so with the knowledge that the lien of his mortgage is subject to be displaced in favor of laborers' liens in case of insolvency. Humphrey Bros. v. Buell-Crocker Lumber Co., 174 N.C. 514, 93 S.E. 971 (1917).

Account as Asset of Bank upon Exercise of Offset. — Where insolvent corporate defendant had $2,568.55 balance with bank, where corporate defendant owed bank on note past due, and where bank was attached as debtor of corporate defendant, order of attachment against bank could not be sustained on basis that twenty-one employees of depositor (i.e., corporate defendant) whose checks were outstanding had lien upon company's assets superior to all other liens under provisions of this section; lien that employees had was against assets of their employer and did not attach to assets of others, and checking account balance became asset of bank upon right of offset being asserted. Killette v. Raemell's Sewing Apparel, Inc., 93 N.C. App. 162, 377 S.E.2d 73 (1989).

Priority of Claims of Federal Government. — While this section creates what is denominated a lien, in practical effect it grants to the employees of the insolvent a right of payment of the designated wages prior to the payment of any other claim, secured or unsecured. This preference is subordinate to the right of the United States under the provisions of 31 U.S.C. § 191, giving priority to debts due the United States. Leggett v. Southeastern People's College, 234 N.C. 595, 68 S.E.2d 263 (1951), commented on in 30 N.C.L. Rev. 442 (1952).

The lien of the employees under this section is not specific or preferred in the sense necessary to give it precedence over the claim of the federal government for taxes under the provisions of 26 U.S.C. § 3672. Leggett v. Southeastern People's College, 234 N.C. 595, 68 S.E.2d 263 (1951), commented on in 30 N.C.L. Rev. 442 (1952).

Notice Need Not Be Filed. — Under this section, the laborer is not required to file a notice of his claim. Walker v. Linden Lumber Co., 170 N.C. 460, 87 S.E. 331 (1915).

ARTICLE 2.

Subcontractors', etc., Liens and Rights against Owners.

§ 44-6: Repealed by Session Laws 1971, c. 880, s. 2.

Cross References. — For present provisions as to statutory liens of mechanics, laborers and materialmen dealing with one other than the owner, see G.S. 44A-17 et seq.

§ 44-7: Repealed by Session Laws 1943, c. 543.

§§ 44-8 through 44-13: Repealed by Session Laws 1971, c. 880, s. 2.

Cross References. — For present provisions as to statutory liens of mechanics, laborers and materialmen dealing with one other than the owner, see G.S. 44A-17 et seq.

§ 44-14: Repealed by Session Laws 1973, c. 1194, s. 6.

ARTICLE 3.

Liens on Vessels.

§§ 44-15 through 44-27: Repealed by Session Laws 1967, c. 1029, s. 2.

Cross References. — As to possessory liens on personal property, see G.S. 44A-1 et seq.

ARTICLE 4.

Warehouse Storage Liens.

§§ **44-28, 44-29:** Repealed by Session Laws 1967, c. 562, s. 6.

ARTICLE 5.

Liens of Hotel, Boarding and Lodging House Keeper.

§§ **44-30 through 44-32:** Repealed by Session Laws 1967, c. 1029, s. 2.

Cross References. — As to possessory liens on personal property, see G.S. 44A-1 et seq.

ARTICLE 6.

Liens of Livery Stable Keepers.

§§ **44-33 through 44-35:** Repealed by Session Laws 1967, c. 1029, s. 2.

Cross References. — As to possessory liens on personal property, see G.S. 44A-1 et seq.

ARTICLE 7.

Liens on Colts, Calves and Pigs.

§§ **44-36 through 44-37.1:** Repealed by Session Laws 1967, c. 1029, s. 2.

Cross References. — As to possessory liens on personal property, see G.S. 44A-1 et seq.

ARTICLE 8.

Perfecting, Recording, Enforcing and Discharging Liens.

§ 44-38. Claim of lien to be filed; place of filing.

All claims shall be filed in the office of the clerk of superior court in the county where the labor has been performed or the materials furnished, specifying in detail the materials furnished or the labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished. (1869-70, c. 206, s. 4; 1876-7, c. 53, s. 1; Code, s. 1784; Rev., s. 2026; C.S., s. 2469; 1971, c. 1185, s. 4.)

Cross References. — As to perfection of security interests in vehicles requiring certificates of title, see G.S. 20-58 et seq.

CASE NOTES

The purpose of filing claims for liens under this section is to give the public notice of the claims, the amount, the material supplied or the labor done, and when done, on what property, specified with such details as will give reasonable notice to all persons of the character of the claims and the property on which the lien attached. Cook v. Cobb, 101 N.C. 68, 7 S.E. 700 (1888); Fulp v. Kernersville Light & Power Co., 157 N.C. 157, 72 S.E. 867 (1911).

Necessity of Compliance. — Compliance with this section is necessary to perfect lien. Equitable Life Assurance Soc'y v. Basnight, 234 N.C. 347, 67 S.E.2d 390 (1951).

The claimant must comply strictly, certainly substantially, in all material respects, with the requirements of the statute, and it is but reasonable and just that he should do so. Cook v. Cobb, 101 N.C. 68, 7 S.E. 700 (1888), holding claim of lien insufficient for failure to comply with statutory requirements.

Compliance with this section was not required to perfect lien under former G.S. 44-2. Barbre-Askew Fin., Inc. v. Thompson, 247 N.C. 143, 100 S.E.2d 381 (1957).

What "Filing" Imports. — The filing of a lien for labor or materials imports more than mere delivery of the written claim to the clerk's office, and requires the transcribing of the notice of lien in the lien docket in the clerk's office and the indexing of same in the name of the claimant; but, as distinguished from liens required by statute to be registered in the office of the register of deeds, it does not require cross-indexing. Saunders v. Woodhouse, 243 N.C. 608, 91 S.E.2d 701 (1956).

Place of Filing. — As to place of filing under former law, see Chadbourn v. Williams, 71 N.C. 444 (1874).

A lien for material and labor was properly filed where the clerk after delivery attached it in its original form to specified page in a book labeled "Lien Docket," where the book without question was the book intended as the lien docket contemplated by former G.S. 2-42 (now G.S. 7A-109), even though the book was also used for the filing of liens for old age assistance, since former G.S. 108-30.1 provided that such liens should be filed in the regular lien docket. Saunders v. Woodhouse, 243 N.C. 608, 91 S.E.2d 701 (1956).

Stipulation that notice was filed with defendant landlord does not comply with this section requiring notice to be filed in the office of the superior court clerk. Eason v. Dew, 244 N.C. 571, 94 S.E.2d 603 (1956).

Particularity Required. — A claim of lien filed under the provisions of this section must comply with the requirements of the statute. Therefore, when the plaintiff's claim failed to specify in detail the material furnished and the labor performed, or the time when the material was furnished and the labor was performed, it was irregular and void. Wray v. Harris, 77 N.C. 77 (1877).

While a substantial compliance with this section is necessary to the validity of a lien filed for material, etc., furnished in the erection of a building, it is not required that the claimant file his itemized statement of the material used in a building which he had contracted to complete for the owner for one sum; but the time of the completion of the work must be stated. Jefferson & Bros. v. Bryant, 161 N.C. 404, 77 S.E. 341 (1913).

This section does not require a listing of material item by item, or the labor hour by hour. Yet it demands more than a mere summary statement. It requires a statement in sufficient detail to put parties who are or may become interested in the premises on notice as to the labor performed and material furnished, the time when the labor was performed and the material was furnished, the amount due therefor, and the property upon which it was employed. Lowery v. Haithcock, 239 N.C. 67, 79 S.E.2d 204 (1953).

Statements Held Sufficient. — When a lienor's schedule for material contains a full itemized statement in detail of the material furnished, and the clerk has entered on his docket the names of the lienor and lienee, the amount claimed by each lienor, a description of the property by metes and bounds, and the dates between which the materials were furnished, referring to the schedule of prices and materials attached to the notice, and asking that it "be taken as a part of the notice of lien," compliance with this section was sufficient. Fulp v. Kernersville Light & Power Co., 157 N.C. 157, 72 S.E. 867 (1911).

Claim for a laborer's lien before a justice of the peace, which read, "J.S.C., owner and possessor, to D.A.C., 22 October, 1894. To 1221/2 days of labor as sawyer at his sawmill, on Jumping Run Creek, from 1 October, 1893, to 31 August, 1894, $127.24. (Signed) D.A.C., claimant," and was sworn to was a reasonable and substantial compliance with the statute. Cameron v. Consolidated Lumber Co., 118 N.C. 266, 24 S.E. 7 (1896). See also, Lowery v. Haithcock, 239 N.C. 67, 79 S.E.2d 204 (1953).

The lien of a plaintiff who furnished materials for a building was not avoided because in the notice thereof that was filed with the clerk the lien was made to attach on two distinct lots separated by a street. Chadbourn v. Williams, 71 N.C. 444 (1874).

Defect When Lien Is Filed. — The claim of lien is the foundation of the action to enforce the lien, and if such lien is defective when filed, it is no lien. Mebane Lumber Co. v. Avery & Bullock Bldrs., Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

Defects Not Cured by Amendment or Pleadings. — Where suit was brought by a contractor to enforce a lien on a building which was to have been paid for in a single sum, and the claim as filed with the clerk was defective in not stating the time the house was completed, as required by this section, it could not be cured by amendment allowed in the superior court at the trial. Jefferson & Bros. v. Bryant, 161 N.C. 404, 77 S.E. 341 (1913).

Where a laborer's claim of lien as filed was defective in failing to specify the time of his labor and that it was done on a particular crop, these defects were not cured by alleging the necessary facts in the pleadings in action to enforce the lien. Cook v. Cobb, 101 N.C. 68, 7 S.E. 700 (1888).

A defect in a lien cannot be cured by amendment after the filing period has expired, nor by alleging the necessary facts in the pleadings in an action to enforce the lien. Mebane Lumber Co. v. Avery & Bullock Bldrs., Inc., 270 N.C. 337, 154 S.E.2d 665 (1967).

Admiralty Proceedings. — The provisions of this section and former G.S. 44-39 are not binding on an admiralty court in a proceeding to establish a lien for labor and materials furnished in the repair of a vessel, but the limitations which they prescribe can be considered by the admiralty court in applying the doctrine of laches. Phelps v. The Cecelia Ann, 199 F.2d 627 (4th Cir. 1952).

While state statutory provisions of limitation do not bind a federal court in admiralty proceedings, it is proper to consider them in applying the principle of laches. Thus a proceeding to enforce a maritime lien for supplies and materials furnished to a vessel and its owner was barred by laches, in view of this section and former G.S. 44-39, where the libel was not instituted until 21 months after the claim became due. Davis v. The Nola Dare, 157 F. Supp. 420 (E.D.N.C. 1957).

As to a contract negotiated by husband for drilling of well on wife's property, see Lowery v. Haithcock, 239 N.C. 67, 79 S.E.2d 204 (1953).

Applied in Gainey v. Gainey, 203 N.C. 190, 165 S.E. 547 (1932); Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc., 263 N.C. 641, 140 S.E.2d 330 (1965); Neal v. Whisnant, 266 N.C. 89, 145 S.E.2d 379 (1965).

Cited in King v. Elliott, 197 N.C. 93, 147 S.E. 701 (1929); United States v. Durham Lumber Co., 257 F.2d 570 (4th Cir. 1958); United States v. Durham Lumber Co., 363 U.S. 522, 80 S. Ct. 1282, 4 L. Ed. 2d 1371 (1960); Priddy v. Kernersville Lumber Co., 258 N.C. 653, 129 S.E.2d 256 (1963); McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964); G.L. Wilson Bldg. Co. v. Leatherwood, 268 F. Supp. 609 (W.D.N.C. 1967).

§ **44-38.1:** Repealed by Session Laws 1967, c. 562, s. 7.

§§ **44-39 through 44-46:** Repealed by Session Laws 1969, c. 1112, s. 4.

§ **44-47:** Repealed by Session Laws 1971, c. 1185, s. 5.

§ 44-48. Discharge of liens.

All liens created by this Chapter may be discharged as follows:

(1) By filing with the clerk a receipt or acknowledgment, signed by the claimant, that the lien has been paid or discharged.

(2) By depositing with the clerk money equal to the amount of the claim, which money shall be held by said officer for the benefit of the claimant.

(3) By an entry in the lien docket that the action on the part of the claimant to enforce the lien has been dismissed, or a judgment rendered against the claimant in such action.

(4) By a failure of the claimant to commence an action for the enforcement of the lien within six months from the notice of lien filed. (1868-9, c. 117, s. 12; Code, s. 1793; Rev., s. 2033; C.S., s. 2479; 1971, c. 1185, s. 6.)

CASE NOTES

Failure to Enforce as Discharge. — Failure of claimant to enforce his lien within six months as prescribed by former G.S. 44-43 operated as a discharge of the lien. Norfleet v. Tarboro Cotton Factory, 172 N.C. 833, 89 S.E. 785 (1916).

Applied in Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc., 263 N.C. 641, 140 S.E.2d 330 (1965).

Cited in Equitable Life Assurance Soc'y v. Basnight, 234 N.C. 347, 67 S.E.2d 390 (1951); Lowery v. Haithcock, 239 N.C. 67, 79 S.E.2d 204 (1953).

Article 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to persons non sui juris.

(a) From and after March 26, 1935, there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State. This lien is in favor of any person, corporation, State entity, municipal corporation or county to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for any drugs, medical supplies, ambulance services, services rendered by any physician, dentist, nurse, or hospital, or hospital attention or services rendered in connection with the injury in compensation for which the damages have been recovered. Where damages are recovered for and in behalf of minors or persons non compos mentis, the liens shall attach to the sum recovered as fully as if the person were sui juris.

(b) Notwithstanding subsection (a) of this section, no lien provided for under subsection (a) of this section is valid with respect to any claims whatsoever unless the physician, dentist, nurse, hospital, corporation, or other person entitled to the lien furnishes, without charge to the attorney as a condition precedent to the creation of the lien, upon request to the attorney representing the person in whose behalf the claim for personal injury is made, an itemized statement, hospital record, or medical report for the use of the attorney in the negotiation, settlement, or trial of the claim arising by reason of the personal injury, and a written notice to the attorney of the lien claimed.

(c) No action shall lie against any clerk of court or any surety on any clerk's bond to recover any claims based upon any lien or liens created under subsection (a) of this section when recovery has been had by the person injured, and no claims against the recovery were filed with the clerk by any person or corporation, and the clerk has otherwise disbursed according to law the money recovered in the action for personal injuries. (1935, c. 121, s. 1; 1947, c. 1027; 1959, c. 800, s. 1; 1967, c. 1204, s. 1; 1969, c. 450, s. 1; 2001-377, s. 1; 2001-487, s. 59.)

Legal Periodicals. — For discussion of amendment, see 25 N.C.L. Rev. 450 (1947).

For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

For comment on new North Carolina wrongful death statute, see 48 N.C.L. Rev. 594 (1970).

CASE NOTES

Strict Construction. — This section and G.S. 44-50 provide rather extraordinary remedies in derogation of the common law and must be strictly construed. Ellington v. Bradford, 242 N.C. 159, 86 S.E.2d 925 (1955).

Section 44-50 must be read in conjunc-

tion with this section. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

The lien of this section attaches to the recovery, if any, and is not a general lien against the assets of the alleged debtor. Gordon v. Forsyth County Hosp. Auth., 409 F. Supp. 708 (M.D.N.C. 1975), aff'd in part, vacated in part, 544 F.2d 748 (4th Cir. 1976).

This section and § 44-50 make any plaintiff's unpaid medical expenses a lien upon his recovery in a personal injury action. Travelers Ins. Co. v. Keith, 283 N.C. 577, 196 S.E.2d 731 (1973).

This section and § 44-50 impose no obligation with reference to such expenses upon the defendant against whom judgment has been rendered. Travelers Ins. Co. v. Keith, 283 N.C. 577, 196 S.E.2d 731 (1973).

The lien provided for by this section is created only where the beneficiary may be indebted for the expenses incurred. Ellington v. Bradford, 242 N.C. 159, 86 S.E.2d 925 (1955).

Lien Should Attach Before Payment by Insurance Company. — If a plaintiff under G.S. 44-50 is to have a lien such as is provided for in this section, the lien should attach before the insurance company makes its payments and when the parties agree upon a settlement; this being so, the plaintiff may enforce the lien against the money which is payable for the personal injury. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

Minor Cannot Recover for Medical Expenses. — This section does not change the common-law rule so as to permit the recovery of expenses for medical treatment as a part of a minor's cause of action for injuries. Ellington v. Bradford, 242 N.C. 159, 86 S.E.2d 925 (1955); Price v. Seaboard Air Line R.R., 274 N.C. 32, 161 S.E.2d 590 (1968).

No Provision for Lien Where Patient Settles with Wrongdoer. — While this section creates a lien in favor of any person, corporation or governmental body which has provided medical care upon personal injury damages recovered in civil actions by patients who have received medical treatment, there is no provision for creation of a lien where the patient settles with the wrongdoer instead of filing a civil action. Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983).

Pro Rata Distribution of Funds Not Required. — G.S. 44-49 and G.S. 44-50 do not require a pro rata distribution of funds among valid lien holders where there are insufficient funds to compensate all of the holders; thus, an attorney was properly granted summary judgment in a hospital's action alleging violation of G.S. 44-49 and G.S. 44-50. N.C. Baptist Hosps., Inc. v. Crowson, 155 N.C. App. 746, 573 S.E.2d 922, 2003 N.C. App. LEXIS 4 (2003), aff'd, 357 N.C. 499, 586 S.E.2d 90 (2003).

As to the right of a hospital receiving funds under the Hill Burton Act, 42 U.S.C. § 291 et seq., to file lien under this section, see Gordon v. Forsyth County Hosp. Auth., 409 F. Supp. 708 (M.D.N.C. 1975), aff'd in part, vacated in part, 544 F.2d 748 (4th Cir. 1976).

Plaintiffs Held Not Entitled to Lien. — Where action for child's damages was instituted in the Edgecombe County Superior Court and plaintiffs did not file a claim for their lien with the clerk of that court within the time designated by this section, they were not entitled to a lien under its provisions. Duke Univ. Medical Ctr., Private Diagnostic Clinic v. Hardy, 89 N.C. 719, 367 S.E.2d 6 (1988).

Cited in Smith v. Hewett, 235 N.C. 615, 70 S.E.2d 825 (1952); Doss v. Sewell, 257 N.C. 404, 125 S.E.2d 899 (1962); Bowen v. Constructors Equip. Rental Co., 283 N.C. 395, 196 S.E.2d 789 (1973); North Carolina Baptist Hosps. v. Mitchell, 88 N.C. App. 263, 362 S.E.2d 841 (1987); Triangle Park Chiropractic v. Battaglia, 139 N.C. App. 201, 532 S.E.2d 833, 2000 N.C. App. LEXIS 814 (2000).

§ 44-49.1: Recodified as § 58-3-135 by Session Laws 1995 (Regular Session, 1996), c. 674, s. 1.

§ 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.

A lien as provided under G.S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the injuries, whether in litigation or otherwise. If an attorney represents the injured person, the lien is perfected as provided under G.S. 44-49. Before their disbursement, any person that receives those funds shall retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for any drugs, medical supplies, ambulance services, services rendered by any physician, dentist, nurse, or hospital, or hospital attention or services, after having received notice of those claims. Evidence as to the amount of the charges shall be competent in the trial of the action. Nothing in this section or in G.S. 44-49 shall be construed so as to interfere with any amount due for attorney's services. The lien provided for shall in no case, exclusive of attorneys' fees, exceed fifty percent (50%) of the amount of damages recovered. Except as provided in G.S. 44-51, a client's instructions for the disbursement of settlement or judgment proceeds are not binding on the disbursing attorney to the extent that the instructions conflict with the requirements of this Article. (1935, c. 121, s. 2; 1959, c. 800, s. 2; 1969, c. 450, s. 2; 1995, c. 538, s. 6(b); 1995 (Reg. Sess., 1996), c. 674, s. 3; 2001-377, s. 2.)

CASE NOTES

Legislative Intent. — By directing third parties as to how to disburse funds received for personal injury claims and limiting percentage of balance of recovery, after deducting attorneys' fees, to be paid to those benefitted by statute, legislature intended that such third parties pay no more than 50% of any such balance to service providers. North Carolina Baptist Hosps. v. Mitchell, 323 N.C. 528, 374 S.E.2d 844 (1988).

Insurer's actual notice of the medical expenses incurred by an injured party created a lien against future settlement proceeds, where such notice was provided to the insurer by the pro se injured party rather than by the medical provider or the injured party's attorney, thus triggering the obligations under G.S. 44-50; the intent of the statute was to ensure that medical service providers were paid when injured parties later received compensation for their injuries. Smith v. State Farm Mut. Auto. Ins. Co., 157 N.C. App. 596, 580 S.E.2d 46, 2003 N.C. App. LEXIS 933 (2003), cert. denied, 357 N.C. 507, 587 S.E.2d 674 (2003).

The Employee Retirement Income Security Act preempts this section, the North Carolina apportionment statute. Hampton Indus., Inc. v. Sparrow, 981 F.2d 726 (4th Cir. 1992).

Strict Construction. — This section and G.S. 44-49 provide rather extraordinary remedies in derogation of the common law and must be strictly construed. Ellington v. Bradford, 242 N.C. 159, 86 S.E.2d 925 (1955).

This section must be read in conjunction with § 44-49. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

Literal Interpretation Was Improper. — Plaintiff's argument that plain language of this section did not prevent assignment of proceeds of personal injury claim received by third party failed, because strictly literal interpretation would have contravened intent of legislature, which was, in part, to provide that injured party receive some part of amount recovered for his injury by requiring third parties, receiving funds paid for personal injury claim, to pay no more than 50% of amount recovered, exclusive of attorneys' fees, to service providers. North Carolina Baptist Hosps. v. Mitchell, 323 N.C. 528, 374 S.E.2d 844 (1988).

This section and G.S. 44-49 make plaintiff's unpaid medical expenses a lien upon his recovery in a personal injury action. Travelers Ins. Co. v. Keith, 283 N.C. 577, 196 S.E.2d 731 (1973).

Insurer's actual notice of the medical expenses incurred by an injured party created a lien against future settlement proceeds, where such notice was provided to the insurer by the pro se injured party rather than by the medical provider or the injured party's attorney, thus triggering the obligations under G.S. 44-50; the intent of the statute was to ensure that medical service providers were paid when injured parties later received compensation for their injuries. Smith v. State Farm Mut. Auto. Ins. Co., 157 N.C. App. 596, 580 S.E.2d 46, 2003 N.C. App. LEXIS 933 (2003), cert. denied, 357 N.C. 507, 587 S.E.2d 674 (2003).

But they impose no obligation with reference to such expenses upon the defendant against whom judgment has been rendered. Travelers Ins. Co. v. Keith, 283 N.C. 577, 196 S.E.2d 731 (1973).

Lien Should Attach Before Payment by Insurance Company. — If a plaintiff under this section is to have a lien such as is provided for in G.S. 44-49, the lien should attach before the insurance company makes its payments and when the parties agree upon a settlement; this being so, the plaintiff may enforce the lien against the money which is payable for the personal injury. Charlotte-Mecklenburg Hosp. Auth. v. First of Ga. Ins. Co., 340 N.C. 88, 455 S.E.2d 655 (1995).

The doctrine of election of remedies did not bar plaintiff chiropractor's recovery from defendant attorney where the attorney's clients were liable to plaintiff for having received services for which they had not paid and the defendant was liable to plaintiff pursuant to this section; the separate actions by plaintiff against either its patients or their attorney were not inconsistent and did not seek any additional or alternative forms of relief and there was no threat of double recovery, as the defendants in each action could claim contribution for payments made by the other, both in defense of the suit and in defense of any proceedings to collect a judgment. Triangle Park Chiropractic v. Battaglia, 139 N.C. App. 201, 532 S.E.2d 833, 2000 N.C. App. LEXIS 814 (2000).

Distribution of Proceeds Held Proper. — Action of defendant attorney in receiving $25,000.00 in settlement proceeds, deducting her fee of 25%, and then dividing the balance equally between injured party and medical providers was in direct accord with this section. North Carolina Baptist Hosps. v. Mitchell, 88 N.C. App. 263, 362 S.E.2d 841 (1987), aff'd, 323 N.C. 528, 374 S.E.2d 844 (1988).

Attorney who followed disbursement provisions of this section when disbursing client's funds from personal injury settlement was not held liable for client's unpaid debt to medical service provider whom attorney knew had obtained client's assignment of all such funds up to full amount of client's debt for medical services. North Carolina Baptist Hosps. v. Mitchell, 323 N.C. 528, 374 S.E.2d 844 (1988).

G.S. 44-49 and G.S. 44-50 do not require a pro rata distribution of funds among valid lien holders where there are insufficient funds to compensate all of the holders; thus, an attorney was properly granted summary judgment in a hospital's action alleging violation of G.S. 44-49 and G.S. 44-50. N.C. Baptist Hosps., Inc. v. Crowson, 155 N.C. App. 746, 573 S.E.2d 922, 2003 N.C. App. LEXIS 4 (2003), aff'd, 357 N.C. 499, 586 S.E.2d 90 (2003).

§ 44-50.1. Accounting of disbursements; attorney's fees to enforce lien rights.

(a) Notwithstanding any confidentiality agreement entered into between the injured person and the payor of proceeds as settlement of compensation for injuries, upon the lienholder's written request and the lienholder's written agreement to be bound by any confidentiality agreements regarding the contents of the accounting, any person distributing funds to a lienholder under this Article in an amount less than the amount claimed by that lienholder shall provide to that lienholder a certification with sufficient information to demonstrate that the distribution was pro rata and consistent with this Article. If the person distributing settlement or judgment proceeds is an attorney, the accounting required by this section is not a breach of the attorney-client privilege.

(b) The certification under subsection (a) of this section shall include a statement of all of the following:

(1) The total amount of the settlement.

(2) The total distribution to lienholders, the amount of each lien claimed, and the percentage of each lien paid.

(3) The total attorney's fees.

(c) Nothing in this Article shall be construed to require any person to act contrary to the requirements of the Health Insurance Portability and Accountability Act of 1996, P.L. 104-91, and regulations adopted pursuant to that Act. (2003-309, s. 1.)

§ 44-51. Disputed claims to be settled before payments.

Whenever the sum or amount or amounts demanded for medical services or hospital fees shall be in dispute, nothing in this Article shall have any effect of compelling payment thereof until the claim is fully established and determined, in the manner provided by law: Provided, however, that when any such sums are in dispute the amount of the lien shall in no case exceed the amount of the bills in dispute. (1935, c. 121, s. 3; 1943, c. 543.)

Article 9A.

Liens for Ambulance Service.

§ 44-51.1. Lien on real property of recipient of ambulance service paid for or provided by county or municipality.

There is hereby created a general lien upon the real property of any person who has been furnished ambulance service by a county or municipal agency or at the expense of county or municipal government. The lien created by this section shall continue from the date of filing until satisfied, except that no action to enforce it may be brought more than 10 years after the date on which ambulance service was furnished nor more than three years after the date of recipient's death. Failure to bring action within such times shall be a complete bar against any recovery and shall extinguish the lien. (1969, c. 684.)

§ 44-51.2. Filing within 90 days required.

No lien created by G.S. 44-51.1 shall be valid but from the time of filing in the office of the clerk of superior court a statement containing the name and address of the person against whom the lien is claimed, the name of the county or municipality claiming the lien, the amount of the unpaid charge for ambulance service, and the date and place of furnishing ambulance service for which charges are asserted and the lien claimed. No lien under this Article shall be valid unless filed in accordance with this section within 90 days of the date of the furnishing the ambulance service. (1969, c. 684.)

§ 44-51.3. Discharge of lien.

Liens created by this Article may be discharged as follows:

(1) By filing with the clerk of superior court a receipt or acknowledgment, signed by the county or municipal treasurer, that the lien has been paid or discharged;

(2) By depositing with the clerk of superior court money equal to the amount of the claim, which money shall be held for the benefit of the claimant; or

(3) By an entry in the lien docket that the action on the part of the lien claimant to enforce the lien has been dismissed, or a judgment has been rendered against the claimant in such action. (1969, c. 684.)

Article 9B.

Attachment or Garnishment and Lien for Ambulance Service in Certain Counties.

§ 44-51.4. Attachment or garnishment for county or city ambulance or county or city supported ambulance service.

Whenever ambulance services are provided by a county, by a county-franchised ambulance service supplemented by county funds, or by a municipally owned and operated ambulance service or by an ambulance service supplemented by municipal funds and a recipient of such ambulance services or one legally responsible for the support of a recipient of such services fails to pay charges fixed for such services for a period of 90 days after the rendering of such services, the county or municipality providing the ambulance services, or providing financial support to the ambulance service, may treat the amount due for such services as if it were a tax due to the county or municipality and may proceed to collect the amount due through the use of attachment and garnishment proceedings as set out in G.S. 105-368. (1969, c. 708, s. 1; 1973, c. 1366, s. 1; 1975, c. 595, s. 2; 1991, c. 595, s. 1.)

§ 44-51.5. General lien for county or city ambulance service.

There is hereby created a general lien upon the real property of any person who has been furnished ambulance service by a county, by a county-franchised ambulance service supplemented by county funds, or municipal agency or at the expense of a county or municipal government or upon the real property of one legally responsible for the support of any person who has been furnished such ambulance service. (1969, c. 708, s. 2; 1973, c. 1366, s. 2.)

§ 44-51.6. Lien to be filed.

No lien created by G.S. 44-51.5 shall be valid but from the time of filing in the office of the clerk of superior court a statement containing the name and address of the person against whom the lien is claimed, the name of the county or municipality claiming the lien, the amount of the unpaid charge for ambulance service, and the date and place of furnishing the ambulance service for which charges are asserted and the lien claimed. No lien under this section shall be valid unless filed after 90 days of the date of the furnishing of ambulance service, and within 180 days of the date of the furnishing of ambulance service. (1969, c. 708, s. 3.)

§ 44-51.7. Discharging lien.

Liens created by G.S. 44-51.5 may be discharged as follows:

(1) By filing with the clerk of superior court a receipt of acknowledgment, signed by the county treasurer, that the lien has been paid or discharged;

(2) By depositing with the clerk of superior court money equal to the amount of the claim, which money shall be held for the benefit of the claimant; or

(3) By an entry in the lien docket that the action on the part of the lien claimant to enforce the lien has been dismissed, or a judgment has been rendered against the claimant in such action. (1969, c. 708, s. 4.)

§ 44-51.8. Counties to which Article applies.

The provisions of this Article shall apply only to Alamance, Alexander, Alleghany, Anson, Ashe, Beaufort, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Caldwell, Camden, Carteret, Caswell, Catawba, Chatham, Cherokee, Chowan, Cleveland, Columbus, Craven, Cumberland, Dare, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Graham, Granville, Greene, Guilford, Halifax, Harnett, Haywood, Henderson, Hertford, Hoke, Hyde, Iredell, Johnston, Jones, Lee, Lenoir, Lincoln, McDowell, Macon, Madison, Mecklenburg, Mitchell, Montgomery, Moore, Nash, New Hanover, Onslow, Orange, Pasquotank, Pender, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Stanly, Stokes, Surry, Swain, Transylvania, Tyrrell, Union, Vance, Wake, Warren, Washington, Watauga, Wilkes, Wilson, Yadkin and Yancey Counties. (1969, c. 708, s. 5; c. 1197; 1971, c. 132; 1973, c. 880, s. 1; cc. 887, 894, 907, 1182; 1975, c. 595, s. 1; 1977, cc. 64, 138, 357; 1977, 2nd Sess., cc. 1144, 1157; 1979, c. 452; 1983, cc. 186, 424; 1983 (Reg. Sess., 1984), c. 933; 1985, c. 9; 1985 (Reg. Sess., 1986), c. 936, s. 6; 1987, c. 466; 1995, c. 9, s. 1; 1995 (Reg. Sess., 1996), c. 676, s. 1; 2000-15, s. 3; 2000-107, s. 1.)

Article 10.

Agricultural Liens for Advances.

§§ **44-52 through 44-64:** Repealed by Session Laws 1965, c. 700, s. 2.

Article 11.

Uniform Federal Tax Lien Registration Act.

§§ **44-65 through 44-68:** Repealed by Session Laws 1969, c. 216.

§§ **44-68.1 through 44-68.7:** Repealed by Session Laws 1989 (Regular Session, 1990), c. 1047, s. 2.

Cross References. — For the Uniform Federal Lien Registration Act, see now G.S. 44-68.10 et seq.

§§ **44-68.8, 44-68.9:** Reserved for future codification purposes.

Article 11A.

Uniform Federal Lien Registration Act.

§ 44-68.10. Short title.

This Article may be cited as the Uniform Federal Lien Registration Act. (1969, c. 216; 1989 (Reg. Sess., 1990), c. 1047, s. 1.)

Editor's Note. — Session Laws 1989 (Reg. Sess., 1990), c. 1047 repealed Article 11 of this Chapter, the Uniform Federal Tax Lien Registration Act, and enacted in its place this Article, the Uniform Federal Lien Registration Act. Where appropriate, the historical citations to sections of former Article 11 have been added to the sections of this Article.

§ 44-68.11. Scope.

This Article applies only to federal tax liens, to other federal liens notices of which under any Act of Congress or any regulation adopted pursuant thereto are required or permitted to be filed in the same manner as notices of federal tax liens, and to notices of federal liens upon real property pursuant to 42 U.S.C. § 9607(l). (1989 (Reg. Sess., 1990), c. 1047, s. 1.)

§ 44-68.12. Place of filing.

(a) Notices of liens, certificates, and other notices affecting federal tax liens or other federal liens must be filed in accordance with this Article.

(b) Notices of liens upon real property for obligations payable to the United States and certificates and notices affecting the liens shall be filed in the office of the clerk of superior court of the county in which the real property subject to the liens is situated.

(c) Notices of federal liens upon personal property, whether tangible or intangible, for obligations payable to the United States and certificates and notices affecting the liens shall be filed as follows:

(1) If the person against whose interest the lien applies is a corporation or a partnership whose principal executive office is in this State, as these entities are defined in the internal revenue laws of the United States, in the office of the Secretary of State;

(2) In all other cases, in the office of the clerk of superior court of the county where the person against whose interest the lien applies resides at the time of filing of the notice of lien. (Ex. Sess. 1924, c. 44, § 1; 1969, c. 216; 1989 (Reg. Sess., 1990), c. 1047, s. 1.)

§ 44-68.13. Execution of notices and certificates.

Certification of notices of liens, certificates, or other notices affecting federal liens by the Secretary of the Treasury of the United States or his delegate, or by any official or entity of the United States responsible for filing or certifying of notice of any other lien, entitles them to be filed and no other attestation, certification, or acknowledgement is necessary. (1969, c. 216; 1989 (Reg. Sess., 1990), c. 1047, s. 1.)

§ 44-68.14. Duties of filing officer.

(a) If a notice of federal lien, a refiling of a notice of federal lien, or a notice of revocation of any certificate described in subsection (b) is presented to a filing officer who is:

(1) The Secretary of State, he shall cause the notice to be numbered, maintained, and indexed in accordance with G.S. 25-9-519, as if the notice were a financing statement within the meaning of the Uniform Commercial Code, Chapter 25 of the General Statutes; or

(2) Any other officer described in G.S. 44-68.12, he shall endorse thereon his identification and the date and time of receipt and forthwith file it alphabetically or enter it in an alphabetical index showing the name and address of the person named in the notice, the date and time of receipt, the title and address of the official or entity certifying the lien, and the total amount appearing on the notice of lien.

(b) If a certificate of release, nonattachment, discharge, or subordination of any lien is presented to the Secretary of State for filing he shall cause:

(1) A record of a certificate of release or nonattachment to be numbered, maintained, and indexed as if a record of the certificate were a termination statement within the meaning of the Uniform Commercial Code, Chapter 25 of the General Statutes, but the record of the notice of lien to which the certificate relates may not be removed from the files; and

(2) A record of a certificate of discharge or subordination to be numbered, maintained, and indexed as if the record of the certificate were a release of collateral within the meaning of the Uniform Commercial Code, Chapter 25 of the General Statutes.

(c) If a refiled notice of federal lien referred to in subsection (a) or any of the certificates or notices referred to in subsection (b) is presented for filing to any other filing officer specified in G.S. 44-68.12, he shall permanently attach the refiled notice or the certificate to the original notice of lien and enter the refiled notice or the certificate with the date of filing in any alphabetical lien index on the line where the original notice of lien is entered.

(d) Upon request of any person, the filing officer shall issue his certificate showing whether there is on file, on the date and hour stated therein, any notice of lien or certificate or notice affecting any lien filed under this Article or (reference previous federal tax lien registration act), naming a particular person, and if a notice or certificate is on file, giving the date and hour of filing of each notice or certificate. The fee for a certificate is five dollars ($5.00). Upon request, the filing officer shall furnish a copy of any notice of federal lien, or notice or certificate affecting a federal lien, for a fee of one dollar ($1.00) per page. (Ex. Sess. 1924, c. 44, ss. 2, 3; 1953, c. 1106, ss. 1, 2; 1963, c. 544; 1969, c. 216; 1989 (Reg. Sess., 1990), c. 1047, s. 1; 2000-169, ss. 33, 34.)

Editor's Note. — The phrase "(reference previous federal tax lien registration act)" in subsection (d) is language from the uniform act that would normally be considered directory. References to former Article 11 should have been inserted in the place of this language.

§ 44-68.15. Fees.

(a) The fee for filing and indexing each notice of lien or certificate or notice affecting the lien in the Office of the Secretary of State is:

(1) For a lien on real estate, five dollars ($5.00);
(2) For a lien on tangible and intangible personal property, five dollars ($5.00);
(3) For a certificate of discharge or subordination, five dollars ($5.00);
(4) For all other notices, including a certificate of release or nonattachment, five dollars ($5.00).

(b) The fee for filing and indexing each notice of lien or certificate or notice affecting the lien in the office of the Clerk of Superior Court, and the fee for furnishing the certificate or copies provided for in G.S. 44-68.14(d), is as provided in G.S. 7A-308.

(c) The officer shall bill the district directors of internal revenue or other appropriate federal officials on a monthly basis for fees for documents filed by them. (1969, c. 216; 1983, c. 713, ss. 29-31; 1989 (Reg. Sess., 1990), c. 1047, s. 1.)

§ 44-68.16. Uniformity of application and construction.

This Article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Article among states enacting it. (1989 (Reg. Sess., 1990), c. 1047, s. 1.)

§ 44-68.17. Liens and notices filed before August 1, 1990.

All liens, notices, certificates, releases and refilings filed before August 1, 1990, to which this Article would otherwise apply if such filing occurred on or after August 1, 1990, and any indexes pertaining thereto, shall be transferred to and maintained in the office in which such filing would have been made had the filing occurred on or after August 1, 1990. (1969, c. 216; 1973, c. 480; 1989 (Reg. Sess., 1990), c. 1047, s. 1.)

Article 12.

Liens on Certain Agricultural Products.

§ 44-69. Effective period for lien on leaf tobacco sold in auction warehouse.

No chattel mortgage, agricultural lien, or other lien of any nature upon leaf tobacco shall be effective for any purpose for a longer period than six months after the sale of such tobacco at a regular sale in an auction tobacco warehouse during the regular season for auction sales of tobacco in such warehouse. This section shall not absolve any person from prosecution and punishment for crime. (1943, c. 642, s. 1; 1975, c. 318.)

Legal Periodicals. — For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

§ 44-69.1. Effective period for liens on peanuts, cotton and grains.

No chattel mortgage, agricultural lien or other lien of any nature upon peanuts, cotton, soybeans, corn, wheat or other grains shall be effective for any purpose for a longer period than 18 months from the date of sale or the date of delivery to the purchaser, whichever date shall fall last. This section shall not absolve any person from prosecution and punishment for crime. (1955, c. 266; 1975, c. 318.)

CASE NOTES

Recovery on Federal Loan Program. — While an action brought by the United States to recover damages for conversion of property is governed by the six-year statute of limitations contained in 28 U.S.C. § 2415(b), and not by similar statutes provided by state law, this section specifically controls the legal duration of an agricultural lien upon soybeans under state substantive law and is not a statute of limitations. Actions to recover on federal loan programs are controlled by federal common law and state law is adopted as the federal common law unless it is found to be discriminatory. In this regard, this section is far from discriminatory and provides an effective mechanism for resolution of disputes concerning perishable, agricultural commodities. United States v. Bailey Feed Mill, Inc., 592 F. Supp. 844 (E.D.N.C. 1984).

Applied in United States v. Currituck Grain, Inc., 6 F.3d 200 (4th Cir. 1993).

§ 44-69.2. Effective period for liens on fruits and vegetables.

No security interest in or lien on fruits and vegetables sold at a regular sale at an auction market at which the Department of Agriculture and Consumer Services furnishes certified inspectors pursuant to Article 17 of Chapter 106 is effective for any purpose more than six months after the date of the sale. This section does not absolve any person from prosecution and punishment for crime. (1981, c. 640, s. 2; 1997-261, s. 109.)

§ 44-69.3. Liens on tangible and intangible assets of milk distributors.

(a) A producer, or an association of producers who supplies milk either through an agreement of sale or on consignment to a distributor shall, upon complying with the provisions of this section, have a lien upon the tangible and intangible assets, including but not limited to the accounts receivable of the distributor to secure payment for such milk. For the purposes of this section, "milk" means the lacteal secretion of cows and includes all skim, butterfat, or other constituents obtained from separation or other process.

(b) The lien claimed by the producer or association of producers must be filed in the office of the clerk of court for the county of the distributor's principal place of business. Provided that if the distributor is not a resident of the State a filing must be made with the clerk of superior court for the county in which the distributor's registered office is located. The clerk shall note the claim of lien on the judgment docket and index the same under the name of the distributor at the time the claim is filed.

(c) A producer or association of producers claiming nonpayment for milk sold to a distributor shall file with the clerk a notarized statement of nonpayment. The statement shall contain at a minimum all of the following information:

(1) The name of the distributor who received the milk.
(2) The date and quantity of milk shipped for which payment has not been received.
(3) Repealed by Session Laws 2004-199, s. 27(f), effective August 17, 2004.

The producer or association of producers shall furnish a copy of the statement as provided by this subsection to the distributor, which shall constitute a notice of claim of lien. The notice shall be served personally by a person authorized by law to serve process or by certified mail. The lien granted by this section shall be effective as of the time it is filed with the clerk of court. Provided the distributor shall have the right to contest the validity of such lien by filing, with the clerk of court and serving on the producer within 10 days after he receives notice that the producer has filed a claim of lien, a notice that the distributor contest the amount due thereunder. In the event the distributor fails to contest the lien or is unsuccessful in obtaining a discharge of the lien, the lien shall be perfected as of the date of filing with the clerk of court.

(d) The lien created by this section may be discharged in any of the following manner:

(1) Repealed by Session Laws 2004-199, s. 27(f), effective August 17, 2004.
(2) By depositing with the clerk of superior court money equal to the amount of the claim, which money shall be held for the benefit of the producer.
(3) By an entry in the lien docket that the action on the part of the lien claimant to enforce the lien has been dismissed or a judgment has been rendered against the claimant in such action.
(4) By filing with the clerk a sworn statement signed by the producer or an official of an association of producers that the lien or claim of lien has been satisfied.

(e) Action to enforce the lien created by this section may be instituted in any court of competent jurisdiction in the county where the lien was filed not later than 90 days following the maturity of the distributor's obligation to pay for the milk. In the event no action to enforce the lien is commenced within the 90-day period the lien created hereby shall no longer be valid. (1985, c. 678, s. 1; 2004-199, s. 27(f).)

ARTICLE 13.

Factors' Liens.

§§ 44-70 through 44-76: Repealed by Session Laws 1965, c. 700, s. 2.

ARTICLE 14.

Assignment of Accounts Receivable and Liens Thereon.

§§ 44-77 through 44-85: Repealed by Session Laws 1965, c. 700, s. 2.

ARTICLE 15.

Liens for Overdue Child Support.

§ 44-86. Lien on real and personal property of person owing past-due child support; definitions; filing required; discharge.

(a) Definitions. — As used in this Article, the terms “designated representative”, “obligee”, and “obligor” have the meanings given them in G.S. 110-129.

(b) Lien Created. — There is created a general lien upon the real and personal property of any person who is delinquent in the payment of court-ordered child support. For purposes of this section, an obligor is delinquent when arrears under a court-ordered child support obligation equals three months of payments or three thousand dollars ($3,000), whichever occurs first. The amount of the lien shall be determined by a verified statement of child support delinquency prepared in accordance with subsection (c) of this section.

(c) Contents of Statement; Verification. — A verified statement of child support delinquency shall contain the following information:

(1) The caption and file docket number of the case in which child support was ordered;

(2) The date of the order of support;

(3) The amount of the child support obligation established by the order; and

(4) The amount of the arrearage as of the date of the statement.

The statement shall be verified by the designated representative in a IV-D case and by the obligee in a non-IV-D case.

(d) Filing and Perfection of Lien. — The verified statement shall be filed in the office of the clerk of superior court in the county in which the child support was ordered. At the time of filing the verified statement, the designated representative in a IV-D case and the obligee in a non-IV-D case shall serve notice on the obligor that the statement has been filed. The notice shall be served and the return of service filed with the clerk of court in accordance with Rule 4 of the North Carolina Rules of Civil Procedure. The notice shall specify the manners in which the lien may be discharged. Upon perfection of the lien, as set forth herein, the clerk shall docket and index the statement on the judgment docket. The clerk shall issue a transcript of the docketed statement to the clerk of any other county as requested by the designated representative in a IV-D case or the obligee in a non-IV-D case. The clerk receiving the transcript shall docket and index the transcript. A lien on personal property attaches when the property is seized by the sheriff. A lien on real property attaches when the perfected lien is docketed and indexed on the judgment docket.

(1) IV-D Cases. — In IV-D cases, the filing of a verified statement with the clerk of court by the designated representative shall perfect the lien. The obligor may contest the lien by motion in the cause.

(2) Non-IV-D Cases. — In a non-IV-D case, the notice to the obligor of the filing of the verified statement shall state that the obligor has 30 days from the date of service to request a hearing before a district court judge to contest the validity of the lien. If the obligor fails to contest the lien after 30 days from the time of service, the obligee may make application to the clerk, and the clerk shall record and index the lien on the judgment docket. If the obligee files a petition contesting the validity of the lien, a hearing shall be held before a district court judge to determine whether the lien is valid and proper. In contested cases,

the clerk of court shall record and index the lien on the judgment docket only by order of the judge. The docketing of a verified statement in a non-IV-D case shall perfect the lien when duly recorded and indexed.

(e) Lien Superior to Subsequent Liens. — Except as otherwise provided by law, a lien established in accordance with this section shall take priority over all other liens subsequently acquired and shall continue from the date of filing until discharged in accordance with G.S. 44-87.

(f) Execution on the Lien. — A designated representative in a IV-D case, after 30 days from the docketing of the perfected lien, or an obligee in a non-IV-D case, after docketing the perfected lien, may enforce the lien in the same manner as for a civil judgment.

(g) Liens Arising Out-of-State. — This State shall accord full faith and credit to child support liens arising in another state when the child support enforcement agency, party, or other entity seeking to enforce the lien complies with the requirements relating to recording and serving child support liens as set forth in this Article and with the requirements relating to the enforcement of foreign judgments as set forth in Chapter 1C of the General Statutes. (1997-433, s. 7; 1998-17, s. 1.)

§ 44-87. Discharge of lien; penalty for failure to discharge.

(a) Liens created by this Article may be discharged as follows:

(1) By the designated representative in IV-D cases, or by the obligee in non-IV-D cases, filing with the clerk of superior court an acknowledgment that the obligor has satisfied the full amount of the lien;

(2) By depositing with the clerk of superior court money equal to the amount of the claim and filing a petition in the cause requesting a district court judge to determine the validity of the lien. The money shall not be disbursed except by order of a district court judge following the hearing on the merits; or

(3) By an entry in the judgment docket book that the action on the part of the lien claimant to enforce the lien has been dismissed, or a judgment has been rendered against the claimant in such action.

(b) An obligee in a non-IV-D case who has received payment in full for a delinquent child support obligation which is the basis for the lien shall, within 30 days of receipt of payment, file with the clerk of court an acknowledgment that the obligor has satisfied the full amount of the lien and that the lien is discharged. If the lienholder fails to timely file the acknowledgment, the obligor may, after serving notice on the obligee, file an action in district court to discharge the lien. If in an action filed by the obligor to discharge the lien, the court discharges the lien and finds that the obligee failed to timely file an acknowledgment discharging the lien, then the court may allow the prevailing party to recover reasonable attorneys' fees to be taxed as court costs against the obligee. (1997-433, s. 7; 1998-17, s. 1.)

Chapter 44A.

Statutory Liens and Charges.

Article 1.

Possessory Liens on Personal Property.

Sec.
44A-1. Definitions.
44A-2. Persons entitled to lien on personal property.
44A-3. When lien arises and terminates.
44A-4. Enforcement of lien by sale.
44A-5. Proceeds of sale.
44A-6. Title of purchaser.
44A-6.1. Action to regain possession of a motor vehicle or vessel.

Article 2.

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ARTICLE 1.

Possessory Liens on Personal Property.

§ 44A-1. Definitions.

As used in this Article:

(1) "Legal possessor" means
  a. Any person entrusted with possession of personal property by an owner thereof, or
  b. Any person in possession of personal property and entitled thereto by operation of law.

(2) "Lienor" means any person entitled to a lien under this Article.

(2a) "Motor Vehicle" has the meaning provided in G.S. 20-4.01.

(3) "Owner" means
  a. Any person having legal title to the property, or
  b. A lessee of the person having legal title, or
  c. A debtor entrusted with possession of the property by a secured party, or
  d. A secured party entitled to possession, or
  e. Any person entrusted with possession of the property by his employer or principal who is an owner under any of the above.

(4) "Secured party" means a person holding a security interest.

(5) "Security interest" means any interest in personal property which interest is subject to the provisions of Article 9 of the Uniform Commercial Code, or any other interest intended to create security in real or personal property.

(6) "Vessel" has the meaning provided in G.S. 75A-2. (1967, c. 1029, s. 1; 1991, c. 731, s. 1.)

Legal Periodicals. — For article concerning liens on personal property not governed by the Uniform Commercial Code, see 44 N.C.L. Rev. 322 (1966).

CASE NOTES

This Chapter did not purport to abrogate long established principles under which equitable liens have been enforced by our courts in a variety of situations. Embree Constr. Group, Inc. v. Rafcor, Inc., 97 N.C. App. 418, 388 S.E.2d 604 (1990), modified on other grounds, 330 N.C. 487, 411 S.E.2d 916 (1992).

Priority of Liens. — For priority purposes, liens duly perfected under this Chapter relate back to the time of first furnishing labor or materials. As between a statutory lien and the lien created by a deed of trust, the general rule is that the lien which is first in time has priority. RDC, Inc. v. Brookleigh Bldrs., Inc., 60 N.C. App. 375, 299 S.E.2d 448, rev'd on other grounds, 309 N.C. 182, 305 S.E.2d 722 (1983).

Defendant properly met the requirements of this chapter, and judgment signed by trial judge properly referred to the site upon which defendant wanted a lien declared and related the lien back to the date when labor and materials were first furnished at the site; therefore, defendant's lien had priority over the deed of trust held by plaintiff. Metropolitan Life Ins. Co. v. Rowell, 115 N.C. App. 152, 444 S.E.2d 231, cert. denied, 338 N.C. 518, 452 S.E.2d 813 (1994).

Applied in MSR Enters., Inc. v. GMC, 27 N.C. App. 94, 218 S.E.2d 234 (1975); Drummond v. Cordell, 72 N.C. App. 262, 324 S.E.2d 301 (1985); Peace River Elec. Coop. v. Ward Transformer Co., 116 N.C. App. 493, 449 S.E.2d 202 (1994), cert. denied, 339 N.C. 739, 454 S.E.2d 655 (1995); Monteau v. Reis Trucking & Constr., Inc., 147 N.C. App. 121, 553 S.E.2d 709, 2001 N.C. App. LEXIS 1052 (2001).

Cited in Floyd S. Pike Elec. Contractor v. Goodwill Missionary Baptist Church, 25 N.C. App. 563, 214 S.E.2d 276 (1975); Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243 (1981); State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

§ 44A-2. Persons entitled to lien on personal property.

(a) Any person who tows, alters, repairs, stores, services, treats, or improves personal property other than a motor vehicle or an aircraft in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the personal property has a lien upon the property. The amount of the lien shall be the lesser of

(1) The reasonable charges for the services and materials; or
(2) The contract price; or
(3) One hundred dollars ($100.00) if the lienor has dealt with a legal possessor who is not an owner.

This lien shall have priority over perfected and unperfected security interests.

(b) Any person engaged in the business of operating a hotel, motel, or boardinghouse has a lien upon all baggage, vehicles and other personal property brought upon his premises by a guest or boarder who is an owner thereof to the extent of reasonable charges for the room, accommodations and other items or services furnished at the request of the guest or boarder. This lien shall not have priority over any security interest in the property which is perfected at the time the guest or boarder brings the property to said hotel, motel or boardinghouse.

(c) Any person engaged in the business of boarding animals has a lien on the animals boarded for reasonable charges for such boarding which are contracted for with an owner or legal possessor of the animal. This lien shall have priority over perfected and unperfected security interests.

(d) Any person who repairs, services, tows, or stores motor vehicles in the ordinary course of the person's business pursuant to an express or implied contract with an owner or legal possessor of the motor vehicle, except for a motor vehicle seized pursuant to G.S. 20-28.3, has a lien upon the motor vehicle for reasonable charges for such repairs, servicing, towing, storing, or for the rental of one or more substitute vehicles provided during the repair, servicing, or storage. This lien shall have priority over perfected and unperfected security interests. Payment for towing and storing a motor vehicle seized pursuant to G.S. 20-28.3 shall be as provided for in G.S. 20-28.2 through G.S. 20-28.5.

(e) Any lessor of nonresidential demised premises has a lien on all furniture, furnishings, trade fixtures, equipment and other personal property to which the tenant has legal title and which remains on the demised premises if (i) the tenant has vacated the premises for 21 or more days after the paid rental period has expired, and (ii) the lessor has a lawful claim for damages against the tenant. If the tenant has vacated the premises for 21 or more days after the expiration of the paid rental period, or if the lessor has received a judgment for possession of the premises which is executable and the tenant has vacated the premises, then all property remaining on the premises may be removed and placed in storage. If the total value of all property remaining on the premises is less than one hundred dollars ($100.00), then it shall be deemed abandoned five days after the tenant has vacated the premises, and the lessor may remove it and may donate it to any charitable institution or organization. Provided, the lessor shall not have a lien if there is an agreement between the lessor or his agent and the tenant that the lessor shall not have a lien. This lien shall be for the amount of any rents which were due the lessor at the time the tenant vacated the premises and for the time, up to 60 days, from the vacating of the premises to the date of sale; and for any sums necessary to repair damages to the premises caused by the tenant, normal wear and tear excepted; and for reasonable costs and expenses of sale. The lien created by this subsection shall be enforced by sale at public sale pursuant to the provisions of G.S. 44A-4(e).

This lien shall not have priority over any security interest in the property which is perfected at the time the lessor acquires this lien.

(e1) This Article shall not apply to liens created by storage of personal property at a self-service storage facility.

(e2) Any lessor of a space for a manufactured home as defined in G.S. 143-143.9(6) has a lien on all furniture, furnishings, and other personal property including the manufactured home titled in the name of the tenant if (i) the manufactured home remains on the demised premises 21 days after the lessor is placed in lawful possession by writ of possession and (ii) the lessor has a lawful claim for damages against the tenant. If the lessor has received a judgment for possession of the premises which has been executed, then all property remaining on the premises may be removed and placed in storage. Prior to the expiration of the 21-day period, the landlord shall release possession of the personal property and manufactured home to the tenant during regular business hours or at a time mutually agreed upon. This lien shall be for the amount of any rents which were due the lessor at the time the tenant vacated the premises and for the time, up to 60 days, from the vacating of the premises to the date of sale; and for any sums necessary to repair damages to the premises caused by the tenant, normal wear and tear excepted; and for reasonable costs and expenses of the sale. The lien created by this subsection shall be enforced by public sale under G.S. 44A-4(e). The landlord may begin the advertisement for sale process immediately upon execution of the writ of possession by the sheriff, but may not conduct the sale until the lien has attached. This lien shall not have any priority over any security interest in the property that is perfected at the time the lessor acquires this lien. The lessor shall not have a lien under this subsection if there is an agreement between the lessor or the lessor's agent and the tenant that the lessor shall not have a lien.

(f) Any person who improves any textile goods in the ordinary course of his business pursuant to an express or implied contract with the owner or legal possessor of such goods shall have a lien upon all goods of such owner or possessor in his possession for improvement. The amount of such lien shall be for the entire unpaid contracted charges owed such person for improvement of said goods including any amount owed for improvement of goods, the possession of which may have been relinquished, and such lien shall have priority over perfected and unperfected security interests. "Goods" as used herein includes any textile goods, yarns or products of natural or man-made fibers or combination thereof. "Improve" as used herein shall be construed to include processing, fabricating or treating by throwing, spinning, knitting, dyeing, finishing, fabricating or otherwise.

(g) Any person who fabricates, casts, or otherwise makes a mold or who uses a mold to manufacture, assemble, or otherwise make a product pursuant to an express or implied contract with the owner of such mold shall have a lien upon the mold. For a lien to arise under this subsection, there must exist written evidence that the parties understood that a lien could be applied against the mold, with the evidence being in the form either of a written contract or a separate written statement provided by the potential holder of the lien under this subsection to the owner of the mold prior to the fabrication or use of the mold. The written contract or separate written statement must describe generally the amount of the potential lien as set forth in this subsection. The amount of the lien under this subsection shall equal the total of (i) any unpaid contracted charges due from the owner of the mold for making the mold, plus (ii) any unpaid contracted charges for all products made with the mold. The lien under this subsection shall not have priority over any security interest in the mold which is perfected at the time the person acquires this lien. As used in this subsection, the word "mold" shall include a mold, die, form, or pattern.

1967, c. 1029, s. 1; 1971, cc. 261, 403; c. 544, s. 1; c. 1197; 1973, c. 1298, s. 1; 975, c. 461; 1981, c. 566, s. 2; c. 682, s. 9; 1981 (Reg. Sess., 1982), c. 1275, s. ; 1995, c. 460, s. 9; c. 480, s. 1; 1995 (Reg. Sess., 1996), c. 744, s. 1; 1998-182, . 14; 1999-278, s. 5; 2006-222, s. 1.2.)

Effect of Amendments. — Session Laws 006-222, s. 1.2, effective October 1, 2006, and pplicable to labor, skills, or materials furished on an aircraft, or storage provided for an ircraft, on or after that date, inserted "or an ircraft" in the first sentence of the introducory language of subsection (a).

Legal Periodicals. — For note on aragemen's liens and duress of goods, see 54 .C.L. Rev. 1106 (1976).

For comment on landlords' eviction remedies n the light of Spinks v. Taylor, 303 N.C. 256, 78 S.E.2d 501 (1981), and the 1981 Act to larify Landlord Eviction Remedies in Resiential Tenancies, see 60 N.C.L. Rev. 885 1982).

For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

For article discussing unfair methods of competition, deceptive trade practices, and unfair trade practices, see 5 Campbell L. Rev. 119 (1982).

For article discussing self help residential eviction by landlords in light of the Landlord Eviction Remedies Act, see 13 N.C. Cent. L.J. 195 (1982).

For comment on the Landlord Eviction Remedies Act in light of Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981), see 18 Wake Forest L. Rev. 25 (1982).

CASE NOTES

Provisions for Retention of Motor Vehile Are Not Unconstitutional. — The proviions of the possessory lien statute which proide for the retention of the motor vehicle by ny person who repairs, services, tows or stores uch vehicle in his business, without prior otice or hearing, do not violate the due process lause of U.S. Const., Amend. XIV. Caesar v. iser, 387 F. Supp. 645 (M.D.N.C. 1975).

This section and § 44A-3 are codificaions of the common-law principle that a arageman has a possessory interest in a vehile left in his care by the owner or legal posessor and in which he has invested labor and aterials. Caesar v. Kiser, 387 F. Supp. 645 M.D.N.C. 1975).

The lienor's possessor interest repreents a balancing of the interests between wnership rights and the right of a craftsman o have security for payment for his service. aesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 975).

Warehouseman's Lien. — Any rights a arehouseman had to plaintiff's personal proprty stored in his warehouse were to be anayzed as a warehouseman's lien under chapter 5 rather than as a possessory lien under hapter 44A. Smithers v. Tru-Pak Moving Sys., 21 N.C. App. 542, 468 S.E.2d 410 (1996).

Owner of garage and wrecker service ith whom sheriff contracted to store ceraín cars levied on pursuant to court order was legal possessor, and under subsection (d) of his section had a lien on the cars from the time e began towing them away; his lien was enorceable in the principal action under the xplicit language of G.S. 1A-1, Rule 24, and G.S. 1-440.43 by intervention. Case v. Miller, 68 N.C. App. 729, 315 S.E.2d 737 (1984).

Owner of storage or towing company was entitled to recovery under this section because the company had an implied contract with the sheriff. Green Tree Fin. Servicing v. Young, 133 N.C. App. 339, 515 S.E.2d 223 (1999).

Mechanic's Lien Survived Credit Union's Repossession of a Car. — While a mechanic who performed a diagnostic analysis of an automobile had a valid lien against the credit union that financed the purchase of the automobile and repossessed the automobile from the mechanic's premises late at night without the mechanic's knowledge or consent, the trial court erred in awarding the mechanic actual and treble damages, as the mechanic's proper remedy was to be awarded possession of the automobile. Old Salem Foreign Car Serv., Inc. v. Webb, 159 N.C. App. 93, 582 S.E.2d 673, 2003 N.C. App. LEXIS 1426 (2003).

Court of Appeals would decline to create a judicial exception to this Article and hold that when property is seized by a law enforcement agency who thereafter directs the local storage facility to store and retain said property at their direction, the lawful owner is entitled to immediate possession of said property and the law enforcement agency is thereafter held accountable for all storage liens. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

A law enforcement agency is not accountable for storage liens attaching, pursuant to this section, to property seized by the agency and stored, at the agency's direction, by a local storage facility. To hold otherwise would be to create a judicial exception to this Article. State v. Davy, 100 N.C. App. 551, 397 S.E.2d 634 (1990).

Amount of Lien Established. — Under the plain language of G.S. 44A-4, where the lien amount was designated as $100.00 in plaintiff's complaint and that allegation was not challenged in the statutorily specified manner, the amount of the lien was conclusively established as being $100.00. Thus, regardless of any labels attached to the various parties herein, the clerk of court did not err in ordering defendant to relinquish possession of transformer upon plaintiff's tender of $100.00. Peace River Elec. Coop. v. Ward Transformer Co., 116 N.C. App. 493, 449 S.E.2d 202 (1994), cert. denied, 339 N.C. 739, 454 S.E.2d 655 (1995).

Lien Not Extinguished Where Check Bounced. — Where, before an automobile was delivered to owner, defendant had a lien on the vehicle for the entire amount due to it for repairs and services pursuant to subsection (d) of this section, and in order to obtain the vehicle the owner gave defendant a check for the balance due, which was returned uncashed because of insufficient funds, defendant's lien was not extinguished and the property was subject to redelivery to defendant through the remedy of claim and delivery. Adder v. Holman & Moody, Inc., 288 N.C. 484, 219 S.E.2d 190 (1975).

Where purchaser of personal property subject to a valid, enforceable, perfected security interest buys in the collateral at a foreclosure sale conducted pursuant to this Chapter to satisfy an account for repairs which the purchaser has failed to pay, for a purchase price which essentially represents payment of the account, the purchaser does not thereby extinguish the security interest; rather, the security property or collateral remains subject to the security interest, and if the indebtedness for payment of which the collateral was pledged remains in default, the right to possession continues to be with the holder of the security interest. Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243, cert. denied, 302 N.C. 629, 280 S.E.2d 441 (1981).

Applied in Marlen C. Robb & Son Boatyard & Marina, Inc. v. Vessel Bristol, 893 F. Supp. 526 (E.D.N.C. 1994).

Cited in Griffin v. Holmes, 843 F. Supp. 81 (E.D.N.C. 1993); In re Aerospace Technologies, Inc., 199 Bankr. 331 (Bankr. M.D.N.C. 1996); North Carolina Farm Bureau Mut. Ins. Co. v. Weaver, 134 N.C. App. 359, 517 S.E.2d 381 (1999); Triad Int'l Maint. Corp. v. Guernsey Air Leasing, Ltd., 178 F. Supp. 2d 547, 2001 U.S. Dist. LEXIS 23827 (M.D.N.C. 2001).

§ 44A-3. When lien arises and terminates.

Liens conferred under this Article arise only when the lienor acquires possession of the property and terminate and become unenforceable when the lienor voluntarily relinquishes the possession of the property upon which a lien might be claimed, or when an owner, his agent, a legal possessor or any other person having a security or other interest in the property tenders prior to sale the amount secured by the lien plus reasonable storage, boarding and other expenses incurred by the lienor. The reacquisition of possession of property voluntarily relinquished shall not reinstate the lien. Liens conferred under this Article do not terminate when the lienor involuntarily relinquishes the possession of the property. (1967, c. 1029, s. 1; 1991, c. 344, s. 3; c. 731, s. 2.)

Legal Periodicals. — For note on garagemen's liens and duress of goods, see 54 N.C.L. Rev. 1106 (1976).

CASE NOTES

Provisions for Retention of Motor Vehicle Are Not Unconstitutional. — The provisions of the possessory lien statute which provide for the retention of the motor vehicle by any person who repairs, services, tows or stores such vehicle in his business, without prior notice or hearing, do not violate the due process clause of U.S. Const., Amend. XIV. Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975).

This section and § 44A-2 are codifications of the common-law principle that a garageman has a possessory interest in a vehicle left in his care by the owner or legal possessor and in which he has invested labor and materials. Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975).

The lienor's possessory interest represents a balancing of the interests between ownership rights and the right of a craftsman to have security for payment for his service. Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975).

Relinquishment Terminates Lien Only When It Is Voluntary. — While it is true that possessory liens generally terminate when the lienor relinquishes possession, that rule only applies when possession is surrendered voluntarily. Case v. Miller, 68 N.C. App. 729, 315 S.E.2d 737 (1984).

While a mechanic who performed a diagnostic analysis of an automobile had a valid lien against the credit union that financed the purchase of the automobile and repossessed the automobile from the mechanic's premises late at night without the mechanic's knowledge or consent, the trial court erred in awarding the mechanic actual and treble damages, as the mechanic's proper remedy was to be awarded possession of the automobile. Old Salem Foreign Car Serv., Inc. v. Webb, 159 N.C. App. 93, 582 S.E.2d 673, 2003 N.C. App. LEXIS 1426 (2003).

Where possession of vehicles was surrendered in obedience to a court order directing their sale, obedience to the court order did not work a forfeiture of the rights of the lienholder. Case v. Miller, 68 N.C. App. 729, 315 S.E.2d 737 (1984).

Amount of Lien Established. — Under the plain language of G.S. 44A-4, where the lien amount was designated as $100.00 in plaintiff's complaint and that allegation was not challenged in the statutorily specified manner, the amount of the lien was conclusively established as being $100.00. Thus, regardless of any labels attached to the various parties herein, the clerk of court did not err in ordering defendant to relinquish possession of transformer upon plaintiff's tender of $100.00. Peace River Elec. Coop. v. Ward Transformer Co., 116 N.C. App. 493, 449 S.E.2d 202 (1994), cert. denied, 339 N.C. 739, 454 S.E.2d 655 (1995).

Where owner obtained delivery of his property by giving the lienholder a worthless check, the property was not voluntarily relinquished by the lienholder. Adder v. Holman & Moody, Inc., 288 N.C. 484, 219 S.E.2d 190 (1975).

Because an aircraft maintenance facility never acquired possession of the complete set of an aircraft's maintenance records, it never acquired a mechanic's lien on those items; when the maintenance facility returned the aircraft's engines to the owner, its interest in the engines terminated and it no longer held an enforceable interest in the engines. Triad Int'l Maint. Corp. v. Guernsey Air Leasing, Ltd., 178 F. Supp. 2d 547, 2001 U.S. Dist. LEXIS 23827 (M.D.N.C. 2001).

Amendment of Complaint Held Timely. — When plaintiff filed motion to amend his complaint to add a cause of action to enforce a materialman's or laborer's lien on December 8, 1983, and the last day he had furnished material or labor to defendants' property was June 15, 1983, his motion was filed within the 180-day period set forth in subsection (a) of this section, the date of the filing of the motion, rather than the date the court rules on it, being the crucial date in measuring the period of limitations. Plaintiff's amendment was therefore not barred by the statute of limitations, and whether it would "relate back" to the filing of the original complaint was immaterial. Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986).

Cited in Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243 (1981); Griffin v. Holmes, 843 F. Supp. 81 (E.D.N.C. 1993); North Carolina Farm Bureau Mut. Ins. Co. v. Weaver, 134 N.C. App. 359, 517 S.E.2d 381 (1999).

§ 44A-4. Enforcement of lien by sale.

(a) Enforcement by Sale. — If the charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 30 days or, in the case of towing and storage charges on a motor vehicle, 10 days following the maturity of the obligation to pay any such charges, the lienor may enforce the lien by public or private sale as provided in this section. The lienor may bring an action on the debt in any court of competent jurisdiction at any time following maturity of the obligation. Failure of the lienor to bring such action within a 180-day period following the commencement of storage shall constitute a waiver of any right to collect storage charges which accrue after such period. Provided that when property is placed in storage pursuant to an express contract of storage, the lien shall continue and the lienor may bring an action to collect storage charges and enforce his lien at any time within 120 days following default on the obligation to pay storage charges.

The owner or person with whom the lienor dealt may at any time following the maturity of the obligation bring an action in any court of competent jurisdiction as by law provided. If in any such action the owner or other party requests immediate possession of the property and pays the amount of the lien asserted into the clerk of the court in which such action is pending, the clerk shall issue an order to the lienor to relinquish possession of the property to the owner or other party. The request for immediate possession may be made in the complaint, which shall also set forth the amount of the asserted lien and the portion thereof which is not in dispute, if any. If within three days after service of the summons and complaint, as the number of days is computed in G.S. 1A-1, Rule 6, the lienor does not file a contrary statement of the amount of the lien at the time of the filing of the complaint, the amount set forth in the complaint shall be deemed to be the amount of the asserted lien. The clerk may at any time disburse to the lienor that portion of the cash bond, which the plaintiff says in his complaint is not in dispute, upon application of the lienor. The magistrate or judge shall direct appropriate disbursement of the disputed or undisbursed portion of the bond in the judgment of the court. In the event an action by the owner pursuant to this section is heard in district or superior court, the substantially prevailing party in such court may be awarded a reasonable attorney's fee in the discretion of the judge.

(b) Notice and Hearings. —

(1) If the property upon which the lien is claimed is a motor vehicle that is required to be registered, the lienor following the expiration of the relevant time period provided by subsection (a) shall give notice to the Division of Motor Vehicles that a lien is asserted and sale is proposed and shall remit to the Division a fee of ten dollars ($10.00). The Division of Motor Vehicles shall issue notice by registered or certified mail, return receipt requested, to the person having legal title to the property, if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party and other person claiming an interest in the property who is actually known to the Division or who can be reasonably ascertained. The notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the Division by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the Division that a hearing is desired. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the Division that a hearing is desired by the return of such form to the Division. The Division shall notify the lienor whether such notice is timely received by the Division. In lieu of the notice by the lienor to the Division and the notices issued by the Division described above, the lienor may issue notice on a form approved by the Division pursuant to the notice requirements above. If notice is issued by the lienor, the recipient shall return the form requesting a hearing to the lienor, and not the Division, within 10 days from the date the recipient receives the notice if a judicial hearing is requested. If the registered or certified mail notice has been returned as undeliverable and the notice of a right to a judicial hearing has been given to the owner of the motor vehicle in accordance with G.S. 20-28.4, no further notice is required. Failure of the recipient to notify the Division or lienor, as specified in the notice, within 10 days of the receipt of such notice that a hearing is desired

shall be deemed a waiver of the right to a hearing prior to the sale of the property against which the lien is asserted, and the lienor may proceed to enforce the lien by public or private sale as provided in this section and the Division shall transfer title to the property pursuant to such sale. If the Division or lienor, as specified in the notice, is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section and the Division will transfer title only pursuant to the order of a court of competent jurisdiction.

If the registered or certified mail notice has been returned as undeliverable, or if the name of the person having legal title to the vehicle cannot reasonably be ascertained and the fair market value of the vehicle is less than eight hundred dollars ($800.00), the lienor may institute a special proceeding in the county where the vehicle is being held, for authorization to sell that vehicle. Market value shall be determined by the schedule of values adopted by the Commissioner under G.S. 105-187.3.

In such a proceeding a lienor may include more than one vehicle, but the proceeds of the sale of each shall be subject only to valid claims against that vehicle, and any excess proceeds of the sale shall be paid immediately to the Treasurer for disposition pursuant to Chapter 116B of the General Statutes.

The application to the clerk in such a special proceeding shall contain the notice of sale information set out in subsection (f) hereof. If the application is in proper form the clerk shall enter an order authorizing the sale on a date not less than 14 days therefrom, and the lienor shall cause the application and order to be sent immediately by first-class mail pursuant to G.S. 1A-1, Rule 5, to each person to whom notice was mailed pursuant to this subsection. Following the authorized sale the lienor shall file with the clerk a report in the form of an affidavit, stating that the lienor has complied with the public or private sale provisions of G.S. 44A-4, the name, address, and bid of the high bidder or person buying at a private sale, and a statement of the disposition of the sale proceeds. The clerk then shall enter an order directing the Division to transfer title accordingly.

If prior to the sale the owner or legal possessor contests the sale or lien in a writing filed with the clerk, the proceeding shall be handled in accordance with G.S. 1-301.2.

(2) If the property upon which the lien is claimed is other than a motor vehicle required to be registered, the lienor following the expiration of the 30-day period provided by subsection (a) shall issue notice to the person having legal title to the property, if reasonably ascertainable, and to the person with whom the lienor dealt if different by registered or certified mail, return receipt requested. Such notice shall state that a lien has been asserted against specific property and shall identify the lienor, the date that the lien arose, the general nature of the services performed and materials used or sold for which the lien is asserted, the amount of the lien, and that the lienor intends to sell the property in satisfaction of the lien. The notice shall inform the recipient that the recipient has the right to a judicial hearing at which time a determination will be made as to the validity of the lien prior to a sale taking place. The notice shall further state that the recipient has a period of 10 days from the date of receipt in which to notify the lienor by registered or certified mail, return receipt requested, that a hearing is desired and that if the recipient wishes to contest the sale of his property pursuant to such lien, the recipient should notify the

lienor that a hearing is desired. The notice shall state the required information in simplified terms and shall contain a form whereby the recipient may notify the lienor that a hearing is desired by the return of such form to the lienor. Failure of the recipient to notify the lienor within 10 days of the receipt of such notice that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the property against which the lien is asserted and the lienor may proceed to enforce the lien by public or private sale as provided in this section. If the lienor is notified within the 10-day period provided above that a hearing is desired prior to sale, the lien may be enforced by sale as provided in this section only pursuant to the order of a court of competent jurisdiction.

(c) Private Sale. — Sale by private sale may be made in any manner that is commercially reasonable. If the property upon which the lien is claimed is a motor vehicle, the sale may not be made until notice is given to the Commissioner of Motor Vehicles pursuant to G.S. 20-114(c). Not less than 30 days prior to the date of the proposed private sale, the lienor shall cause notice to be mailed, as provided in subsection (f) hereof, to the person having legal title to the property, if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained. Notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof. The lienor shall not purchase, directly or indirectly, the property at private sale and such a sale to the lienor shall be voidable.

(d) Request for Public Sale. — If an owner, the person with whom the lienor dealt, any secured party, or other person claiming an interest in the property notifies the lienor prior to the date upon or after which the sale by private sale is proposed to be made, that public sale is requested, sale by private sale shall not be made. After request for public sale is received, notice of public sale must be given as if no notice of sale by private sale had been given.

(e) Public Sale. —

(1) Not less than 20 days prior to sale by public sale the lienor:

a. Shall notify the Commissioner of Motor Vehicles as provided in G.S. 20-114(c) if the property upon which the lien is claimed is a motor vehicle; and

a1. Shall cause notice to be mailed to the person having legal title to the property if reasonably ascertainable, to the person with whom the lienor dealt if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained, provided that notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (f) hereof; and

b. Shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held;

and shall publish notice of sale once a week for two consecutive weeks in a newspaper of general circulation in the same county, the date of the last publication being not less than five days prior to the sale. The notice of sale need not be published if the vehicle has a market value of less than three thousand five hundred dollars ($3,500), as determined by the schedule of values adopted by the Commissioner under G.S. 105-187.3.

(2) A public sale must be held on a day other than Sunday and between the hours of 10:00 A.M. and 4:00 P.M.:

a. In any county where any part of the contract giving rise to the lien was performed, or
b. In the county where the obligation secured by the lien was contracted for.

(3) A lienor may purchase at public sale.

(f) Notice of Sale. — The notice of sale shall include:

(1) The name and address of the lienor;
(2) The name of the person having legal title to the property if such person can be reasonably ascertained and the name of the person with whom the lienor dealt;
(3) A description of the property;
(4) The amount due for which the lien is claimed;
(5) The place of the sale;
(6) If a private sale the date upon or after which the sale is proposed to be made, or if a public sale the date and hour when the sale is to be held.

(g) Damages for Noncompliance. — If the lienor fails to comply substantially with any of the provisions of this section, the lienor shall be liable to the person having legal title to the property or any other party injured by such noncompliance in the sum of one hundred dollars ($100.00), together with a reasonable attorney's fee as awarded by the court. Damages provided by this section shall be in addition to actual damages to which any party is otherwise entitled. (1967, c. 1029, s. 1; 1975, c. 438, s. 1; c. 716, s. 5; 1977, c. 74, s. 4; c. 793, s. 1; 1981, c. 690, s. 26; 1983, c. 44, ss. 1, 2; 1985, c. 655, ss. 4, 5; 1989, c. 770, s. 10; 1991, c. 344, s. 1; c. 731, s. 3; 1995 (Reg. Sess., 1996), c. 635, ss. 2-4; 1998-182, s. 15; 1999-216, s. 10; 1999-460, s. 7; 2004-128, s. 5.)

Editor's Note. — Subdivision (b)(1), as amended by Session Laws 2004-128, s. 5, effective October 1, 2004, is applicable to orders entered on on or after that date.

Legal Periodicals. — For note on garagemen's liens and duress of goods, see 54 N.C.L. Rev. 1106 (1976).

CASE NOTES

Former Provisions as to Sale Unconstitutional. — The sale provision of this section as it stood before the 1975 amendment permitted the sale of motor vehicles by a lienor without affording the owner an opportunity for notice and a hearing to judicially determine the validity of the underlying debt, and in this respect the statute violated the due process clause of U.S. Const., Amend. XIV. Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975).

"State Action" Involved. — The State is actively involved in the creation and enforcement of the lien on motor vehicles and such must be held to constitute "state action" as that term is used in 42 U.S.C. § 1983. Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975).

Lienor Must Comply with Section when Mail Notice Undeliverable. — Subdivision (b)(1) of this section did not allow a lienor of an abandoned motor vehicle to dispose of it without complying with the requirements of this section as they pertain to other types of personal property when the registered or certified mail notice had been returned as undeliverable. Ernie's Tire Sales & Serv. v. Riggs, 106 N.C. App. 460, 417 S.E.2d 75 (1992).

Under North Carolina law, the sale could not be accomplished without the affirmative acts of the Department (now Division) of Motor Vehicles in transferring the indicia of ownership. Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975).

Lienor May Not Sell Vehicle Without Prior Judicial Determination or Owner's Waiver. — The lienor may still retain his possessory lien on the motor vehicle if the owner or legal possessor fails to pay his charges, but the lienor may not, without a prior judicial determination or the owner's waiver, sell the motor vehicle to satisfy his claim. Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975).

Amount Designated in Complaint Established Amount of Lien. — Under the plain language of this section, where the lien amount was designated as $100.00 in plaintiff's complaint and that allegation was not challenged in the statutorily specified manner, the amount of the lien was conclusively established as being $100.00. Thus, regardless of any labels attached to the various parties herein, the clerk of court did not err in ordering defendant to relinquish possession of transformer upon plaintiff's tender of $100.00. Peace River Elec. Coop. v. Ward Transformer Co., 116 N.C. App. 493, 449 S.E.2d 202 (1994), cert. denied, 339 N.C. 739, 454 S.E.2d 655 (1995).

Time for Collection by Lienholder. — In view of the proviso of subsection (a) of this section, which states that when property is placed in storage pursuant to an express contract of storage, the lien shall continue and the lienor may bring an action to collect storage charges and enforce his lien at any time within 120 days following default on the obligation to pay storage charges, and in view of the fact that storage was under an express contract with the sheriff, subject to the control of court, lienholder's right to collect did not end 180 days after storage began, but 120 days after the default, if any, occurred. Case v. Miller, 68 N.C. App. 729, 315 S.E.2d 737 (1984).

Applicability of Bond Provision. — The bond provision is located only in the second paragraph of subsection (a), the paragraph governing lien actions filed by the owner of property subject to a lien; accordingly, the bond provision applies only to lien actions filed by the owner of property subject to a lien, not to lien actions filed by the lienor. Griffin v. Holmes, 843 F. Supp. 81 (E.D.N.C. 1993).

Section 44A-4(b)(2) provides that the lienor has to issue notice to the person having legal title to property and specifies what the notice should contain; where defendant failed to comply substantially with the provisions of that subdivision, defendant was liable for statutory and actual damages. Rowell v. North Carolina Equip. Co., 146 N.C. App. 431, 552 S.E.2d 274, 2001 N.C. App. LEXIS 940 (2001).

Calculation of Damages. — Determination of actual damages, if any, was reserved for the jury, and the measure of actual damages was the difference between the fair market value of the property at the time of the sale and the amount for which the property was actually sold. Rowell v. North Carolina Equip. Co., 146 N.C. App. 431, 552 S.E.2d 274, 2001 N.C. App. LEXIS 940 (2001).

Attorney Fees. — Where defendant neither prevailed nor defended under the theory that he had a chapter 44A lien, but it was a warehouseman's lien under chapter 25, the trial court erred by awarding attorney fees under this section. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

Applied in Drummond v. Cordell, 72 N.C. App. 262, 324 S.E.2d 301 (1985); Drummond v. Cordell, 73 N.C. App. 438, 326 S.E.2d 292 (1985); AT & T Family Fed. Credit Union v. Beaty Wrecker Serv., Inc., 108 N.C. App. 611, 425 S.E.2d 427 (1993); Rowell v. North Carolina Equip. Co., 146 N.C. App. 431, 552 S.E.2d 274, 2001 N.C. App. LEXIS 940 (2001); Triad Int'l Maint. Corp. v. Guernsey Air Leasing, Ltd., 178 F. Supp. 2d 547, 2001 U.S. Dist. LEXIS 23827 (M.D.N.C. 2001).

Cited in Old Salem Foreign Car Serv., Inc. v. Webb, 159 N.C. App. 93, 582 S.E.2d 673, 2003 N.C. App. LEXIS 1426 (2003).

OPINIONS OF ATTORNEY GENERAL

Enforcement of Lien by Warehouseman. — Warehouseman with liens pursuant to both Article 1 of Chapter 44A and Article 7 of the U.C.C. may enforce lien under G.S. 25-7-210 without allowing the owner a judicial hearing under G.S. 44A-4. See opinion of Attorney General to Resa L. Harris, Legal Officer, Office of the Clerk of Superior Court, Mecklenburg County, 48 N.C.A.G. 111 (1979).

§ 44A-5. Proceeds of sale.

The proceeds of the sale shall be applied as follows:

(1) Payment of reasonable expenses incurred in connection with the sale. Expenses of sale include but are not limited to reasonable storage and boarding expenses after giving notice of sale.

(2) Payment of the obligation secured by the lien.

(3) Any surplus shall be paid to the person entitled thereto; but when such person cannot be found, the surplus shall be paid to the clerk of superior court of the county in which the sale took place, to be held by the clerk for the person entitled thereto. (1967, c. 1029, s. 1; 1971, c. 544, s. 2.)

CASE NOTES

Effect of Sale. — The sale of property encumbered by a statutory lien does not extinguish the lien; instead, its obligations are collectable from the proceeds of sale. Case v.

Miller, 68 N.C. App. 729, 315 S.E.2d 737 (1984).

Cited in Drummond v. Cordell, 73 N.C. App. 438, 326 S.E.2d 292 (1985).

§ 44A-6. Title of purchaser.

A purchaser for value at a properly conducted sale, and a purchaser for value without constructive notice of a defect in the sale, whether or not the purchaser is the lienor or an agent of the lienor, acquires title to the property free of any interests over which the lienor was entitled to priority. (1967, c. 1029, s. 1; 1995, c. 480, s. 2.)

Legal Periodicals. — For survey of 1981 commercial law, see 60 N.C.L. Rev. 1238 (1982).

CASE NOTES

Where purchaser of personal property subject to a valid, enforceable, perfected security interest buys in the collateral at a foreclosure sale conducted pursuant to this chapter to satisfy an account for repairs which the purchaser has failed to pay for a purchase price which essentially represents payment of the account, the purchaser does not thereby extinguish the security interest; rather, the security property or collateral remains subject to the security interest, and if the indebtedness for payment of which the collateral was pledged remains in default, the right to possession continues to be with the holder of the security interest. Paccar Fin. Corp. v. Harnett Transf., Inc., 51 N.C. App. 1, 275 S.E.2d 243, cert. denied, 302 N.C. 629, 280 S.E.2d 441 (1981).

Applied in Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975).

§ 44A-6.1. Action to regain possession of a motor vehicle or vessel.

(a) When the lienor involuntarily relinquishes possession of the property and the property upon which the lien is claimed is a motor vehicle or vessel, the lienor may institute an action to regain possession of the motor vehicle or vessel in small claims court any time following the lienor's involuntary loss of possession and following maturity of the obligation to pay charges. The lienor shall serve a copy of the summons and the complaint pursuant to G.S. 1A-1, Rule 4, on each secured party claiming an interest in the vehicle or vessel. For purposes of this section, involuntary relinquishment of possession includes only those situations where the owner or other party takes possession of the motor vehicle or vessel without the lienor's permission or without judicial process. If in the court action the owner or other party retains possession of the motor vehicle or vessel, the owner or other party shall pay the amount of the lien asserted as bond into the clerk of the court in which the action is pending.

If within three days after service of the summons and complaint, as the number of days is computed in G.S. 1A-1, Rule 6, neither the defendant nor a secured party claiming an interest in the vehicle or vessel files a contrary statement of the amount of the lien at the time of the filing of the complaint, the amount set forth in the complaint shall be deemed to be the amount of the asserted lien. The clerk may at any time disburse to the lienor that portion of the cash bond which is not in dispute, upon application of the lienor. The magistrate shall:

(1) Direct appropriate disbursement of the disputed or undisbursed portion of the bond; and

(2) Direct appropriate possession of the motor vehicle or vessel if, in the judgment of the court, the plaintiff has a valid right to a lien.

(b) Either party to an action pursuant to subsection (a) of this section may appeal to district court for a trial de novo. (1991, c. 344, s. 2; c. 731, s. 4.)

CASE NOTES

Mechanic's Lien Survived Credit Union's Repossession of a Car. — While a mechanic who performed a diagnostic analysis of an automobile had a valid lien against the credit union that financed the purchase of the automobile and repossessed the automobile from the mechanic's premises late at night without the mechanic's knowledge or consent, the trial court erred in awarding the mechanic actual and treble damages, as the mechanic's proper remedy was to be awarded possession of the automobile. Old Salem Foreign Car Serv., Inc. v. Webb, 159 N.C. App. 93, 582 S.E.2d 673, 2003 N.C. App. LEXIS 1426 (2003).

Failure to Use Legal Remedies May Preclude Insurance Coverage. — The actions of defendant, who had available legal remedies under subsection (a) of this section but attempted to repossess car by means not authorized by law, were not "necessary or incidental" to "garage operations" and insurance contract did not provide coverage for conduct complained of in wrongful death action. North Carolina Farm Bureau Mut. Ins. Co. v. Weaver, 134 N.C. App. 359, 517 S.E.2d 381 (1999).

ARTICLE 2.

Statutory Liens on Real Property.

Part 1. Liens of Mechanics, Laborers, and Materialmen Dealing with Owner.

§ 44A-7. Definitions.

Unless the context otherwise requires in this Article:

(1) "Improve" means to build, effect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements, and shall also mean and include any design or other professional or skilled services furnished by architects, engineers, land surveyors and landscape architects registered under Chapter 83A, 89A or 89C of the General Statutes, and rental of equipment directly utilized on the real property in making the improvement.

(2) "Improvement" means all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, or landscaping, including trees and shrubbery, driveways, and private roadways, on real property.

(3) An "owner" is a person who has an interest in the real property improved and for whom an improvement is made and who ordered the improvement to be made. "Owner" includes successors in interest of the owner and agents of the owner acting within their authority.

(4) "Real property" means the real estate that is improved, including lands, leaseholds, tenements and hereditaments, and improvements placed thereon. (1969, c. 1112, s. 1; 1975, c. 715, s. 1; 1985, c. 689, s. 13; 1995 (Reg. Sess., 1996), c. 607, s. 1.)

Legal Periodicals. — For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

For comment on materialmen's liens in North Carolina, see 61 N.C.L. Rev. 926 (1983).

For article, "North Carolina Construction Law Survey II," see 22 Wake Forest L. Rev. 481 (1987).

For note, "Mechanics' Liens—Judicial Legislation at Work: Changes in the Mechanics' Lien

Law of North Carolina after Electric Supply Co. v. Swain Electrical Co.," see 27 Wake Forest L. Rev. 1033 (1992).

CASE NOTES

Act Is Remedial in Nature. — The materialman's lien act, Chapter 44A, Article 2, Part 1, is remedial in nature and should be construed to advance the legislative intent in enacting it. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

The 1975 amendment created a new right to a lien in those who perform or furnish professional design or surveying services. Wilbur Smith & Assocs. v. South Mt. Properties, Inc., 29 N.C. App. 447, 224 S.E.2d 692, cert. denied, 290 N.C. 552, 226 S.E.2d 514 (1976).

Providing rental equipment does not constitute furnishing material, as the common meaning of the word material is simply "the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical (as a machine, tool, building, fabric) is made." Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

As to whether vendee who orders commencement of work before acquiring legal title is an owner within the meaning of this section, see Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

Cited in Meads v. Davis, 22 N.C. App. 479, 206 S.E.2d 868 (1974); Bryan v. Projects, Inc., 29 N.C. App. 453, 224 S.E.2d 689 (1976); Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978); Con Co., Inc. v. Wilson Acres Apts., Ltd., 56 N.C. App. 661, 289 S.E.2d 633 (1982); W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 78 N.C. App. 664, 338 S.E.2d 135 (1986); Brown v. Middleton, 86 N.C. App. 63, 356 S.E.2d 386 (1987); K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989); Blalock Elec. Co. v. Grassy Creek Dev. Corp., 99 N.C. App. 440, 393 S.E.2d 354 (1990); McNeary's Arborists, Inc. v. Carley Capital Group, 103 N.C. App. 650, 406 S.E.2d 644 (1991).

§ 44A-8. Mechanics', laborers', and materialmen's lien; persons entitled to claim of lien on real property.

Any person who performs or furnishes labor or professional design or surveying services or furnishes materials or furnishes rental equipment pursuant to a contract, either express or implied, with the owner of real property for the making of an improvement thereon shall, upon complying with the provisions of this Article, have a right to file a claim of lien on real property on the real property to secure payment of all debts owing for labor done or professional design or surveying services or material furnished or equipment rented pursuant to the contract. (1969, c. 1112, s. 1; 1975, c. 715, s. 2; 1995 (Reg. Sess., 1996), c. 607, s. 2; 2005-229, s. 1.)

Legal Periodicals. — For article, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," see 12 Wake Forest L. Rev. 283 (1976).

For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

For note, "Judicial Activism Constructs Lenders' Nightmare — Embree Construction Group, Inc. v. Rafcor, Inc. and United Carolina Bank," see 15 Campbell L. Rev. 77 (1992).

For article, "North Carolina's Real Estate Recording Laws: The Ghost of 1885," see 28 N.C. Cent. L.J. 199 (2006).

CASE NOTES

Purpose. — The purpose of the materialman's lien statute is to protect the interest of the supplier in the materials it supplies; the materialman, rather than the mortgagee, should have the benefit of materials that go into the property and give it value. To implement this purpose, courts should construe the statute so as to further the legislature's intent. They should construe a remedial statute to advance the remedy intended. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

The purpose of this lien statute is to protect the interest of the contractor, laborer or materialman. Embree Constr. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 411 S.E.2d 916 (1992).

The lien created by this section secures the right of the claimant to amounts earned whether or not the funds are due or the claimant's job is complete. Embree Constr. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 411 S.E.2d 916 (1992).

The 1975 amendment created a new right to a lien in those who perform or furnish professional design or surveying services. Wilbur Smith & Assocs. v. South Mt. Properties, Inc., 29 N.C. App. 447, 224 S.E.2d 692, cert. denied, 290 N.C. 552, 226 S.E.2d 514 (1976).

The lien created by this section is incident to and security for a debt. There can be no lien in the absence of an underlying debt. Lowe's of Fayetteville, Inc. v. Quigley, 46 N.C. App. 770, 266 S.E.2d 378 (1980); Caldwell's Well Drilling, Inc. v. Moore, 79 N.C. App. 730, 340 S.E.2d 518 (1986).

A laborers' and materialmen's lien arises out of the relationship of debtor and creditor, and it is for the debt that the lien is created by statute. Lowe's of Fayetteville, Inc. v. Quigley, 46 N.C. App. 770, 266 S.E.2d 378 (1980).

There must be a contract, express or implied, to create a laborer's or materialman's lien. The holder of the lien has a "security" that open or general creditors do not have and that is based on contract. Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6, rev'd on other grounds, 293 N.C. 688, 239 S.E.2d 566 (1977).

Without a contract the lien does not exist. Lowe's of Fayetteville, Inc. v. Quigley, 46 N.C. App. 770, 266 S.E.2d 378 (1980).

Absent express or implied contract, the statutory lien is unavailable. Embree Constr. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 411 S.E.2d 916 (1992).

Defendant was not a materialman for purposes of the statute of repose, G.S. 1-50(5)(b)(9), because plaintiff and defendant had no contract, and defendant's only intent was that of a manufacturer, to place its product into the stream of commerce, without ever intending its product be particularly delivered to plaintiff. Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 122 N.C. App. 413, 470 S.E.2d 826 (1996).

Third Party Contract Not Implied. — This article does not provide an exception to the principle that where there is a contract between persons for the furnishing of services or goods to a third person, the latter is not liable on an implied contract simply because he has received such services or goods. Suffolk Lumber Co. v. White, 12 N.C. App. 27, 182 S.E.2d 215 (1971).

As to whether vendee who orders commencement of work before acquiring legal title is an owner within the meaning of G.S. 44A-7, see Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

Plaintiff Must Prove Performance Pursuant to Contract with Defendant. — Plaintiff has the burden of showing, not only that it performed labor or furnished materials for the making of an improvement on defendants' property, but also that the labor was performed or the materials were furnished pursuant to a contract, either express or implied, with defendants. Wilson Elec. Co. v. Robinson, 15 N.C. App. 201, 189 S.E.2d 758 (1972); Caldwell's Well Drilling, Inc. v. Moore, 79 N.C. App. 730, 340 S.E.2d 518 (1986).

Absence of Contract Justified Dismissal. — Where much of the evidence offered by plaintiff and all of the evidence offered by defendants tended to show that plaintiff's contract was with the general contractor employed to build the house, and not with defendants, the trial court acted properly in accepting the verdict of the jury and entering judgment dismissing the plaintiff's claim. Wilson Elec. Co. v. Robinson, 15 N.C. App. 201, 189 S.E.2d 758 (1972).

"Debts Owing." — Where plumbing company had contracted with owner of office condominium complex for a total, after change orders, of $43,178.61, and prior to defaulting, owner had paid $30,000.00 toward this total, the "debt owing" to which a lien under this section could attach totalled $13,718.61. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 78 N.C. App. 664, 338 S.E.2d 135, cert. denied, 316 N.C. 731, 345 S.E.2d 398 (1986).

Lien Could Not Be Imposed Absent Underlying Debt. — Where plaintiff sought a personal judgment against owners based on its contract to drill a well and sought to have such personal judgment declared to be a specific lien on the property allegedly conveyed by owners to purchasers, but there was no allegation in the complaint that the purchasers were indebted to plaintiff in any amount, and subsequently plaintiff abandoned its claim for a personal judgment based on the contract by taking a voluntary dismissal of its claim against the owners, when the trial judge granted the purchasers' motion to dismiss under G.S. 1A-1, Rule 12(b) there was no debt or judgment to be secured by a lien on the property in question, and since the court necessarily considered matters outside the pleadings, i.e., the voluntary dismissal of plaintiff's claim for personal judgment against the owners, the order under G.S. 1A-1, Rule 12(b) was converted to a summary judgment for the purchasers with respect to the dismissal of plaintiff's claim to have a lien imposed on the property. Caldwell's Well Drilling, Inc. v. Moore, 79 N.C. App. 730, 340 S.E.2d 518 (1986).

Improvement of Property Not Required. — There is no requirement in this section that the lienholder's work actually improve the property. Design Assocs. v. Powers, 86 N.C. App. 216, 356 S.E.2d 819 (1987).

No Lien for Lost Profits. — A lien under this section attaches only for debts owing for labor done or professional design or surveying services or material furnished. Nothing is said about lost profits. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 78 N.C. App. 664, 338 S.E.2d 135, cert. denied, 316 N.C. 731, 345 S.E.2d 398 (1986).

Meaning of "Labor". — The partial clearing and staking of the building lines on a construction was "labor" under this section as it read prior to the 1975 amendment. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

The term "labor" in this section as it read prior to the 1975 amendment was not restricted to unskilled work of an inferior and toilsome nature. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

Providing rental equipment does not constitute furnishing material, as the common meaning of the word material is simply "the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical (as a machine, tool, building, fabric) is made." Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

First Furnishing. — The judgment in defendant's favor properly ordered a sale of the property to enforce defendant's statutory lien, and the lien related back to the date of the first furnishing listed in the claim of lien and judgment even though the court failed to include the beginning date of the work. Metropolitan Life Ins. Co. v. Rowell, 113 N.C. App. 779, 440 S.E.2d 283, rev'd on other grounds, 115 N.C. App. 152, 444 S.E.2d 231, cert. denied, 338 N.C. 518, 452 S.E.2d 813 (1994).

Delivery of Materials to Site. — The lien claimant is not required to personally make delivery of materials to the site of the improvement, so long as the materialman furnished the goods with the intent that they would later be placed on the site and they were so placed. The lien, when properly perfected, will relate to and take effect from the first furnishing of materials on the site. Raleigh Paint & Wallpaper Co. v. Peacock & Assocs., 38 N.C. App. 144, 247 S.E.2d 728 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 470 (1979); Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986).

Compliance with Requisite Elements Created Valid Lien. — Contractor complied with all the required elements under North Carolina law in order to establish a valid lien under this chapter where it was undisputed that contractor performed pursuant to a contract, that it proved the first date it furnished materials at the construction project and its contract was with the owner of the property since contractor's contract was with person who became legal owner of the property by a valid deed. Southeastern Sav. & Loan Ass'n v. Rentenbach Constructors, Inc., 114 Bankr. 441 (E.D.N.C. 1989), aff'd per curiam, 907 F.2d 1139 (4th Cir. 1990).

Lien of First Tier Subcontractor Recognized. — G.S. 44A-23 grants to a first tier subcontractor a lien upon real property based upon a right of subrogation to the direct lien of the general contractor on the improved real property as provided in G.S. 44A-8. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Plaintiff subcontractor could not establish a lien for labor and materials as a prime contractor when its own notice of claim of lien and judicial findings to which plaintiff consented established it as a subcontractor. Outer Banks Contractors v. Forbes, 47 N.C. App. 371, 267 S.E.2d 63 (1980), aff'd, 302 N.C. 599, 276 S.E.2d 375 (1981).

Lien Is Inchoate Until Perfected. — The lien provided for by this section is inchoate until perfected by compliance with G.S. 44A-11 and 44A-12, and is lost if the steps required for its perfection are not taken in the manner and within the time prescribed by law. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978), decided under this section as it read prior to the 1975 amendment.

Enforcement of Lien and Arbitration Are Mutually Exclusive. — The right to file and enforce a lien claim and the right to resolve a dispute through arbitration are mutually exclusive rights. Adams v. Nelsen, 67 N.C. App. 284, 312 S.E.2d 896 (1984), modified on other grounds, 313 N.C. 442, 329 S.E.2d 322 (1985).

But plaintiff, by contractually agreeing to arbitration, did not thereby waive his right to file a lien claim and to institute court action to enforce such lien, and he was entitled to enforce any award in his favor through a judgment enforcing his lien claim. Adams v. Nelsen, 67 N.C. App. 284, 312 S.E.2d 896 (1984), modified on other grounds, 313 N.C. 442, 329 S.E.2d 322 (1985).

Agreement to Arbitrate Did Not Bar Plaintiff from Statutory Remedy. — Claim of lien, included within complaint of plaintiff, a registered professional engineer, for breach of contract, and filed pursuant to this section, constituted a statutory remedy that was not extinguished merely because plaintiff had entered into a contract providing for arbitration; plaintiff was not foreclosed from pursuing his statutory remedy by agreeing to arbitrate. Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985).

Materialman's Lien Superior to Faulty Deed of Trust. — Where deed of trust which was recorded did not convey debtor's predecessor's interest in that property, but instead purported to convey an interest which debtor did not have, and the deed was indexed with debtor as grantor and thus was recorded outside of its chain of title which had the same effect on notice as no registration, fact that such deed was signed general partner of actual owner had no effect, hence materialmen's lien was superior to deed of trust. Southeastern Sav. & Loan Ass'n v. Rentenbach Constructors, Inc., 114 Bankr. 441 (E.D.N.C. 1989), aff'd per curiam, 907 F.2d 1139 (4th Cir. 1990).

Priority over Purchase Money Deed of Trust. — Where plaintiff had a contract with the owner of the property within the meaning and intent of those terms as used in this section, materials furnished pursuant to that contract gave rise to a statutory materialman's lien which takes precedence over a purchase money deed of trust when there is an intervening construction loan deed of trust. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

Professional design services furnished by an architectural firm pursuant to a contract entitled the plaintiff firm to a lien to secure payment for those services. Design Assocs. v. Powers, 86 N.C. App. 216, 356 S.E.2d 819 (1987).

Applied in Mauney v. Morris, 73 N.C. App. 589, 327 S.E.2d 248 (1985); Lynch v. Price Homes, Inc., 156 N.C. App. 83, 575 S.E.2d 543, 2003 N.C. App. LEXIS 26 (2003).

Cited in Pegram-West, Inc. v. Hiatt Homes, Inc., 12 N.C. App. 519, 184 S.E.2d 65 (1971); Bryan v. Projects, Inc., 29 N.C. App. 453, 224 S.E.2d 689 (1976); Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418 (1987); Electric Supply Co. v. Swain Elec. Co., 328 N.C. 651, 403 S.E.2d 291 (1991); Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994); Forsyth Mem. Hosp. v. Armstrong World Indus., Inc., 336 N.C. 438, 444 S.E.2d 423 (1994).

§ 44A-9. Extent of claim of lien on real property.

A claim of lien on real property authorized under this Article shall extend to the improvement and to the lot or tract on which the improvement is situated, to the extent of the interest of the owner. When the lot or tract on which a building is erected is not surrounded at the time of making the contract with the owner by an enclosure separating it from adjoining land of the same owner, the lot or tract to which any claim of lien on real property extends shall be the area that is reasonably necessary for the convenient use and occupation of the building, but in no case shall the area include a building, structure, or improvement not normally used or occupied or intended to be used or occupied with the building with respect to which the claim of lien on real property is claimed. (1969, c. 1112, s. 1; 2005-229, s. 1.)

§ 44A-10. Effective date of claim of lien on real property.

A claim of lien on real property granted by this Article shall relate to and take effect from the time of the first furnishing of labor or materials at the site of the improvement by the person claiming the claim of lien on real property. (1969, c. 1112, s. 1; 2005-229, s. 1.)

Legal Periodicals. — For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

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This section implies that there be a visible commencement of the improvement. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

Partial clearing of a site and staking of outlines of the building, as the "first furnishing of labor," constitute a "visible commencement of an improvement" sufficient to put a prudent man on notice that a possible improvement is underway and that the property might be subject to a lien under G.S. 44A-8. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

First Furnishing. — The judgment in defendant's favor properly ordered a sale of the property to enforce defendant's statutory lien, and the lien related back to the date of the first furnishing listed in the claim of lien and judgment even though the court failed to include the beginning date of the work. Metropolitan Life Ins. Co. v. Rowell, 113 N.C. App. 779, 440 S.E.2d 283, rev'd on other grounds, 115 N.C. App. 152, 444 S.E.2d 231, cert. denied, 338 N.C. 518, 452 S.E.2d 813 (1994).

Delivery of Materials to Site. — The lien claimant is not required to personally make delivery of materials to the site of the improvement so long as the materialman furnished the goods with the intent that they would later be placed on the site and they were so placed. The lien, when properly perfected, will relate to and take effect from the first furnishing of materials on the site. Raleigh Paint & Wallpaper Co. v. Peacock & Assocs., 38 N.C. App. 144, 247 S.E.2d 728 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 470 (1979); Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986).

Mechanic's Lien for Work Done to Bring Property into Compliance with Restrictive Covenants. — Where it was undisputed that plaintiff first furnished labor or materials at lot for the purpose of bringing the property into compliance with the terms of applicable protective covenants on June 8, 1987, over a year after defendant's deed of trust on the property was recorded, plaintiff did not have priority over defendant and defendant was entitled to judgment as a matter of law. K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

Priority of Contractor's Lien. — By virtue of this section, a contractor's lien for all labor and materials furnished pursuant to a contract is deemed prior to any liens or encumbrances attaching to the property subsequent to the date of the contractor's first furnishing of labor or materials to the construction site. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

A materialman's lien on a leasehold which is properly enforced so as to relate back prior to a deed of trust on the leasehold would, upon foreclosure, entitle the materialman to priority in that portion of the proceeds representing the value of the leasehold. Miller v. Lemon Tree Inn of Roanoke Rapids, Inc., 32 N.C. App. 524, 233 S.E.2d 69 (1977).

Priority of Purchase Money Deed of Trust Under Doctrine of Instantaneous Seisin. — A materialman's lien relates back and takes effect from the time of the first furnishing of materials at the site of the improvement by the person claiming the lien. While the statutory language does not indicate the precise moment of attachment, it does indicate an order of priority between competing lien claimants. That priority can be defeated by the application of the doctrine of instantaneous seisin. Such doctrine provides that when a deed and a purchase money deed of trust are executed, delivered, and recorded as part of the same transaction, the deed of trust attaches at the instant the vendee acquires title and constitutes a lien superior to all others. It would thus subordinate a previously existing materialman's lien. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

Policy supporting the doctrine of instantaneous seisin is that a vendor who parts with property and supplies the purchase price does so on the basis of having a first priority security interest in the property. The vendor who advances purchase money relies on the assurance that he or she will be able to foreclose on the land if the purchase price is not repaid. It is thus equitable and just that the vendor have a first priority security interest and be protected from the possibility of losing both the land and the money in the transaction. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

No Priority Where Holder Gives Construction Lender Priority over Own Interest. — Since the vendor and the construction lender have the resources and the bargaining power to require the vendee to obtain lien waivers from material suppliers or to obtain title insurance, the court can perceive no reason to extend the doctrine of instantaneous seisin to protect, at the expense of the materialman, the holder of a purchase money security interest who, by consenting to give a construction lender's security an intervening priority over his or her own, has indicated an intent not to be so protected. Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc., 72 N.C. App. 224, 324 S.E.2d 626, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

A claim of lien is not fatally defective because of an obvious scrivener's error in stating the date of first furnishing it. Canady v. Creech, 288 N.C. 354, 218 S.E.2d 383 (1975).

Where a claim of lien for labor and materials in connection with the construction of a dwelling on certain property was filed on October 8, 1973, within 120 days from the last day the materials and supplies were furnished, but the claim of lien erroneously recited that the labor and materials were first furnished on December 4, 1973, and where on August 20, 1973, the property was conveyed, the erroneous statement in the claim of lien as to the date of first furnishing did not preclude enforcement of the lien against the purchasers, since they had constructive notice of the facts upon which the claim of lien was based and could not take advantage of a scrivener's error in the claim relative to these facts and upon which they did not rely to defeat the lien, which, because of these facts, related back to a time that predated their purchase. Canady v. Creech, 288 N.C. 354, 218 S.E.2d 383 (1975).

Filing of Action Did Not Relate Back to Filing Claim of Lien. — G.S. 44A-10 caused a subcontractor's claim of lien to relate back to the first date materials were provided, but had nothing to do with the effective date of the action to enforce the claim; a lien was not an action, and thus for purposes of a motion to consolidate, the filing of the action did not relate back to the date of the filing of the claim of lien. Barrier Geotechnical Contractors, Inc. v. Radford Quarries of Boone, Inc., — N.C. App. —, 646 S.E.2d 840, 2007 N.C. App. LEXIS 1599 (2007).

Applied in Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994).

Cited in Wachovia Bank & Trust Co. v. Harris, 455 F.2d 841 (4th Cir. 1972); Wachovia Bank & Trust Co. v. Harris, 409 U.S. 844, 93 S. Ct. 47, 34 L. Ed. 2d 84 (1972); Universal Mechanical, Inc. v. Hunt, 114 N.C. App. 484, 442 S.E.2d 130 (1994).

§ 44A-11. Perfecting claim of lien on real property.

A claim of lien on real property granted by this Article shall be perfected as of the time provided in G.S. 44A-10 upon the filing of the claim of lien on real property under G.S. 44A-12 and may be enforced pursuant to G.S. 44A-13. (1969, c. 1112, s. 1; 2005-229, s. 1.)

Legal Periodicals. — For article, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," see 12 Wake Forest L. Rev. 283 (1976).

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Applied in Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

§ 44A-12. Filing claim of lien on real property.

(a) Place of Filing. — All claims of lien on real property must be filed in the office of the clerk of superior court in each county where the real property subject to the claim of lien on real property is located. The clerk of superior court shall note the claim of lien on real property on the judgment docket and index the same under the name of the record owner of the real property at the time the claim of lien on real property is filed. An additional copy of the claim of lien on real property may also be filed with any receiver, referee in bankruptcy or assignee for benefit of creditors who obtains legal authority over the real property.

(b) Time of Filing. — Claims of lien on real property may be filed at any time after the maturity of the obligation secured thereby but not later than 120 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien.

(c) Contents of Claim of Lien on Real Property to Be Filed. — All claims of lien on real property must be filed using a form substantially as follows:

CLAIM OF LIEN ON REAL PROPERTY

(1) Name and address of the person claiming the claim of lien on real property:
(2) Name and address of the record owner of the real property claimed to be subject to the claim of lien on real property at the time the claim of lien on real property is filed:
(3) Description of the real property upon which the claim of lien on real property is claimed: (Street address, tax lot and block number, reference to recorded instrument, or any other description of real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.)
(4) Name and address of the person with whom the claimant contracted for the furnishing of labor or materials:
(5) Date upon which labor or materials were first furnished upon said property by the claimant:
(5a) Date upon which labor or materials were last furnished upon said property by the claimant:
(6) General description of the labor performed or materials furnished and the amount claimed therefor:

____
Lien Claimant

Filed this ________ day of ________, ________

____
Clerk of Superior Court

A general description of the labor performed or materials furnished is sufficient. It is not necessary for lien claimant to file an itemized list of materials or a detailed statement of labor performed.

(d) No Amendment of Claim of Lien on Real Property. — A claim of lien on real property may not be amended. A claim of lien on real property may be cancelled by a claimant or the claimant's authorized agent or attorney and a new claim of lien on real property substituted therefor within the time herein provided for original filing.

(e) Notice of Assignment of Claim of Lien on Real Property. — When a claim of lien on real property has been filed, it may be assigned of record by the lien claimant in a writing filed with the clerk of superior court who shall note the assignment in the margin of the judgment docket containing the claim of lien on real property. Thereafter the assignee becomes the lien claimant of record.

(f) Waiver of Right to File, Serve, or Claim Liens as Consideration for Contract Against Public Policy. — An agreement to waive the right to file a claim of lien on real property granted under this Part, or an agreement to waive the right to serve a notice of claim of lien upon funds granted under Part 2 of this Article, which agreement is in anticipation of and in consideration for the awarding of any contract, either expressed or implied, for the making of an improvement upon real property under this Article is against public policy and is unenforceable. This section does not prohibit subordination or release of a lien granted under this Part or Part 2 of this Article. (1969, c. 1112, s. 1; 1977, c. 369; 1983, c. 888; 1999-456, s. 59; 2005-229, s. 1.)

Editor's Note. — This section, as amended by Session Laws 2005-229, s. 1, effective October 1, 2005, is applicable to claims of lien on real property filed and notices of claims of lien upon funds served on or after that date.

Legal Periodicals. — For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 418 (1971).

For comment, "Offer to Purchase and Contract: Buyer Beware," see 8 Campbell L. Rev. 473 (1986).

For article, "North Carolina's Real Estate Recording Laws: The Ghost of 1885," see 28 N.C. Cent. L.J. 199 (2006).

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A lien is lost if the steps required to perfect it are not taken in the same manner and within the time prescribed by law. Strickland v. General Bldg. & Masonry Contractors, 22 N.C. App. 729, 207 S.E.2d 399 (1974).

Plaintiff was not entitled to enforce by means of its second lien an obligation which was asserted but not enforced in its first lien where plaintiff's second claim of lien contained incorrect statements concerning the date of first furnishings, and the alleged amount owed; thus the claim was defective. Plaintiff also failed to cancel this second lien and substitute a new claim of lien containing the correct information within the prescribed time. Gaston Grading & Landscaping v. Young, 116 N.C. App. 719, 449 S.E.2d 475 (1994).

Filing Is Required. — Although a second tier subcontractor must notice its claim of lien using a format substantially similar to that provided in G.S. 44A-19, perfection of this lien is not achieved merely upon proper notice; the claim of lien must also be filed pursuant to this section before it is considered perfected. Cameron & Barkley Co. v. American Ins. Co., 112 N.C. App. 36, 434 S.E.2d 632 (1993).

First Furnishing. — The judgment in defendant's favor properly ordered a sale of the property to enforce defendant's statutory lien, and the lien related back to the date of the first furnishing listed in the claim of lien and judgment even though the court failed to include the beginning date of the work. Metropolitan Life Ins. Co. v. Rowell, 113 N.C. App. 779, 440 S.E.2d 283, rev'd on other grounds, 115 N.C. App. 152, 444 S.E.2d 231, cert. denied, 338 N.C. 518, 452 S.E.2d 813 (1994).

Delivery of Materials to Site. — The lien claimant is not required to personally make delivery of materials to the site of the improvement so long as the materialman furnished the goods with the intent that they would later be placed on the site and they were so placed. The lien, when properly perfected, will relate to and take effect from the first furnishing of materials on the site. Raleigh Paint & Wallpaper Co. v. Peacock & Assocs., 38 N.C. App. 144, 247 S.E.2d 728 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 470 (1979); Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986).

Date in Claim of Lien Is Binding. — Barring an obvious error, easily discernible to the title examiner, the plaintiff is bound by the date stated in his claim of lien. Beach & Adams Bldrs., Inv. v. Northwestern Bank, 28 N.C. App. 80, 220 S.E.2d 414 (1975).

The plaintiff was not entitled to amend or change the date of last furnishing stated in his claim of lien, where such date, on its face, was not an obvious typographical error, and as the claim of lien was filed more than 120 days after the last date of furnishing, it was void and subject to cancellation. Brown v. Middleton, 86 N.C. App. 63, 356 S.E.2d 386 (1987).

Contents. — A claim of lien need only identify the owner, the claimant, and the party with which the claimant contracted. Thus, while plaintiff's claim of lien met the requirements of this section, the claim of lien did not meet the requirements of G.S. 44A-19, because the claim of lien did not name defendant or assert rights available to plaintiff via a notice of claim of lien. Universal Mechanical, Inc. v. Hunt, 114 N.C. App. 484, 442 S.E.2d 130 (1994).

But a claim of lien is not fatally defective because of an obvious scrivener's error in stating the date of first furnishing it. Canady v. Creech, 288 N.C. 354, 218 S.E.2d 383 (1975).

Where a claim of lien for labor and materials in connection with the construction of a dwelling on certain property was filed on October 8, 1973, within 120 days from the last day the materials and supplies were furnished, but the claim of lien erroneously recited that the labor and materials were first furnished on December 4, 1973, and where on August 20, 1973, the property was conveyed, the erroneous statement in the claim of lien as to the date of first furnishing did not preclude enforcement of the lien against the purchasers, since they had constructive notice of the facts upon which the claim of lien was based and could not take advantage of a scrivener's error in the claim relative to these facts and upon which they did not rely to defeat the lien, which, because of these facts, related back to a time that predated their purchase. Canady v. Creech, 288 N.C. 354, 218 S.E.2d 354 (1975).

Provision of contract between debtor and contractor in which the contractor warrants that title to all work, materials and equipment is free and clear of all liens, claims, security interest or encumbrances if construed as a complete waiver of statutory lien rights, was invalid and unenforceable under North Carolina law. Southeastern Sav. & Loan Ass'n v. Rentenbach Constructors, Inc., 114 Bankr. 441 (E.D.N.C. 1989), aff'd per curiam, 907 F.2d 1139 (4th Cir. 1990).

Claim of Materialman, etc., Need Not State Date of Last Furnishing. — Although this section clearly requires that a lien be filed within 120 days after the last furnishing of labor or materials, there is no requirement that a mechanic, laborer, or materialman state in his claim of lien the date of the last furnishing. Strickland v. General Bldg. & Masonry Contractors, 22 N.C. App. 729, 207 S.E.2d 399 (1974).

Notice of Claim of Lien. — A claim of lien may not serve as a notice of claim of lien because a notice of claim of lien must identify all the parties in the "contractual chain" between the claimant and the owner. Universal Mechanical, Inc. v. Hunt, 114 N.C. App. 484, 442 S.E.2d 130 (1994).

Lien Held Void. — Where plaintiff, in claim of lien, stated that materials were last furnished upon the property on March 28, 1973, which date was more than 120 days prior to July 27, 1973, when the claim was filed, the lien itself was void. Strickland v. General Bldg. & Masonry Contractors, 22 N.C. App. 729, 207 S.E.2d 399 (1974).

Applied in Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978); Wolfe v. Hewes, 41 N.C. App. 88, 254 S.E.2d 204 (1979); RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983); Mauney v. Morris, 73 N.C. App. 589, 327 S.E.2d 248 (1985); Lynch v. Price Homes, Inc., 156 N.C. App. 83, 575 S.E.2d 543, 2003 N.C. App. LEXIS 26 (2003).

Cited in Metropolitan Life Ins. Co. v. Rowell, 115 N.C. App. 152, 444 S.E.2d 231, cert. denied, 338 N.C. 518, 452 S.E.2d 813 (1994); J.F. Wilkerson Contracting Co. v. Rowland, 29 N.C. App. 722, 225 S.E.2d 840 (1976); Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977); Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6 (1977); Miller v. Lemon Tree Inn of Roanoke Rapids, Inc., 32 N.C. App. 524, 233 S.E.2d 69 (1977); RDC, Inc. v. Brookleigh Bldrs., Inc., 60 N.C. App. 375, 299 S.E.2d 448 (1983); Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985); Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418 (1987); Mill-Power Supply Co. v. CVM Assocs., 85 N.C. App. 455, 355 S.E.2d 245 (1987); Blalock Elec. Co. v. Grassy Creek Dev. Corp., 99 N.C. App. 440, 393 S.E.2d 354 (1990); Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994); Stewart Enters. v. MRM Constr. Co., 116 N.C. App. 604, 449 S.E.2d 20 (1994); Vance Constr. Co. v. Duane White Land Corp., 120 N.C. App. 401, 462 S.E.2d 814 (1995); Johnson Neurological Clinic, Inc. v. Kirkman, 121 N.C. App. 326, 465 S.E.2d 32 (1996); Paving Equip. of Carolinas, Inc. v. Waters, 122 N.C. App. 502, 470 S.E.2d 546 (1996).

§ 44A-12.1. No docketing of lien unless authorized by statute.

(a) The clerk of superior court shall not index, docket, or record a claim of lien on real property or other document purporting to claim or assert a lien on real property in such a way as to affect the title to any real property unless the document:

(1) Is offered for filing under this Article or another statute that provides for indexing and docketing of claims of lien on real property; and

(2) Appears on its face to contain all of the information required by the statute under which it is offered for filing.

(b) The clerk may accept, for filing only, any document that does not meet the criteria established for indexing, docketing, or recording under subsection (a) of this section. If the clerk does accept this document, the clerk shall inform the person offering the document that it will not be indexed, docketed, or recorded in any way as to affect the title to any real property.

(c) Any person who causes or attempts to cause a claim of lien on real property or other document to be filed, knowing that the filing is not authorized by statute, or with the intent that the filing is made for an improper purpose such as to hinder, harass, or otherwise wrongfully interfere with any person, shall be guilty of a Class 1 misdemeanor.

(d) A claim of lien on real property, a claim of lien on real property with a notice of claim of lien upon funds attached thereto, or other document purporting to claim or assert a lien on real property that is filed by an attorney licensed in the State of North Carolina and that otherwise complies with subsection (a) of this section shall not be rejected by the clerk of superior court for indexing, docketing, recording, or filing. (2001-495, s. 1; 2005-229, s. 1.)

§ 44A-13. Action to enforce claim of lien on real property.

(a) Where and When Action Commenced. — An action to enforce a claim of lien on real property may be commenced in any county where venue is otherwise proper. No such action may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the claim of lien on real property. If the title to the real property against which the claim of lien on real property is asserted is by law vested in a receiver or is subject to the control of the bankruptcy court, the claim of lien on real property shall be enforced in accordance with the orders of the court having jurisdiction over said real property. The filing of a proof of claim with a receiver or in bankruptcy and the filing of a notice of lis pendens in each county where the real property subject to the claim of lien on real property is located within the time required by this section satisfies the requirement for the commencement of a civil action.

(b) Judgment. — A judgment enforcing a lien under this Article may be entered for the principal amount shown to be due, not exceeding the principal amount stated in the claim of lien enforced thereby. The judgment shall direct a sale of the real property subject to the lien thereby enforced.

(c) Notice of Action. — In order for the sale under G.S. 44A-14(a) to pass all title and interest of the owner to the purchaser good against all claims or interests recorded, filed or arising after the first furnishing of labor or materials at the site of the improvement by the person claiming the claim of lien on real property, a notice of lis pendens shall be filed in each county in which the real property subject to the claim of lien on real property is located except the county in which the action is commenced. The notice of lis pendens shall be filed within the time provided in subsection (a) of this section for the commencement of the action by the lien claimant. If neither an action nor a notice of lis pendens is filed in accordance with this section, the judgment entered in the action enforcing the claim of lien on real property shall not direct a sale of the real property subject to the claim of lien on real property enforced thereby nor be entitled to any priority under the provisions of G.S. 44A-14(a), but shall be entitled only to those priorities accorded by law to money judgments. (1969, c. 1112, s. 1; 1977, c. 883; 2005-229, s. 1.)

Legal Periodicals. — For article, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," see 12 Wake Forest L. Rev. 283 (1976).

For note, "Judicial Activism Constructs Lenders' Nightmare — Embree Construction Group, Inc. v. Rafcor, Inc. and United Carolina Bank," see 15 Campbell L. Rev. 77 (1992).

For survey of 1977 law on civil procedure, see 56 N.C.L. Rev. 874 (1978).

CASE NOTES

Specific Statute Controls General Section Establishing One Form of Action. — A particular statute controls a general one with reference to the same subject matter. Subsection (a) of this section specifically directs that a lien against property vested in a trustee in bankruptcy "shall be enforced" in accordance with the orders of the bankruptcy court; this provision controls over G.S. 1A-1, Rule 2, which is a general rule establishing one form of action. Therefore, an action under G.S. 1A-1, Rule 2 was not required to enforce lien. RDC, Inc. v.

Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

Enforcement of Lien and Arbitration Are Mutually Exclusive. — The right to file and enforce a lien claim and the right to resolve a dispute through arbitration are mutually exclusive rights. Adams v. Nelsen, 67 N.C. App. 284, 312 S.E.2d 896 (1984), modified on other grounds, 313 N.C. 442, 329 S.E.2d 322 (1985).

But plaintiff, by contractually agreeing to arbitration, did not thereby waive his right to file a lien claim and institute court action to enforce such lien, and he was entitled to enforce any award in his favor through a judgment enforcing his lien claim. Adams v. Nelsen, 67 N.C. App. 284, 312 S.E.2d 896 (1984).

The lienor under § 44A-8 may proceed to enforce his lien and simultaneously bring an action to recover a personal judgment for the amount due. Lowe's of Fayetteville, Inc. v. Quigley, 46 N.C. App. 770, 266 S.E.2d 378 (1980).

Filing of Lien Claim in Bankruptcy Proceedings Commences Action for Enforcement. — The filing by statutory lienor of a proof of claim in bankruptcy proceedings of the owner of the real property constituted the commencement of an action for the enforcement of its lien within the meaning of subsection (a) of this section. RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

Bankruptcy Proceeding Does Not Toll 180-Day Period. — The 180-day period is not a statute of limitations, but an element of the cause of action; it is not tolled by a bankruptcy proceeding. RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

Time Limitation Inapplicable Where Lien Cancelled. — Subsection (a) of this section, which only limits the time for suing to enforce a lien on real property, had no application where there was no lien on real estate that contractor could sue to enforce, as the lien that he might have sued to enforce had been cancelled and discharged both by the terms of agreement between himself and owner and the provisions of G.S. 44A-16(5). In re Woodie, 85 N.C. App. 533, 355 S.E.2d 163 (1987).

Amended Claim Requires Notice. — Amending a claim for a monetary award, to include a claim under this section to enforce a lien against nonparties without allowing any type of notice, does not fall within the reasonable interpretation of G.S. 1A-1, Rule 15(c). Lawyers Title Ins. Corp. v. Langdon, 91 N.C. App. 382, 371 S.E.2d 727 (1988), cert. denied, 324 N.C. 335, 378 S.E.2d 793 (1989).

Plaintiff's amended complaint did not relate back to the date of the original complaint, because the plaintiff failed to establish that the added parties received notice or should have known of the action against them within the limitation period. Stewart Enters. v. MRM Constr. Co., 116 N.C. App. 604, 449 S.E.2d 20 (1994).

The amount of the lien is limited by subsection (b) of this section to the amount stated in the claim. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 78 N.C. App. 664, 338 S.E.2d 135, cert. denied, 316 N.C. 731, 345 S.E.2d 398 (1986).

A judgment enforcing a lien under subsection (b) cannot exceed the amount determined to be due from the defendant to the plaintiff; thus, portion of judgment ordering attorney's fees awarded by jury to be enforced as a part of the lien was a nullity. Paving Equip. of Carolinas, Inc. v. Waters, 122 N.C. App. 502, 470 S.E.2d 546 (1996).

Contest of Amount of Lien. — Subsection (b) of this section contemplates that a defendant has the right to contest the amount of plaintiff's lien during enforcement proceedings, and not prior thereto. Frank H. Conner Co. v. Spanish Inns Charlotte, Ltd., 294 N.C. 661, 242 S.E.2d 785 (1978).

Contents of Judgment Enforcing Lien. — To enforce a materialman's lien the judgment must state the effective date of the lien and contain a general description of the property subject to the lien, so that one reading the docketed judgment will have notice that it was more than a money judgment. Miller v. Lemon Tree Inn of Roanoke Rapids, Inc., 32 N.C. App. 524, 233 S.E.2d 69 (1977).

The effect of subsection (c) is to give protection to purchasers and examiners of titles no matter where the action to enforce the lien is instituted. Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

Liens established pursuant to this Chapter are not "contractual security" within the meaning of G.S. 1A-1, Rule 55(b)(1), and a clerk or assistant clerk of court is without jurisdiction to make orders consummating foreclosure of liens established pursuant to this Chapter. Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

Dismissal of a suit on account of plaintiff's inability to establish an alleged lien was improper where the complaint, in addition to averring the lien and praying for its foreclosure, stated a good cause of action for labor performed or materials supplied. Lowe's of Fayetteville, Inc. v. Quigley, 46 N.C. App. 770, 266 S.E.2d 378 (1980).

An action to enforce a lien need not be filed in the county where the land is situated. Ridge Community Investors, Inc. v. Berry, 32 N.C. App. 642, 234 S.E.2d 6, rev'd on other grounds, 293 N.C. 688, 239 S.E.2d 566 (1977).

Better Practice Is to File Where Claim of Lien Is Filed. — It is the better practice to file the action to enforce a lien in the county in which the claim of lien is filed. Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

But Language in Subsection (a) Is Not a Jurisdictional Requirement. — The language contained in subsection (a) stating that the action to enforce a lien "may be instituted in any county in which the lien is filed" is not a jurisdictional requirement. Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

The 1977 amendment adding subsection (c) is a strong indication that it was not the intent of the legislature to enact a jurisdictional requisite when it used language in subsection (a) to the effect that such action "may be instituted in any county in which the lien is filed." Ridge Community Investors, Inc. v. Berry, 293 N.C. 688, 239 S.E.2d 566 (1977).

Date in Claim of Lien Is Binding. — Barring an obvious error, easily discernible to the title examiner, the plaintiff is bound by the date stated in his claim of lien. Beach & Adams Bldrs., Inc. v. Northwestern Bank, 28 N.C. App. 80, 220 S.E.2d 414 (1975).

Lien Not Barred by Failure of Court to Include Beginning and Ending Dates of Work in Judgment. — Where a plaintiff pursued his recovery by filing both a claim of lien and action, and had at all times maintained its request for a lien in its complaint and appeal, the judgment relating back and incorporating the complaint and claim of lien included all the information required, except the effective date of the lien, then plaintiff should not have been barred from the benefits of a remedy by the trial court's failure to include in its judgment the beginning and ending dates of the work. Jennings Glass Co. v. Brummer, 88 N.C. App. 44, 362 S.E.2d 578 (1987).

And while the date of last furnishing is not statutorily required, it cannot be deemed mere "surplusage" when supplied, even voluntarily. To do so would do injury to the purpose of the lien statute, in that title examiners would, barring an obvious error, reasonably rely on the date actually furnished. Beach & Adams Bldrs., Inc. v. Northwestern Bank, 28 N.C. App. 80, 220 S.E.2d 414 (1975).

But a claim of lien is not fatally defective because of an obvious scrivener's error in stating the date of first furnishing it. Canady v. Creech, 288 N.C. 354, 218 S.E.2d 383 (1975).

Delivery of Materials to Site. — The lien claimant is not required to personally make delivery of materials to the site of the improvement so long as the materialman furnished the goods with the intent that they would later be placed on the site and they were so placed. The lien, when properly perfected, will relate to and take effect from the first furnishing of materials on the site. Raleigh Paint & Wallpaper Co. v. Peacock & Assocs., 38 N.C. App. 144, 247 S.E.2d 728 (1978), cert. denied, 296 N.C. 415, 251 S.E.2d 470 (1979); Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986).

Lien Claimant Not Entitled to Foreclosure Sale Surplus Where He Failed to Timely Commence An Enforcement Action. — Although the subsequent buyer of the property at a foreclosure sale had perfected his lien, he was not entitled to any of the surplus funds from the foreclosure sale where he had failed to timely commence an action to enforce his lien. Lynch v. Price Homes, Inc., 156 N.C. App. 83, 575 S.E.2d 543, 2003 N.C. App. LEXIS 26 (2003).

The judgment in defendant's favor properly ordered a sale of the property to enforce defendant's statutory lien, and the lien related back to the date of the first furnishing listed in the claim of lien and judgment even though the court failed to include the beginning date of the work. Metropolitan Life Ins. Co. v. Rowell, 113 N.C. App. 779, 440 S.E.2d 283, rev'd on other grounds, 115 N.C. App. 152, 444 S.E.2d 231, cert. denied, 338 N.C. 518, 452 S.E.2d 813 (1994).

Prejudgment Interest. — Prejudgment interest is not authorized when only enforcing a statutory lien, absent a contract between the parties. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 78 N.C. App. 664, 338 S.E.2d 135, cert. denied, 316 N.C. 731, 345 S.E.2d 398 (1986).

Action to Recover Money Damages and to Enforce Lien. — Action to enforce a materialmen's lien did not need to be filed in the county where the liened property was located; because the primary purpose of a contractor's suit was recovery of money damages, but also requested enforcement of a lien, venue was proper in the county where the contractor had its principal place of business, even though the liened property was located in a different county. Wellons Constr., Inc. v. Landsouth Props., LLC, 168 N.C. App. 403, 607 S.E.2d 695, 2005 N.C. App. LEXIS 255 (2005).

Applied in H & B Co. v. Hammond, 17 N.C. App. 534, 195 S.E.2d 58 (1973); Embree Constr. Group, Inc. v. Rafcor, Inc., 330 N.C. 487, 411 S.E.2d 916 (1992).

Cited in T.A. Loving Co. v. Latham, 15 N.C. App. 441, 190 S.E.2d 248 (1972); Miller v. Lemon Tree Inn of Wilmington, Inc., 39 N.C. App. 133, 249 S.E.2d 836 (1978); Mill-Power Supply Co. v. CVM Assocs., 85 N.C. App. 455, 355 S.E.2d 245 (1987); Blalock Elec. Co. v. Grassy Creek Dev. Corp., 99 N.C. App. 440, 393 S.E.2d 354 (1990); Dalton Moran Shook, Inc. v. Pitt Dev. Co., 113 N.C. App. 707, 440 S.E.2d 585 (1994); Metropolitan Life Ins. Co. v. Rowell, 115

N.C. App. 152, 444 S.E.2d 231, cert. denied, 338 N.C. 518, 452 S.E.2d 813 (1994); Piedmont Rebar, Inc. v. Sun Constr., Inc., 150 N.C. App. 573, 564 S.E.2d 281, 2002 N.C. App. LEXIS 583 (2002).

§ 44A-14. Sale of property in satisfaction of judgment enforcing claim of lien on real property or upon order prior to judgment; distribution of proceeds.

(a) Execution Sale; Effect of Sale. — Except as provided in subsection (b) of this section, sales under this Article and distribution of proceeds thereof shall be made in accordance with the execution sale provisions set out in G.S. 1-339.41 through 1-339.76. The sale of real property to satisfy a claim of lien on real property granted by this Article shall pass all title and interest of the owner to the purchaser, good against all claims or interests recorded, filed or arising after the first furnishing of labor or materials at the site of the improvement by the person claiming a lien.

(b) Sale of Property upon Order Prior to Judgment. — A resident judge of superior court in the district in which the action to enforce the claim of lien on real property is pending, a judge regularly holding the superior courts of the said district, any judge holding a session of superior court, either civil or criminal, in the said district, a special judge of superior court residing in the said district, or the chief judge of the district court in which the action to enforce the claim of lien on real property is pending, may, upon notice to all interested parties and after a hearing thereupon and upon a finding that a sale prior to judgment is necessary to prevent substantial waste, destruction, depreciation or other damage to said real property prior to the final determination of said action, order any real property against which a claim of lien on real property under this Article is asserted, sold in any manner determined by said judge to be commercially reasonable. The rights of all parties shall be transferred to the proceeds of the sale. Application for such order and further proceedings thereon may be heard in or out of session. (1969, c. 1112, s. 1; 2005-229, s. 1.)

CASE NOTES

Applied in Adams v. Nelsen, 67 N.C. App. 284, 312 S.E.2d 896 (1984).

Cited in T.A. Loving Co. v. Latham, 15 N.C. App. 441, 190 S.E.2d 248 (1972); Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985); Symons Corp. v. Insurance Co. of N. Am., 94 N.C. App. 541, 380 S.E.2d 550 (1989); Blalock Elec. Co. v. Grassy Creek Dev. Corp., 99 N.C. App. 440, 393 S.E.2d 354 (1990).

§ 44A-15. Attachment available to lien claimant.

In addition to other grounds for attachment, in all cases where the owner removes or attempts or threatens to remove an improvement from real property subject to a claim of lien on real property under this Article, without the written permission of the lien claimant or with the intent to deprive the lien claimant of his or her claim of lien on real property, the remedy of attachment of the property subject to the claim of lien on real property shall be available to the lien claimant or any other person. (1969, c. 1112, s. 1; 2005-229, s. 1.)

§ 44A-16. Discharge of record claim of lien on real property.

Any claim of lien on real property filed under this Article may be discharged by any of the following methods:

(1) The lien claimant of record, the claimant's agent or attorney, in the presence of the clerk of superior court may acknowledge the satisfaction of the claim of lien on real property indebtedness, whereupon the clerk of superior court shall forthwith make upon the record of such claim of lien on real property an entry of such acknowledgment of satisfaction, which shall be signed by the lien claimant of record, the claimant's agent or attorney, and witnessed by the clerk of superior court.

(2) The owner may exhibit an instrument of satisfaction signed and acknowledged by the lien claimant of record which instrument states that the claim of lien on real property indebtedness has been paid or satisfied, whereupon the clerk of superior court shall cancel the claim of lien on real property by entry of satisfaction on the record of such claim of lien on real property.

(3) By failure to enforce the claim of lien on real property within the time prescribed in this Article.

(4) By filing in the office of the clerk of superior court the original or certified copy of a judgment or decree of a court of competent jurisdiction showing that the action by the claimant to enforce the claim of lien on real property has been dismissed or finally determined adversely to the claimant.

(5) Whenever a sum equal to the amount of the claim or claims of lien on real property claimed is deposited with the clerk of court, to be applied to the payment finally determined to be due, whereupon the clerk of superior court shall cancel the claim or claims of lien on real property or claims of lien on real property of record.

(6) Whenever a corporate surety bond, in a sum equal to one and one-fourth times the amount of the claim or claims of lien on real property claimed and conditioned upon the payment of the amount finally determined to be due in satisfaction of said claim or claims of lien on real property, is deposited with the clerk of court, whereupon the clerk of superior court shall cancel the claim or claims of lien on real property of record. (1969, c. 1112, s. 1; 1971, c. 766; 2005-229, s. 1.)

CASE NOTES

Subdivision (6) is more for the benefit of the landowner than the lien-creditor. Gelder & Assocs. v. St. Paul Fire & Marine Ins. Co., 34 N.C. App. 731, 239 S.E.2d 604 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

The primary purpose of subdivision (6) of this section is to protect the landowner, not the lien claimant, who is already protected by virtue of the lien on the property. George v. Hartford Accident & Indem. Co., 330 N.C. 755, 412 S.E.2d 43 (1992).

The primary purpose of subdivision (6) of this section is to provide the landowner a convenient way to unburden his property while the lien claimant's claim is litigated. George v. Hartford Accident & Indem. Co., 330 N.C. 755, 412 S.E.2d 43 (1992).

The lien-creditor has no choice under subdivision (6) as to whether the lien will be cancelled. Gelder & Assocs. v. St. Paul Fire & Marine Ins. Co., 34 N.C. App. 731, 239 S.E.2d 604 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

Lien Not Cancelled by Voluntary Dismissal. — In light of the requirement of subdivision (4) of this section that a judgment must be filed to discharge a lien, a lien may not be cancelled by taking a voluntary dismissal without prejudice. Newberry Metal Masters Fabricators, Inc. v. Mitek Indus., Inc., 333 N.C. 250, 424 S.E.2d 383 (1993).

Three Year Limitations Period Applied to Action to Recover on Surety Bond. — Subsection (1) of G.S. 1-52, which provides for a three year statute of limitations, applied to subcontractor's action to recover on contractor's surety bond. George v. Hartford Accident & Indem. Co., 102 N.C. App. 761, 404 S.E.2d 1 (1991), modified on other grounds, 330 N.C. 755, 412 S.E.2d 43 (1992).

Defendant's Liability on Bond Did Not Accrue Until Amount Established. — Where a bond obligated defendant to "pay the full amount of the Lien Claim as established in any appropriate court proceeding," under the clear wording of the bond, the defendant's liability did not accrue until the amount was "established in any appropriate court proceeding." The amount was established in the award of the arbitrator in May, 1988 and became a final judgment August, 1988. Thus plaintiff's claim filed in February 1989 was timely. George v. Hartford Accident & Indem. Co., 102 N.C. App. 761, 404 S.E.2d 1 (1991), modified on other grounds, 330 N.C. 755, 412 S.E.2d 43 (1992).

When Limitations Period Begins to Run in Favor of Corporate Surety. — The statute of limitations begins to run in favor of a corporate surety which has filed a bond discharging a lien under subdivision (6) of this section when final judgment is entered in favor of the lien claimant. George v. Hartford Accident & Indem. Co., 330 N.C. 755, 412 S.E.2d 43 (1992).

A corporate surety bond acts as a substitute for the land; the lien claimant's right to make demand upon the bond accrues at the same time that he would have been able to enforce the lien against the land: at final judgment in his favor. George v. Hartford Accident & Indem. Co., 330 N.C. 755, 412 S.E.2d 43 (1992).

Landowner Free to Sell, Mortgage, etc., Land After Action Under Subdivisions (5) or (6). — Under subdivision (6) of this section the landowner can post a bond and free his land from the weight of the lien while the parties litigate over the amount, if any, that may finally be determined to be due. He can accomplish the same result by depositing cash with the clerk under subdivision (5). He is then free to sell, mortgage or otherwise encumber the land free of the lien. Gelder & Assocs. v. St. Paul Fire & Marine Ins. Co., 34 N.C. App. 731, 239 S.E.2d 604 (1977), cert. denied, 294 N.C. 441, 241 S.E.2d 843 (1978).

Applied in Beach & Adams Bldrs., Inc. v. Northwestern Bank, 28 N.C. App. 80, 220 S.E.2d 414 (1975); Miller v. Lemon Tree Inn of Roanoke Rapids, Inc., 32 N.C. App. 524, 233 S.E.2d 69 (1977); In re Woodie, 85 N.C. App. 533, 355 S.E.2d 163 (1987).

Cited in In re Woodie, 85 N.C. App. 533, 355 S.E.2d 163 (1987); Miller v. Ensley, 88 N.C. App. 686, 365 S.E.2d 11 (1988); Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128 (1990).

Part 2. Liens of Mechanics, Laborers, and Materialmen Dealing with One Other Than Owner.

§ 44A-17. Definitions.

Unless the context otherwise requires in this Article:

(1) "Contractor" means a person who contracts with an owner to improve real property.

(2) "First tier subcontractor" means a person who contracts with a contractor to improve real property.

(3) "Obligor" means an owner, contractor or subcontractor in any tier who owes money to another as a result of the other's partial or total performance of a contract to improve real property.

(4) "Second tier subcontractor" means a person who contracts with a first tier subcontractor to improve real property.

(5) "Third tier subcontractor" means a person who contracts with a second tier subcontractor to improve real property. (1971, c. 880, s. 1.)

Legal Periodicals. — For survey of North Carolina construction law, see 21 Wake Forest L. Rev. 633 (1986).

CASE NOTES

Applied in Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

Cited in Con Co., Inc. v. Wilson Acres Apts., Ltd., 56 N.C. App. 661, 289 S.E.2d 633 (1982); Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248 (1986); Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418 (1987); Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

§ 44A-18. Grant of lien upon funds; subrogation; perfection.

Upon compliance with this Article:

(1) A first tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds that are owed to the contractor with whom the first tier subcontractor dealt and that arise out of the improvement on which the first tier subcontractor worked or furnished materials.

(2) A second tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds that are owed to the first tier subcontractor with whom the second tier subcontractor dealt and that arise out of the improvement on which the second tier subcontractor worked or furnished materials. A second tier subcontractor, to the extent of the second tier subcontractor's lien provided in this subdivision, shall also be entitled to be subrogated to the lien of the first tier subcontractor with whom the second tier contractor dealt provided for in subdivision (1) of this section and shall be entitled to perfect it by notice of claim of lien upon funds to the extent of the claim.

(3) A third tier subcontractor who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds that are owed to the second tier subcontractor with whom the third tier subcontractor dealt and that arise out of the improvement on which the third tier subcontractor worked or furnished materials. A third tier subcontractor, to the extent of the third tier subcontractor's lien upon funds provided in this subdivision, shall also be entitled to be subrogated to the lien upon funds of the second tier subcontractor with whom the third tier contractor dealt and to the lien upon funds of the first tier subcontractor with whom the second tier subcontractor dealt to the extent that the second tier subcontractor is entitled to be subrogated thereto, and in either case shall be entitled to perfect the same by notice of claim of lien upon funds to the extent of the claim.

(4) Subcontractors more remote than the third tier who furnished labor, materials, or rental equipment at the site of the improvement shall be entitled to a lien upon funds that are owed to the person with whom they dealt and that arise out of the improvement on which they furnished labor, materials, or rental equipment, but such remote tier subcontractor shall not be entitled to subrogation to the rights of other persons.

(5) The liens upon funds granted under this section shall secure amounts earned by the lien claimant as a result of having furnished labor, materials, or rental equipment at the site of the improvement under the contract to improve real property, including interest at the legal rate provided in G.S. 24-5, whether or not such amounts are due and whether or not performance or delivery is complete. In the event insufficient funds are retained to satisfy all lien claimants, subcontractor lien claimants may recover the interest due under this subdivision on a pro rata basis, but in no event shall interest due under this subdivision increase the liability of the obligor under G.S. 44A-20.

(6) A lien upon funds granted under this section is perfected upon the giving of notice of claim of lien upon funds in writing to the obligor as provided in G.S. 44A-19 and shall be effective upon the obligor's receipt of the notice. The subrogation rights of a first, second, or third

tier subcontractor to the claim of lien on real property of the contractor created by Part 1 of Article 2 of this Chapter are perfected as provided in G.S. 44A-23. (1971, c. 880, s. 1; 1985, c. 702, s. 3; 1995 (Reg. Sess., 1996), c. 607, s. 3; 2005-229, s. 1.)

Editor's Note. — This section, as rewritten by Session Laws 2005-229, s. 1, effective October 1, 2005, is applicable to claims of lien on real property filed and notices of claims of lien upon funds served on or after that date.

Legal Periodicals. — For article, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," see 12 Wake Forest L. Rev. 283 (1976).

For survey of 1977 contract law, see 56 N.C.L. Rev. 926 (1978).

For survey on subcontractors' statutory lien rights, see 70 N.C.L. Rev. 1996 (1992).

CASE NOTES

Editor's Note. — *Many of the cases annotated below were decided prior to the 1992 amendment to G.S. 44A-23, which, inter alia, added subsection (b) of that section.*

The primary purpose of a lien statute is to protect laborers and materialmen who expend their labor and materials upon the buildings of others. Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

Adequate Lien for Subcontractors and Suppliers of Materials and Labor. — Appellate court erred in reversing the trial court's grant of summary judgment to the product supplier that found the product supplier was entitled to judgment in the amount specified in its notice of lien sent to the manufacturer; the state constitution and statutory law provided that a materialman was entitled to an adequate lien on the subject matter of the materials supplied, the product supplier sent a notice of lien for a certain amount to the manufacturer after the product supplier became aware that the contractor with whom the manufacturer had contracted was having financial difficulties, and the manufacturer nevertheless paid the contractor, instead of the product supplier, shortly before the contractor went bankrupt. O & M Indus. v. Smith Eng'g Co., 360 N.C. 263, 624 S.E.2d 345, 2006 N.C. LEXIS 6 (2006).

Liberal Construction. — The lien statute is remedial in nature and, therefore, should be liberally construed to advance the legislature's intent. No statute, however, should be construed so liberally as to give it a meaning never intended by the legislature. Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

Meaning of "Labor". — Because it is not explicitly defined in this Article, "labor" must be given its common and ordinary meaning. Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

Materials are furnished within the meaning of this section if, pursuant to a subcontract, a subcontractor delivers materials to the site of improvement to real property. Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418, aff'd, 321 N.C. 215, 362 S.E.2d 547 (1987).

Materials are furnished within the meaning of subdivision (1) of this section when, pursuant to a subcontract, materials are delivered to the site of improvement, and there is no need that they be incorporated into the improvement itself. Contract Steel Sales, Inc. v. Freedom Constr. Co., 321 N.C. 215, 362 S.E.2d 547 (1987).

The rental of equipment is not within the scope of "labor or materials" in this Article. Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

Providing rental equipment does not constitute furnishing material, as the common meaning of the word material is simply "the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical (as a machine, tool, building, fabric) is made." Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

The general lease of a crane was not lienable pursuant to this Article. Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993).

Under this section, a subcontractor's direct lien rights are limited to the amount owing to the entity above him in the construction chain. Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

Summary Judgment Proper. — Trial court properly granted the owners' summary judgment motion as to a subcontractor's claim for a lien on funds under G.S. 44A-18(1), as the contractor's claim against the owners had been arbitrated, and after the contractor's claim was set-off against the owners' claim, the contractor was indebted to the owners. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Lien on Funds Does Not Arise by Subrogation. — Subcontractor's lien on funds does not arise by subrogation; rather, under G.S. 44A-18(1), a lien in favor of the subcontractor can attach only to funds owed by an owner to a contractor. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

And if nothing is owing to the first tier subcontractor, the second tier subcontractor has no right to enforce his lien under the plain language of this section. Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

Notice to Be Filed Following Receipt of Payment. — Subcontractor who receives payments from a contractor within 90 days of the contractor's filing for bankruptcy does not perfect his lien by the mere receipt and possession of the payments; he must still file the statutory notice in order to become a secured creditor and protect his receipt of payments from avoidance by the bankruptcy trustee. Precision Walls, Inc. v. Crampton, 196 Bankr. 299 (E.D.N.C. 1996).

But Tiered Subcontractor May Enforce Lien of General Contractor Under § 44A-23. — Section 44A-23 expressly preserves the rights of a first, second or third tier subcontractor to enforce the lien of the general contractor. This construction is supported by the inclusion of the language that upon filing of the notice and claim of lien "no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent." This language, not found in this section, indicates that the legislature intended for the subcontractor to be secured by a mechanic's lien to the full extent of his claim. Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

While it is true that G.S. 44A-23 expressly limits the tiered subcontractor's lien only "to the extent of his claim," this language does not mean "to the extent of his claim as permitted by this section." Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

What Is First Tier Subcontractor's Lien upon Funds. — The first tier subcontractor's lien upon funds contemplated by subdivision (1) of this section is a lien upon funds which are owed and not upon funds which might have been owed had the contract been completed. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

Lien Under Subdivision (1) Necessary for Lien Under § 44A-20(d). — The existence of a lien upon the realty granted by G.S. 44A-20(d) is dependent upon the existence of a valid lien upon funds pursuant to subdivision (1) of this section. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

Subcontractor's Lien Recognized. — Appellate court has long recognized that a lien in favor of a subcontractor may arise either directly under G.S. 44A-18 and G.S. 44A-20 or by subrogation under G.S. 44A-23. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

A lien upon realty may arise directly in favor of a first tier subcontractor under subdivision (1) of this section and G.S. 44A-20, and the right to such a lien, unlike the right to a lien under G.S. 44A-23, may arise without regard to whether the general contractor has waived its own lien rights. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

Subcontractor's Right Not Affected by Prime Contractor's Waiver. — Prime contractor's waiver of the right to establish a lien does not affect subcontractor's right to perfect a lien as a subcontractor under this section. Con Co., Inc. v. Wilson Acres Apts., Ltd., 56 N.C. App. 661, 289 S.E.2d 633, cert. denied, 306 N.C. 382, 294 S.E.2d 206 (1982).

Subcontractor's Right Not Affected by Amounts Due or Completion of Performance. — Where the plaintiff subcontractor, pursuant to a subcontract with the general contractor, furnished materials to the site of improvement to the real property improved, pursuant to this section, the plaintiff was entitled to a lien upon funds owed by the owner to the general contractor, regardless of whether or not the amounts were due and whether or not performance or delivery was complete. Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418, aff'd, 321 N.C. 215, 362 S.E.2d 547 (1987).

Subcontractor Need Not Deliver Materials Personally. — This section, which grants a lien to subcontractors "who furnished labor or materials at the site of the improvement," does not require that the subcontractor claiming the lien personally deliver the materials to the building site. Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986).

Physical Presence of Materials When Notice Is Given Not Required. — Just as actual incorporation into the improvement is not a statutory prerequisite, neither does the statute require that the materials be physically present on the site at the time notice of lien is given. Contract Steel Sales, Inc. v. Freedom Constr. Co., 321 N.C. 215, 362 S.E.2d 547 (1987).

Second-Tier Subcontractor Had No Lien Rights Upon Funds. — Since nothing was owed to the first-tier subcontractor at or after the time that the second-tier subcontractor filed its lien claim, it was undisputed that the second-tier subcontractor had no lien rights upon funds under this section. Electric Supply Co. v. Swain Elec. Co., 328 N.C. 651, 403 S.E.2d 291 (1991).

Plaintiff's Subrogation Claim Barred. — Plaintiff had an adequate legal remedy in the form of a statutory lien against defendants pursuant to this section, but did not exercise it in a timely manner. Failure to timely assert the remedy is not a circumstance that renders the statutory remedy "inadequate," because to do so would allow a party to circumvent equitable principles. Therefore, the existence of a legal remedy acts as a legal bar to plaintiff's subrogation claim, and the trial court properly granted summary judgment for defendants. Jones Cooling & Heating, Inc. v. Booth, 99 N.C. App. 757, 394 S.E.2d 292 (1990), cert. denied, 328 N.C. 732, 404 S.E.2d 869 (1991).

If a third tier subcontractor delivers materials to a second tier subcontractor with the intent that the materials ultimately be delivered at the site, and the materials are actually delivered at the site, the third tier subcontractor has a lien on the funds owed to the second tier subcontractor for those materials. Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986).

Applied in Interior Distribs., Inc. v. Promac, Inc., 27 N.C. App. 418, 219 S.E.2d 281 (1975); Lewis-Brady Bldrs. Supply, Inc. v. Bedros, 32 N.C. App. 209, 231 S.E.2d 199 (1977); Martin Architectural Prods. v. Meridian Constr. Co., 155 N.C. App. 176, 574 S.E.2d 189, 2002 N.C. App. LEXIS 1567 (2002).

Cited in Olney Paint Co. v. Zalewski, 29 N.C. App. 149, 223 S.E.2d 573 (1976); Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985); Concrete Supply Co. v. Ramseur Baptist Church, 95 N.C. App. 658, 383 S.E.2d 222 (1989); Cameron & Barkley Co. v. American Ins. Co., 112 N.C. App. 36, 434 S.E.2d 632 (1993); Precision Walls, Inc. v. Crampton, 196 Bankr. 299 (E.D.N.C. 1996); James River Equip., Inc v. Tharpe's Excavating, Inc., 179 N.C. App. 336, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006), review denied, appeal dismissed, 361 N.C. 167, 639 S.E.2d 651 (2006).

§ 44A-19. Notice of claim of lien upon funds.

(a) Notice of a claim of lien upon funds shall set forth all of the following information:

(1) The name and address of the person claiming the lien upon funds.
(2) A general description of the real property improved.
(3) The name and address of the person with whom the lien claimant contracted to improve real property.
(4) The name and address of each person against or through whom subrogation rights are claimed.
(5) A general description of the contract and the person against whose interest the lien upon funds is claimed.
(6) The amount of the lien upon funds claimed by the lien claimant under the contract.

(b) All notices of claims of liens upon funds by first, second, or third tier subcontractors must be given using a form substantially as follows:

NOTICE OF CLAIM OF LIEN UPON FUNDS BY
FIRST, SECOND, OR THIRD TIER SUBCONTRACTOR

To:
1. ______________________________, owner of property involved.
(Name and address)
2. ______________________________, general contractor.
(Name and address)
3. ______________________________, first tier subcontractor against or through whom subrogation is claimed, if any.
(Name and address)
4. ______________________________, second tier subcontractor against or through whom subrogation is claimed, if any.
(Name and address)

General description of real property where labor performed or material furnished:

____

____
____

General description of undersigned lien claimant's contract including the names of the parties thereto:

____
____

The amount of lien upon funds claimed pursuant to the above described contract: $ ____________________

The undersigned lien claimant gives this notice of claim of lien upon funds pursuant to North Carolina law and claims all rights of subrogation to which he is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated __________

____________________, Lien Claimant
____
(Address)

(c) All notices of claims of liens upon funds by subcontractors more remote than the third tier must be given using a form substantially as follows:

NOTICE OF CLAIM OF LIEN UPON FUNDS BY SUBCONTRACTOR MORE REMOTE THAN THE THIRD TIER

To:
______________________________, person holding funds against which lien
(Name and Address)

upon funds is claimed.

General description of real property where labor performed or material furnished:

____
____
____

General description of undersigned lien claimant's contract including the names of the parties thereto:

____
____

The amount of lien upon funds claimed pursuant to the above described contract: $ ______________________________

The undersigned lien claimant gives this notice of claim of lien upon funds pursuant to North Carolina law and claims all rights to which he or she is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated: __________

____________________, Lien Claimant
____
(Address)

(d) Notices of claims of lien upon funds under this section shall be served upon the obligor by personal delivery or in any manner authorized by Rule 4 of the North Carolina Rules of Civil Procedure. A copy of the notice of claim of lien upon funds shall be attached to any claim of lien on real property filed pursuant to G.S. 44A-20(d) or G.S. 44A-23.

(e) Notices of claims of lien upon funds shall not be filed with the clerk of superior court and shall not be indexed, docketed, or recorded in any way as to affect title to any real property, except a notice of a claim of lien upon funds may be filed with the clerk of superior court under either of the following circumstances:

(1) When the notice of claim of lien upon funds is attached to a claim of lien on real property filed pursuant to G.S. 44A-20(d) or G.S. 44A-23.

(2) When the notice of claim of lien upon funds is filed by the obligor for the purpose of discharging the claim of lien upon funds in accordance with G.S. 44A-20(e).

(f) Filing a notice of claim of lien upon funds pursuant to subsection (e) of this section is not a violation of G.S. 44A-12.1. (1971, c. 880, s. 1; 1985, c. 702, s. 1; 2005-229, s. 1.)

Editor's Note. — The North Carolina Rules of Civil Procedure, referred to in subsection (d), are codified in G.S. 1A-1.

CASE NOTES

Purpose of Notice. — The notice of claim of lien filed by the subcontractor is for the purpose of giving the owner obligor notice; the notice is not intended to protect innocent third parties and does not affect the title to the real property being improved. Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418, aff'd, 321 N.C. 215, 362 S.E.2d 547 (1987).

Filing Is Also Required. — Although a second tier subcontractor must notice its claim of lien using a format substantially similar to that provided in this section, perfection of this lien is not achieved merely upon proper notice; the claim of lien must also be filed pursuant to G.S. 44A-12 before it is considered perfected. Cameron & Barkley Co. v. American Ins. Co., 112 N.C. App. 36, 434 S.E.2d 632 (1993).

Deviation from the statutory form is permissible so long as all of the information set out in the statutory form is contained in the notice. Contract Steel Sales, Inc. v. Freedom Constr. Co., 321 N.C. 215, 362 S.E.2d 547 (1987).

Sufficient Compliance. — The subcontractor's letter to the property owner was held, as a matter of law, to substantially comply with the notice requirements set forth in this section. Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418, aff'd, 321 N.C. 215, 362 S.E.2d 547 (1987).

Appellate court erred in reversing the trial court's grant of summary judgment to the product supplier that found the product supplier was entitled to judgment in the amount specified in its notice of lien sent to the manufacturer; the state constitution and statutory law provided that a materialman was entitled to an adequate lien on the subject matter of the materials supplied, the product supplier sent a notice of lien for a certain amount to the manufacturer after the product supplier became aware that the contractor with whom the manufacturer had contracted was having financial difficulties, the manufacturer nevertheless paid the contractor, instead of the product supplier, shortly before the contractor went bankrupt, and the manufacturer's receipt of notice obligated it to pay the product supplier's claimed lien amount. O & M Indus. v. Smith Eng'g Co., 360 N.C. 263, 624 S.E.2d 345, 2006 N.C. LEXIS 6 (2006).

Claim of Lien Insufficient. — A claim of lien may not serve as a notice of claim of lien because a notice of claim of lien must identify all the parties in the "contractual chain" between the claimant and the owner. Universal Mechanical, Inc. v. Hunt, 114 N.C. App. 484, 442 S.E.2d 130 (1994).

A claim of lien need only identify the owner, the claimant, and the party with which the claimant contracted. Thus, while plaintiff's claim of lien met the requirements of G.S. 44A-12, the claim of lien did not meet the requirements of this section, because the claim of lien did not name defendant or assert rights available to plaintiff via a notice of claim of lien. Universal Mechanical, Inc. v. Hunt, 114 N.C. App. 484, 442 S.E.2d 130 (1994).

Applied in Interior Distribs., Inc. v. Promac, Inc., 27 N.C. App. 418, 219 S.E.2d 281 (1975); Lewis-Brady Bldrs. Supply, Inc. v. Bedros, 32 N.C. App. 209, 231 S.E.2d 199 (1977); Martin Architectural Prods. v. Meridian Constr. Co., 155 N.C. App. 176, 574 S.E.2d 189, 2002 N.C. App. LEXIS 1567 (2002).

Cited in Outer Banks Contractors v. Forbes, 47 N.C. App. 371, 267 S.E.2d 63 (1980).

§ 44A-20. Duties and liability of obligor.

(a) Upon receipt of the notice of claim of lien upon funds provided for in this Article, the obligor shall be under a duty to retain any funds subject to the lien or liens upon funds under this Article up to the total amount of such liens upon funds as to which notices of claims of lien upon funds have been received.

(b) If, after the receipt of the notice of claim of lien upon funds to the obligor, the obligor makes further payments to a contractor or subcontractor against whose interest the lien or liens upon funds are claimed, the lien upon funds shall continue upon the funds in the hands of the contractor or subcontractor who received the payment, and in addition the obligor shall be personally liable to the person or persons entitled to liens upon funds up to the amount of such wrongful payments, not exceeding the total claims with respect to which the notice of claim of lien upon funds was received prior to payment.

(c) If an obligor makes a payment after receipt of notice of claim of lien on funds and incurs personal liability under subsection (b) of this section, the obligor shall be entitled to reimbursement and indemnification from the party receiving such payment.

(d) If the obligor is an owner of the property being improved, the lien claimant shall be entitled to a claim of lien upon real property upon the interest of the obligor in the real property to the extent of the owner's personal liability under subsection (b) of this section, which claim of lien on real property shall be enforced only in the manner set forth in G.S. 44A-7 through G.S. 44A-16 and which claim of lien on real property shall be entitled to the same priorities and subject to the same filing requirements and periods of limitation applicable to the contractor. The claim of lien on real property is perfected as of the time set forth in G.S. 44A-10 upon the filing of the claim of lien on real property pursuant to G.S. 44A-12. The claim of lien on real property shall be in the form set out in G.S. 44A-12(c) and shall contain, in addition, a copy of the notice of claim of lien upon funds given pursuant to G.S. 44A-19 as an exhibit together with proof of service thereof by affidavit, and shall state the grounds the lien claimant has to believe that the obligor is personally liable for the debt under subsection (b) of this section.

(e) A notice of claim of lien upon funds under G.S. 44A-19 may be filed by the obligor with the clerk of superior court in each county where the real property upon which the filed notice of claim of lien upon funds is located for the purpose of discharging the notice of claim of lien upon funds by any of the methods described in G.S. 44A-16.

(f) A bond deposited under this section to discharge a filed notice of claim of lien upon funds shall be effective to discharge any claim of lien on real property filed by the same lien claimant pursuant to subsection (d) of this section or G.S. 44A-23 and shall further be effective to discharge any notices of claims of lien upon funds served by lower tier subcontractors or any claims of lien on real property filed by lower tier subcontractors pursuant to subsection (d) of this section or G.S. 44A-23 claiming through or against the contractor or higher tier subcontractors up to the amount of the bond. (1971, c. 880, s. 1; 1985, c. 702, s. 2; 2005-229, s. 1.)

Editor's Note. — This section, as rewritten by Session Laws 2005-229, s. 1, effective October 1, 2005, is applicable to claims of lien on real property filed and notices of claims of lien upon funds served on or after that date.

CASE NOTES

Lien Under § 44A-18(1) Necessary for Lien Under Subsection (d). — The existence of a lien upon the realty granted by subsection (d) of this section is dependent upon the existence of a valid lien upon funds pursuant to G.S. 44A-18(1). Mace v. Bryant Constr. Corp., 48

N.C. App. 297, 269 S.E.2d 191 (1980).

A lien upon realty may arise directly in favor of a first tier subcontractor under G.S. 44A-18(1) and this section, and the right to such a lien, unlike the right to a lien under G.S. 44A-23, may arise without regard to whether the general contractor has waived its own lien rights. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

Appellate court has long recognized that a lien in favor of a subcontractor may arise either directly under G.S. 44A-18 and G.S. 44A-20 or by subrogation under G.S. 44A-23. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Receipt of Notice. — Credit union was to retain at least the amount claimed by a subcontractor upon receipt of notice of the subcontractor's lien when it still owed an amount exceeding that under the construction contract, and it could not set off its attorney's fees from the amount owed. Martin Architectural Prods. v. Meridian Constr. Co., 155 N.C. App. 176, 574 S.E.2d 189, 2002 N.C. App. LEXIS 1567 (2002).

Appellate court erred in reversing the trial court's grant of summary judgment to the product supplier that found the product supplier was entitled to judgment in the amount specified in its notice of lien sent to the manufacturer; the state constitution and statutory law provided that a materialman was entitled to an adequate lien on the subject matter of the materials supplied, the product supplier sent a notice of lien for a certain amount to the manufacturer after the product supplier became aware that the contractor with whom the manufacturer had contracted was having financial difficulties, the manufacturer nevertheless paid the contractor, instead of the product supplier, shortly before the contractor went bankrupt, and the manufacturer's receipt of notice obligated it to pay the product supplier's claimed lien amount. O & M Indus. v. Smith Eng'g Co., 360 N.C. 263, 624 S.E.2d 345, 2006 N.C. LEXIS 6 (2006).

Effect of Filing Claim Before Service of Notice. — The fact that a lien claim is filed under this section before notice is actually served does not make a difference. Con Co., Inc. v. Wilson Acres Apts., Ltd., 56 N.C. App. 661, 289 S.E.2d 633, cert. denied, 306 N.C. 382, 294 S.E.2d 206 (1982).

Once entitlement to a lien has been established, statutory requirements concerning perfection must be liberally construed in favor of the lien claimant. Contract Steel Sales, Inc. v. Freedom Constr. Co., 321 N.C. 215, 362 S.E.2d 547 (1987).

Applied in Interior Distribs., Inc. v. Promac, Inc., 27 N.C. App. 418, 219 S.E.2d 281 (1975); Lewis-Brady Bldrs. Supply, Inc. v. Bedros, 32 N.C. App. 209, 231 S.E.2d 199 (1977).

Cited in Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985); Contract Steel Sales, Inc. v. Freedom Constr. Co., 84 N.C. App. 460, 353 S.E.2d 418 (1987).

§ 44A-21. Pro rata payments.

(a) Where the obligor is a contractor or subcontractor and the funds in the hands of the obligor and the obligor's personal liability, if any, under G.S. 44A-20 are less than the amount of valid liens upon funds that have been received by the obligor under this Article, the parties entitled to liens upon funds shall share the funds on a pro rata basis.

(b) Where the obligor is an owner and the funds in the hands of the obligor and the obligor's personal liability, if any, under G.S. 44A-20 are less than the sum of the amount of valid claims of liens upon funds that have been received by the obligor under this Article and the amount of the valid claims of liens on real property upon the owner's property filed by the subcontractors with the clerk of superior court under G.S. 44A-23, the parties entitled to liens upon funds and the parties entitled to subrogation claims of liens on real property upon the owner's property shall share the funds on a pro rata basis. (1971, c. 880, s. 1; 1998-217, s. 4(d); 2005-229, s. 1.)

Editor's Note. — This section, as rewritten by Session Laws 2005-229, s. 1, effective October 1, 2005, is applicable to claims of lien on real property filed and notices of claims of lien upon funds served on or after that date.

CASE NOTES

Applied in Interior Distribs., Inc. v. Promac, Inc., 27 N.C. App. 418, 219 S.E.2d 281 (1975).

Cited in Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C.

App. 108, 336 S.E.2d 694 (1985); Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128 (1990), aff'd, Electric Supply Co. v. Swain Elec. Co., 328 N.C. 651, 403 S.E.2d 291 (1991).

§ 44A-22. Priority of liens upon funds.

Liens upon funds perfected under this Article have priority over all other interests or claims theretofore or thereafter created or suffered in the funds by the person against whose interest the lien upon funds is asserted, including, but not limited to, liens arising from garnishment, attachment, levy, judgment, assignments, security interests, and any other type of transfer, whether voluntary or involuntary. Any person who receives payment from an obligor in bad faith with knowledge of a lien upon funds shall take such payment subject to the lien upon funds. (1971, c. 880, s. 1; 2005-229, s. 1.)

Legal Periodicals. — For article, "Mechanics' Liens for the Improvement of Real Property: Recent Developments in Perfection, Enforcement and Priority," see 12 Wake Forest L. Rev. 283 (1976).

CASE NOTES

Notice Must Be Filed. — Subcontractor who receives payments from a contractor within 90 days of the contractor's filing for bankruptcy does not perfect his lien by the mere receipt and possession of the payments; he must still file the statutory notice, in order to become a secured creditor and protect his receipt of payments from avoidance by the bankruptcy trustee. Precision Walls, Inc. v. Crampton, 196 Bankr. 299 (E.D.N.C. 1996).

Applied in Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248 (1986).

Cited in Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985).

§ 44A-23. Contractor's claim of lien on real property; perfection of subrogation rights of subcontractor.

(a) First tier subcontractor. — A first tier subcontractor, who gives notice of claim of lien upon funds as provided in this Article, may, to the extent of this claim, enforce the claim of lien on real property of the contractor created by Part 1 of this Article. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The claim of lien on real property is perfected as of the time set forth in G.S. 44A-10 upon filing of the claim of lien on real property pursuant to G.S. 44A-12. Upon the filing of the claim of lien on real property, with the notice of claim of lien upon funds attached, and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

(b) Second or third subcontractor. —

(1) A second or third tier subcontractor, who gives notice of claim of lien upon funds as provided in this Article, may, to the extent of his claim, enforce the claim of lien on real property of the contractor created by Part 1 of Article 2 of the Chapter except when:

a. The contractor, within 30 days following the date the building permit is issued for the improvement of the real property involved, posts on the property in a visible location adjacent to the posted building permit and files in the office of the clerk of superior court in each county wherein the real property to be improved is located, a completed and signed notice of contract form and the second or third tier subcontractor fails to serve upon the contractor a completed and signed notice of subcontract form by the same means of service as described in G.S. 44A-19(d); or

b. After the posting and filing of a signed notice of contract and the service upon the contractor of a signed notice of subcontract, the contractor serves upon the second or third tier subcontractor, within five days following each subsequent payment, by the same means of service as described in G.S. 44A-19(d), the written notice of payment setting forth the date of payment and the period for which payment is made as requested in the notice of subcontract form set forth herein.

(2) The form of the notice of contract to be so utilized under this section shall be substantially as follows and the fee for filing the same with the clerk of superior court shall be the same as charged for filing a claim of lien on real property:

"NOTICE OF CONTRACT

"(1) Name and address of the Contractor:
"(2) Name and address of the owner of the real property at the time this Notice of Contract is recorded:
"(3) General description of the real property to be improved (street address, tax map lot and block number, reference to recorded instrument, or any other description that reasonably identifies the real property):
"(4) Name and address of the person, firm or corporation filing this Notice of Contract:
"Dated: ____________________

____
"Contractor
"Filed this the ________ day of ________________, ________.

____
Clerk of Superior Court"

(3) The form of the notice of subcontract to be so utilized under this section shall be substantially as follows:

"NOTICE OF SUBCONTRACT

"(1) Name and address of the subcontractor:
"(2) General description of the real property where the labor was performed or the material was furnished (street address, tax map lot and block number, reference to recorded instrument, or any description that reasonably identifies the real property):
"(3)
"(i) General description of the subcontractor's contract, including the names of the parties thereto:
"(ii) General description of the labor and material performed and furnished thereunder:
"(4) Request is hereby made by the undersigned subcontractor that he be notified in writing by the contractor of, and within five days following, each subsequent payment by the contractor to the first tier subcontractor for labor performed or material furnished at the improved real property within the above descriptions of such in paragraph (2) and subparagraph (3)(ii), respectively, the date payment was made and the period for which payment is made.
"Dated: ______________________________

____
Subcontractor"

(4) The manner of such enforcement shall be as provided by G.S. 44A-7 through G.S. 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon the filing of a claim of lien on real property pursuant

to G.S. 44A-12. Upon the filing of the claim of lien on real property, with the notice of claim of lien upon funds attached, and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the second or third tier subcontractor without his written consent. (1971, c. 880, s. 1; 1985, c. 702, s. 4; 1991 (Reg. Sess., 1992), c. 1010, s. 1; 1993, c. 553, s. 13; 1997-456, s. 27; 1999-456, s. 59; 2005-229, s. 1.)

Editor's Note. — This section, as rewritten by Session Laws 2005-229, s. 1, effective October 1, 2005, is applicable to claims of lien on real property filed and notices of claims of lien upon funds served on or after that date.

Legal Periodicals. — For survey on subcontractors' statutory lien rights, see 70 N.C.L. Rev. 1996 (1992).

CASE NOTES

Editor's Note. — *Most of the cases annotated below were decided prior to the 1992 amendment, which, inter alia, added subsection (b).*

The legislative intent was to continue the subcontractor's separate right in this section to a lien by subrogation to the contractor's lien on real property created by G.S. 44A-8 (the contractor's lien). Electric Supply Co. v. Swain Elec. Co., 328 N.C. 651, 403 S.E.2d 291 (1991).

Subcontractor's Lien Recognized. — Appellate court has long recognized that a lien in favor of a subcontractor may arise either directly under G.S. 44A-18 and G.S. 44A-20 or by subrogation under G.S. 44A-23. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Subcontractor is entitled to a lien under this section only by way of subrogation; his lien rights are dependent upon the lien rights of the general contractor. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

Because a subcontractor is entitled to a lien under G.S. 44A-23 only by way of subrogation, a subcontractor's lien rights are dependent upon the lien rights of the general contractor; where the general contractor does not have any lien rights against the owner, the first-tier subcontractor, likewise, has no rights. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Right of Subrogation Where Owner Has Paid Contractor for Specific Labor or Materials. — Even if the owner has specifically paid the contractor for the labor or materials supplied by the specific unpaid subcontractor who is claiming the lien, that subcontractor retains a right of subrogation, to the extent of his claim, to whatever lien rights the contractor otherwise has in the project. Electric Supply Co. v. Swain Elec. Co., 328 N.C. 651, 403 S.E.2d 291 (1991).

Barring of Subcontractor's Rights by General Contractor. — No action of the contractor will be effective to prejudice the rights of the subcontractor without his written consent upon the filing of the notice and claim of lien and the commencement of the action; prior to that time, however, the general contractor is free to waive its lien rights and to effectively bar the subcontractor's rights by way of subrogation. Mace v. Bryant Constr. Corp., 48 N.C. App. 297, 269 S.E.2d 191 (1980).

Prior payment to intermediary first tier subcontractors does not bar claims of second tier subcontractors. Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

As Tiered Subcontractor May Enforce Lien of General Contractor Under This Section. — This section expressly preserves the rights of a first, second or third tier subcontractor to enforce the lien of the general contractor. This construction is supported by the inclusion of the language that upon filing of the notice and claim of lien "no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent." This language, not found in G.S. 44A-18, indicates that the legislature intended for the subcontractor to be secured by a mechanic's lien to the full extent of his claim. Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

A second tier subcontractor has a right to a mechanic's lien against the owner's property when the first tier subcontractor has been fully paid but the owner still owes money to the general contractor. Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

G.S. 44A-23 grants to a first tier subcontractor a lien upon real property based upon a right of subrogation to the direct lien of the general contractor on the improved real property as provided in G.S. 44A-8. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Subcontractor May Assert Whatever Lien Contractor Has Against Owner. — Subcontractor may assert whatever lien that the contractor who dealt with the owner has against the owner's real property relating to the project. Electric Supply Co. v. Swain Elec. Co., 328 N.C. 651, 403 S.E.2d 291 (1991).

Tiered Subcontractor Not Limited to Extent of Claim Under § 44A-18. — While it is true that this section expressly limits the tiered subcontractor's lien only "to the extent of his claim," this language does not mean "to the extent of his claim as permitted by G.S. 44A-18." Electric Supply Co. v. Swain Elec. Co., 97 N.C. App. 479, 389 S.E.2d 128, aff'd, 328 N.C. 651, 403 S.E.2d 291 (1991).

Subcontractor Bound by Defenses Against Contractor. — If a subcontractor attempts to perfect a lien by subrogation, he is bound by any defenses available against the contractor. Con Co., Inc. v. Wilson Acres Apts., Ltd., 56 N.C. App. 661, 289 S.E.2d 633, cert. denied, 306 N.C. 382, 294 S.E.2d 206 (1982).

Trial court properly granted the owners' summary judgment motion as to a subcontractor's claim for enforcement of lien under G.S. 44A-23, as the subcontractor's claim was by way of subrogation; the contractor's claim against the owners had been arbitrated, and after the contractor's claim was set-off against the owners' claim, the contractor was indebted to the owners for corrected and uncompleted work. Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 587 S.E.2d 87, 2003 N.C. App. LEXIS 1930 (2003).

Plaintiffs' liens on real property were limited by the amount remaining due on the contract; they were not permitted to assert liens on improved property for the full amount of their claims where that amount greatly exceeded the amount due on the contract. Vulcan Materials Co. v. Fowler Contracting Corp., 111 N.C. App. 919, 433 S.E.2d 462, appeal dismissed, 335 N.C. 565, 439 S.E.2d 163 (1993).

Cited in Universal Mechanical, Inc. v. Hunt, 114 N.C. App. 484, 442 S.E.2d 130 (1994).

Part 3. Criminal Sanctions for Furnishing a False Statement in Connection with Improvement to Real Property.

§ 44A-24. False statement a misdemeanor.

If any contractor or other person receiving payment from an obligor for an improvement to real property or from a purchaser for a conveyance of real property with improvements shall knowingly furnish to such obligor, purchaser, or to a lender who obtains a security interest in said real property, or to a title insurance company insuring title to such real property, a false written statement of the sums due or claimed to be due for labor or material furnished at the site of improvements to such real property, then such contractor, subcontractor or other person shall be guilty of a Class 1 misdemeanor. Upon conviction and in the event the court shall grant any defendant a suspended sentence, the court may in its discretion include as a condition of such suspension a provision that the defendant shall reimburse the party who suffered loss on such conditions as the court shall determine are proper.

The elements of the offense herein stated are the furnishing of the false written statement with knowledge that it is false and the subsequent or simultaneous receipt of payment from an obligor or purchaser, and in any prosecution hereunder it shall not be necessary for the State to prove that the obligor, purchaser, lender or title insurance company relied upon the false statement or that any person was injured thereby. (1971, c. 880, s. 1.1; 1973, c. 991; 1993, c. 539, s. 406; 1994, Ex. Sess., c. 24, s. 14(c).)

ARTICLE 3.

Model Payment and Performance Bond.

§ 44A-25. Definitions.

Unless the context otherwise requires in this Article:

(1) "Claimant" includes any individual, firm, partnership, association or corporation entitled to maintain an action on a bond described in this

Article and shall include the "contracting body" in a suit to enforce the performance bond.

(2) "Construction contract" means any contract for the construction, reconstruction, alteration or repair of any public building or other public work or public improvement, including highways.

(3) "Contracting body" means any department, agency, or political subdivision of the State of North Carolina which has authority to enter into construction contracts.

(4) "Contractor" means any person who has entered into a construction contract with a contracting body.

(5) "Labor or materials" shall include all materials furnished or labor performed in the prosecution of the work called for by the construction contract regardless of whether or not the labor or materials enter into or become a component part of the public improvement, and further shall include gas, power, light, heat, oil, gasoline, telephone services and rental of equipment or the reasonable value of the use of equipment directly utilized in the performance of the work called for in the construction contract.

(6) "Subcontractor" means any person who has contracted to furnish labor or materials to, or who has performed labor for, a contractor or another subcontractor in connection with a construction contract. (1973, c. 1194, s. 1.)

Local Modification. — (As to Article 3) City of Charlotte: 1987, c. 329, s. 2; (As to Article 3) city of Durham: 1987, c. 789; 1991, c. 107; (As to Article 3) city of Mount Airy: 2003-281, s. 1; (As to Article 3) town of Manteo: 1985 (Reg. Sess., 1986), c. 808.

Legal Periodicals. — For note, "Mechanics' Liens—Judicial Legislation at Work: Changes in the Mechanics' Lien Law of North Carolina after Electric Supply Co. v. Swain Electrical Co.," see 27 Wake Forest L. Rev. 1033 (1992).

CASE NOTES

Right of Materialman Who Furnishes Material to Subcontractor to Recover. — Neither actual delivery of material to a prime contract job site nor incorporation of the material into the work affects a materialman's right to recover under the contractor's payment bond; in order for a materialman who furnishes a subcontractor with materials for use on a public project to recover against a prime contractor's payment bond pursuant to this Article, it is only necessary that the materialman has sold and delivered the materials to the subcontractor in good faith and under the reasonable belief that these materials were for ultimate use under the prime contract. Syro Steel Co. v. Hubbell Hwy. Signs, Inc., 108 N.C. App. 529, 424 S.E.2d 208 (1993).

Where there was evidence that a materialman delivered material to a subcontractor in good faith and under the reasonable belief that the material was intended for use on the construction project, and where the subcontractor failed to present any evidence indicating that the materialman should have had reasonable grounds to believe that materials shipped to the subcontractor's warehouse were not intended for the project site, the trial court did not err in granting summary judgment in favor of the materialman against the contractor's payment bond for the materials shipped to the project site and to the warehouse. Syro Steel Co. v. Hubbell Hwy. Signs, Inc., 108 N.C. App. 529, 424 S.E.2d 208 (1993).

Assignee of Subcontractor Was Also a Subcontractor. — Assignee of a subcontractor that installed a fire protection system on a port project that the prime contractor contracted with the subcontractor to install was a second-tier subcontractor and thus a subcontractor under G.S. 44A-25(6); therefore, a supplier that sold supplies for the project to the assignee could bring a performance bond claim when the assignee did not pay for the supplies. HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc., 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

Applied in Interstate Equip. Co. v. Smith, 292 N.C. 592, 234 S.E.2d 599 (1977); Noland Co. v. Poovey, 58 N.C. App. 800, 295 S.E.2d 238 (1982); Southeastern Steel Erectors, Inc. v. Inco, Inc., 108 N.C. App. 429, 424 S.E.2d 433 (1993); McClure Estimating Co. v. H.G. Reynolds Co., 136 N.C. App. 176, 523 S.E.2d 144, 1999 N.C. App. LEXIS 1300 (1999).

Cited in Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360 (1987).

§ 44A-26. Bonds required.

(a) When the total amount of construction contracts awarded for any one project exceeds three hundred thousand dollars ($300,000), a performance and payment bond as set forth in (1) and (2) is required by the contracting body from any contractor or construction manager at risk with a contract more than fifty thousand dollars ($50,000). In the discretion of the contracting body, a performance and payment bond may be required on any construction contract as follows:

(1) A performance bond in the amount of one hundred percent (100%) of the construction contract amount, conditioned upon the faithful performance of the contract in accordance with the plans, specifications and conditions of the contract. Such bond shall be solely for the protection of the contracting body that is constructing the project.

(2) A payment bond in the amount of one hundred percent (100%) of the construction contract amount, conditioned upon the prompt payment for all labor or materials for which a contractor or subcontractor is liable. The payment bond shall be solely for the protection of the persons furnishing materials or performing labor for which a contractor, subcontractor, or construction manager at risk is liable.

(b) The performance bond and the payment bond shall be executed by one or more surety companies legally authorized to do business in the State of North Carolina and shall become effective upon the awarding of the construction contract. (1973, c. 1194, s. 1; 1983, c. 818; 1987 (Reg. Sess., 1988), c. 1108, s. 10; 1995, c. 367, s. 3; 2001-496, s. 7.)

Local Modification. — Guilford: 1987 (Reg. Sess., 1988), c. 1010, s. 1; city of Greensboro: 1987 (Reg. Sess., 1988), c. 1010, s. 1; city of Winston-Salem: 1987 (Reg. Sess., 1988), c. 949; town of Carrboro: 1995, c. 339, s. 5.

Cross References. — As to waiver of bonding requirements for Small Business Enterprises bids, see G.S. 136-28.10.

Editor's Note. — Session Laws 2005-276, s. 28.10, as amended by Session Laws 2006-67, s. 1, provides: "(a) The Department of Transportation may implement up to two performance-based contracts for routine maintenance and operations, exclusive of resurfacing. Selection of firms to perform this work shall be made using a best-value procurement process.

"Prior to any advertisement for a proposed project, the Department shall report to the Joint Legislative Transportation Oversight Committee on the contractor selection criteria to be used."

"(b) For contracts authorized under this section, notwithstanding G.S. 44A-26(a)(1) and (a)(2), the Department of Transportation may require the bonds issued pursuant to Article 3 of Chapter 44A of the General Statutes for public construction to be provided on a periodic basis and in the amount to cover that specific period rather than for the entire project duration."

CASE NOTES

Article Presumed Written into Payment Bond. — In all cases of public construction for which a payment bond is required under this section, the provisions of this Article are conclusively presumed to have been written into the payment bond. Pyco Supply Co. v. American Centennial Ins. Co., 321 N.C. 435, 364 S.E.2d 380 (1988).

Requirement for Benefit of Laborers and Subcontractors. — Statutory bond requirement in G.S. 44A-26(a)(2) are clearly and explicitly for the benefit of laborers and subcontractors. James River Equip., Inc v. Tharpe's Excavating, Inc., 179 N.C. App. 336, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006), review denied, appeal dismissed, 361 N.C. 167, 639 S.E.2d 651 (2006).

The subcontractor is bound by the subcontract language when dealing with the surety. Otherwise, the relationship between the surety and the principal is fundamentally altered. Mason C. Day Excavating, Inc. v. Crowder Constr. Co., 676 F. Supp. 670 (W.D.N.C. 1987).

Agreement for Delayed Payment. — This Article does not explicitly provide that an agreement for delayed payment after termination of the subcontract is void. Mason C. Day Excavating, Inc. v. Crowder Constr. Co., 676 F. Supp. 670 (W.D.N.C. 1987).

Proof That Materials Were Used on Project. — If the supplier in good faith furnished the material for the construction of the project, it is entitled to recover for the materials so furnished. It is not required to prove that the materials were actually used on the project. Noland Co. v. Poovey, 58 N.C. App. 800, 295 S.E.2d 238 (1982).

Submission of Surety's Liability to Jury. — Where there is evidence from which a jury could conclude that the supplier delivered some materials to the job site which it did not in good faith believe were intended for the project, the issue as to the surety's liability on the bond should be submitted to the jury. Noland Co. v. Poovey, 58 N.C. App. 800, 295 S.E.2d 238 (1982).

Bond Must Be Provided for Life of Project. — General contractor could be held liable to the supplier for failure to provide a payment bond for the life of the project because the bond requirements of G.S. 44A-26, extended throughout life of project. James River Equip., Inc v. Tharpe's Excavating, Inc., 179 N.C. App. 336, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006), review denied, appeal dismissed, 361 N.C. 167, 639 S.E.2d 651 (2006).

Cited in Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360 (1987); James River Equip., Inc. v. Mecklenburg Utils., Inc., 179 N.C. App. 414, 634 S.E.2d 557, 2006 N.C. App. LEXIS 1898 (2006).

OPINIONS OF ATTORNEY GENERAL

Withholding of Prime Contractor's Funds Unnecessary. — Even in view of the required statutory contract payment bond, the provisions of Article 32 of the general contract conditions of state construction contracts (which provides for the withholding of the prime contractor's funds upon notice of a claim by the subcontractor against the prime contractor) are not necessary; since the subcontractor is adequately protected by the contract payment bond required by Article 3 of Chapter 44A, there is no legal requirement for withholding such funds. See opinion of Attorney General to Mr. James S. Lofton, Secretary, N.C. Department of Transportation, 58 N.C.A.G. 25 (1988).

Applied in HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc., 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

§ 44A-27. Actions on payment bonds; service of notice.

(a) Subject to the provision of subsection (b) hereof, any claimant who has performed labor or furnished materials in the prosecution of the work required by any contract for which a payment bond has been given pursuant to the provisions of this Article, and who has not been paid in full therefor before the expiration of 90 days after the day on which the claimant performed the last such labor or furnished the last such materials for which he claims payment, may bring an action on such payment bond in his own name, to recover any amount due him for such labor or materials and may prosecute such action to final judgment and have execution on the judgment.

(b) Any claimant who has a direct contractual relationship with any subcontractor but has no contractual relationship, express or implied, with the contractor may bring an action on the payment bond only if he has given written notice to the contractor within 120 days from the date on which the claimant performed the last of the labor or furnished the last of the materials for which he claims payment, stating with substantial accuracy the amount claimed and the name of the person for whom the work was performed or to whom the material was furnished.

(c) The notice required by subsection (b), above, shall be served by registered or certified mail, postage prepaid, in an envelope addressed to such contractor at any place where his office is regularly maintained for the transaction of business or served in any manner provided by law for the service of summons. (1973, c. 1194, s. 1; 1987, c. 569; 2001-177, s. 1; 2001-487, s. 100.)

CASE NOTES

The subcontractor is bound by the subcontract language when dealing with the surety. Otherwise, the relationship between the surety and the principal is fundamentally altered. Mason C. Day Excavating, Inc. v. Crowder Constr. Co., 676 F. Supp. 670 (W.D.N.C. 1987).

Subcontractor's Assignee Was a Subcontractor. — Supplier was entitled to summary judgment and an award of damages because the supplier gave a timely written notice of a performance bond claim when a subcontractor's assignee, and therefore a subcontractor as defined by G.S. 44A-25(6), failed to pay for supplies purchased from the supplier for a port project. HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc., 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

Agreement for Delayed Payment. — This Article does not explicitly provide that an agreement for delayed payment after termination of the subcontract is void. Mason C. Day Excavating, Inc. v. Crowder Constr. Co., 676 F. Supp. 670 (W.D.N.C. 1987).

Failure to Mitigate. — Supplier was not estopped from its performance bond claim for failure to mitigate by giving an earlier notification as the notice given by the supplier was timely given under the statute. HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc., 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

Applied in Monteau v. Reis Trucking & Constr., Inc., 147 N.C. App. 121, 553 S.E.2d 709, 2001 N.C. App. LEXIS 1052 (2001).

Cited in Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360 (1987); Symons Corp. v. Insurance Co. of N. Am., 94 N.C. App. 541, 380 S.E.2d 550 (1989).

§ 44A-28. Actions on payment bonds; venue and limitations.

(a) Every action on a payment bond as provided in G.S. 44A-27 shall be brought in a court of appropriate jurisdiction in a county where the construction contract or any part thereof is to be or has been performed.

(b) No action on a payment bond shall be commenced after the expiration of the longer period of one year from the day on which the last of the labor was performed or material was furnished by the claimant, or one year from the day on which final settlement was made with the contractor. (1973, c. 1194, s. 1.)

Legal Periodicals. — For survey of North Carolina construction law, see 21 Wake Forest L. Rev. 633 (1986).

CASE NOTES

Purpose of employing "final settlement" as yardstick is that it provides definite time, fixed by public record and readily ascertainable, after which subcontractors must bring suit. Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360 (1987), rev'd on other grounds, 321 N.C. 435, 364 S.E.2d 380 (1988).

For discussion of meaning of "final settlements," see Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360 (1987), rev'd on other grounds, 321 N.C. 435, 364 S.E.2d 380 (1988).

Appellate court does not find that a final completion requirement needs to be implied into G.S. 44A-28(b) since the doctrine of substantial completion adequately addresses concerns that there could be a final ascertainment of the amount due immediately on the execution of a contract; certainly a project must be substantially complete before a governmental agency is capable of administratively fixing the amount it is bound to pay, however, the North Carolina legislature does not expressly require the contract to be 100-percent completed before the government may determine the final settlement, and the appellate court does not import this language into North Carolina law. Cencomp, Inc. v. Webcon, Inc., 157 N.C. App. 501, 579 S.E.2d 482, 2003 N.C. App. LEXIS 731 (2003).

It is true that the government's retainage of funds casts doubt on whether its payment was intended to be a genuinely "final" payment" for purposes of determining a final settlement under G.S. 44A-28(b); however, final payment and final settlement are not synonymous, and and while retainage directly affects final payment, it does not have a similar impact on final settlement. A governmental entity may administratively fix the amount it is bound to pay, and then retain a portion of that payment to ensure not only that the contractor completes the entire project, including the punch-list, but also that no liens are outstanding. Cencomp, Inc. v. Webcon, Inc., 157 N.C. App. 501, 579 S.E.2d 482, 2003 N.C. App. LEXIS 731 (2003).

Construction Contract is Prime Contract. — A complaint which was filed in the county where some portion of a subcontract was performed should have been removed for improper venue to the county where the prime contract was performed because the statutory definitions, the plain language, context and federal case law support an interpretation that "the construction contract" addressed in this section is the prime contract and only the prime contract. McClure Estimating Co. v. H.G. Reynolds Co., 136 N.C. App. 176, 523 S.E.2d 144, 1999 N.C. App. LEXIS 1300 (1999).

When Limitation Period Commences to Run. — Subsection (b) is a statute of repose; therefore the limitation period contained therein runs from the longer period of one year from the last day on which labor was performed or material was furnished, or one year from the date of final settlement with the contractor. Tipton & Young Constr. Co. v. Blue Ridge Structure Co., 116 N.C. App. 115, 446 S.E.2d 603, aff'd, 340 N.C. 257, 456 S.E.2d 308 (1995).

Subcontractors' suit against the contractor's insurer was time-barred under G.S. 44A-28(b) where: (1) the contractor had sent a final bill on the project to the City; (2) the project engineer had advised the City that the work was substantially complete and that final payment (less a retainage) should be made, with the retainage balance to be paid after the City was satisfied that the project was 100-percent complete; (3) the City wrote the contractor a check for the final amount less the retainer more than one year before the suit was filed; (4) the City's Finance Director was confident that the final sum had been determined even though a retainage had been kept; and (5) the City's engineering technician testified that contractors submitted a final bill and that the retainage was usually paid one to three months later. Cencomp, Inc. v. Webcon, Inc., 157 N.C. App. 501, 579 S.E.2d 482, 2003 N.C. App. LEXIS 731 (2003).

Contractual Reduction of Statutory Limitation Time Disregarded. — Where the contractual provisions of a bond sought to shorten the limitation period to the minimum allowed under subsection (b), but the statute provides for the longer period, the contractual limits set out in the bond would be disregarded to the extent they would reduce the limitation period allowed under subsection (b). Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360 (1987), rev'd on other grounds, 321 N.C. 435, 364 S.E.2d 380 (1988).

Parties cannot contract to shorten the one-year limitations period for payment bonds required by the public bond statute. However, in contrast to the provisions governing payment bonds, the public bond statute does not specify a limitations period for performance bonds. Town of Pineville v. Atkinson/Dyer/Watson Architects, 114 N.C. App. 497, 442 S.E.2d 73 (1994).

Amended Complaint Related Back to Filing of Original Complaint. — Where supplier attached contract two to its original complaint, where supplier amended the complaint to state a claim which included contract four, and where the original complaint and amended complaint, viewed together, evidenced the intention of the supplier to collect all outstanding sums owed by general contractor to supplier for material supplied in connection with any bonded contract on which surety for general contractor was liable, allegations in original complaint were sufficient to put surety on notice of all of supplier's claims, and the amended complaint related back to the original complaint; Court of Appeals erred in holding that since one year limitation in subsection (b) was a substantive element of the claim that had gone unsatisfied, the amended complaint could not relate back to date of the filing of the original complaint. Pyco Supply Co. v. American Centennial Ins. Co., 321 N.C. 435, 364 S.E.2d 380 (1988).

Applied in Mid-South Constr. Co. v. Wilson, 71 N.C. App. 445, 322 S.E.2d 418 (1984).

Cited in Pyco Supply Co. v. American Centennial Ins. Co., 321 N.C. 435, 364 S.E.2d 380 (1988).

§ 44A-29. Limitation of liability of a surety.

No surety shall be liable under a payment bond for a total amount greater than the face amount of the payment bond. A judgment against any surety may be reduced or set aside upon motion by the surety and a showing that the total amount of claims paid and judgments previously rendered under such payment bond, together with the amount of the judgment to be reduced or set aside, exceeds the face amount of the bond. (1973, c. 1194, s. 1.)

§ 44A-30. Variance of liability; contents of bond.

(a) No act of or agreement between a contracting body, a contractor or a surety shall reduce the period of time for giving notice under G.S. 44A-27(b) or commencing action under G.S. 44A-28(b) or otherwise reduce or limit the liability of the contractor or surety as prescribed in this Article.

(b) Every bond given by a contractor to a contracting body pursuant to this Article shall be conclusively presumed to have been given in accordance herewith, whether or not such bond be so drawn as to conform to this Article. This Article shall be conclusively presumed to have been written into every bond given pursuant thereto. (1973, c. 1194, s. 1.)

CASE NOTES

Article Presumed Written into Payment Bond. — In all cases of public construction for which a payment bond is required under G.S. 44A-26, the provisions of this Article are conclusively presumed to have been written into the payment bond. Pyco Supply Co. v. American Centennial Ins. Co., 321 N.C. 435, 364 S.E.2d 380 (1988).

The subcontractor is bound by the subcontract language when dealing with the surety. Otherwise, the relationship between the surety and the principal is fundamentally altered. Mason C. Day Excavating, Inc. v. Crowder Constr. Co., 676 F. Supp. 670 (W.D.N.C. 1987).

Cited in Noland Co. v. Poovey, 58 N.C. App. 800, 295 S.E.2d 238 (1982); Pyco Supply Co. v. American Centennial Ins. Co., 85 N.C. App. 114, 354 S.E.2d 360 (1987).

§ 44A-31. Certified copy of bond and contract.

(a) Any person entitled to bring an action or any defendant in an action on a payment bond shall have a right to require the contracting body to certify and furnish a copy of the payment bond and of the construction contract covered by the bond. It shall be the duty of such contracting body to give any such person a certified copy of the payment bond and the construction contract upon not less than 10 days' notice and request. The contracting body may require a reasonable payment for the actual cost of furnishing the certified copy.

(b) A copy of any payment bond and of the construction contract covered by the bond certified by the contracting body shall constitute prima facie evidence of the contents, execution and delivery of such bond and construction contract. (1973, c. 1194, s. 1.)

§ 44A-32. Designation of official; violation a misdemeanor.

Each contracting body shall designate an official thereof to require the bonds described by this Article. If the official so designated shall fail to require said bond, he shall be guilty of a Class 1 misdemeanor. (1973, c. 1194, s. 1; 1993, c. 539, s. 407; 1994, Ex. Sess., c. 24, s. 14(c).)

CASE NOTES

No Civil Remedy Available Against Board of Education. — Claims for failure to maintain a performance bond against the Board of Education were properly dismissed because the supplier had no civil remedy against the Board for such a violation. James River Equip., Inc v. Tharpe's Excavating, Inc., 179 N.C. App. 336, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006), review denied, appeal dismissed, 361 N.C. 167, 639 S.E.2d 651 (2006).

§ 44A-33. Form.

(a) A performance bond form containing the following provisions shall comply with this Article: the date the bond is executed; the name of the principal; the name of the surety; the name of the contracting body; the amount of the bond; the contract number; and the following conditions:

"KNOW ALL MEN BY THESE PRESENTS, That we, the PRINCIPAL AND SURETY above named, are held and firmly bound unto the above named Contracting Body, hereinafter called the Contracting Body, in the penal sum of the amount stated above for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

"THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the Principal entered into a certain contract with the Contracting Body, numbered as shown above and hereto attached:

"NOW THEREFORE, if the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Contracting Body, with or without notice to the Surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the Surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

"IN WITNESS WHEREOF, the above-bounden parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body."

Appropriate places for execution by the surety and principal shall be provided.

(b) A payment bond form containing the following provisions shall comply with this Article: the date the bond is executed; the name of the principal; the name of the surety; the name of the contracting body; the contract number; and the following conditions:

"KNOW ALL MEN BY THESE PRESENTS, That we, the PRINCIPAL and SURETY above named, are held and firmly bound unto the above named Contracting Body, hereinafter called the Contracting Body, in the penal sum of the amount stated above, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

"THE CONDITION OF THIS OBLIGATION IS SUCH, that whereas the Principal entered into a certain contract with the Contracting Body, numbered as shown above and hereto attached;

"NOW THEREFORE, if the Principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the Surety being hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

"IN WITNESS WHEREOF, the above-bounden parties have executed this instrument under their several seals on the date indicated above, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body."

Appropriate places for execution by the surety and principal shall be provided. (1973, c. 1194, s. 1.)

CASE NOTES

Quoted in James River Equip., Inc v. Tharpe's Excavating, Inc., 179 N.C. App. 336, 634 S.E.2d 548, 2006 N.C. App. LEXIS 1897 (2006), review denied, appeal dismissed, 361 N.C. 167, 639 S.E.2d 651 (2006).

§ 44A-34. Construction of Article.

The addition of this Article shall not be construed as making the provisions of Articles 1 and 2 of Chapter 44A of the General Statutes apply to public bodies or public buildings. (1973, c. 1194, s. 3.)

§ 44A-35. Attorneys' fees.

In any suit brought or defended under the provisions of Article 2 or Article 3 of this Chapter, the presiding judge may allow a reasonable attorneys' fee to the attorney representing the prevailing party. This attorneys' fee is to be taxed as part of the court costs and be payable by the losing party upon a finding that there was an unreasonable refusal by the losing party to fully resolve the matter which constituted the basis of the suit or the basis of the defense. For purposes of this section, "prevailing party" is a party plaintiff or third party plaintiff who obtains a judgment of at least fifty percent (50%) of the monetary amount sought in a claim or is a party defendant or third party defendant against whom a claim is asserted which results in a judgment of less than fifty percent (50%) of the amount sought in the claim defended. Notwithstanding the foregoing, in the event an offer of judgment is served in accordance with G.S. 1A-1, Rule 68, a "prevailing party" is an offeree who obtains judgment in an amount more favorable than the last offer or is an offeror against whom judgment is rendered in an amount less favorable than the last offer. (1991 (Reg. Sess., 1992), c. 1010, s. 3; 1993 (Reg. Sess., 1994), c. 763, s. 1.)

CASE NOTES

Discretion of Trial Judge. — Where the trial judge found as a fact that there was no unreasonable refusal to resolve the dispute, his determination not to award attorney fees was not an abuse of discretion. Barrett Kays & Assocs. v. Colonial Bldg. Co., 129 N.C. App. 525, 500 S.E.2d 108 (1998).

Award of Attorneys' Fees Held Error. — In a breach of contract suit wherein plaintiff subcontractor accepted an offer of judgment made by defendant general contractor, the suit was settled and the trial court erred by granting an award of attorneys' fees to the subcontractor; when an offer of judgment is involved, no prevailing or losing party exists and an award of attorneys' fees is precluded under G.S. 44A-35. Martin & Loftis Clearing & Grading, Inc. v. Saieed Constr. Sys. Corp., 168 N.C. App. 542, 608 S.E.2d 124, 2005 N.C. App. LEXIS 341 (2005).

Construction. — G.S. 44A-35 is remedial in nature and must be liberally construed. Martin & Loftis Clearing & Grading, Inc. v. Saieed Constr. Sys. Corp., 168 N.C. App. 542, 608 S.E.2d 124, 2005 N.C. App. LEXIS 341 (2005).

Prevailing Party. — G.S. 44A-35 provides a specific definition of what constitutes a prevailing party when an offer of judgment is made by stating that there is no prevailing party when such an offer is made and accepted. Martin & Loftis Clearing & Grading, Inc. v. Saieed Constr. Sys. Corp., 168 N.C. App. 542, 608 S.E.2d 124, 2005 N.C. App. LEXIS 341 (2005).

Cited in Members Interior Constr., Inc. v. Leader Constr. Co., 124 N.C. App. 121, 476 S.E.2d 399 (1996); HSI N.C., LLC v. Diversified Fire Prot. of Wilmington, Inc., 169 N.C. App. 767, 611 S.E.2d 224, 2005 N.C. App. LEXIS 805 (2005).

§§ 44A-36 through 44A-39: Reserved for future codification purposes.

Article 4.

Self-Service Storage Facilities.

§ 44A-40. Definitions.

As used in this Article, unless the context clearly requires otherwise:

(1) "Last known address" means that address provided by the occupant in the latest rental agreement or the address provided by the occupant in a subsequent written notice of a change of address.

(2) "Lienor" means any person entitled to a lien under this Article.

(3) "Occupant" means a person, his sublessee, successor, or assign, entitled to the use of the storage space at a self-service storage facility under a rental agreement, to the exclusion of others.

(4) "Owner" means the owner, operator, lessor, or sublessor of a self-service storage facility, his agent, or any other person authorized by him to manage the facility or to receive rent from an occupant under a rental agreement.

(5) "Personal property" means movable property not affixed to land and includes, but is not limited to, goods, merchandise, and household items.

(6) "Rental agreement" means any agreement or lease, written or oral, that establishes or modifies the terms, conditions, rules or any other provisions concerning the use and occupancy of a self-service storage facility.

(7) "Self-service storage facility" means any real property designed and used for the purpose of renting or leasing individual storage space to occupants who are to have access to such for the purpose of storing and removing personal property. No occupant shall use a self-service storage facility for residential purposes. A self-service storage facility is not subject to the provisions of Article 7 of General Statutes Chapter 25. Provided, however, if an owner issues any warehouse receipt, bill of lading, or other document of title for the personal property stored, the owner and the occupant are subject to the provisions of Article 7 of General Statutes Chapter 25 and the provisions of this Article do not apply. (1981 (Reg. Sess., 1982), c. 1275, s. 1.)

§ 44A-41. Self-service storage facility owner entitled to lien.

The owner of a self-service storage facility has a lien upon all personal property stored at the facility for rent, expenses necessary for the preservation of the personal property, and expenses reasonably incurred in the sale or other disposition of the personal property pursuant to this Article. This lien shall not have priority over any security interest which is perfected at the time the occupant stores the property at the self-service storage facility. (1981 (Reg. Sess., 1982), c. 1275, s. 1.)

§ 44A-42. When self-service storage facility lien arises and terminates.

The lien conferred under this Article arises only when the owner acquires possession of the property stored in the self-service storage facility; and it shall terminate when the owner relinquishes possession of the property upon which the lien might be claimed, or when the occupant or any other person having a security or other interest in the property tenders prior to sale the amount of the rent, plus the expenses incurred by the owner for the preservation of the property. The reacquisition of possession of the property stored in the self-service storage facility, which was relinquished, shall not reinstate the lien. (1981 (Reg. Sess., 1982), c. 1275, s. 1.)

§ 44A-43. Enforcement of self-service storage facility lien.

(a) If the rent and other charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 15 days following the maturity of the obligation to pay rent, the owner may enforce the lien by a public sale or other disposition of the property as provided in this section. The owner may bring an action to collect rent and other charges in any court of competent jurisdiction at any time following the maturity of the obligation to pay the rent.

The occupant or any other person having a security or other interest in the property stored in the self-service storage facility may bring an action to request the immediate possession of the property, at any time following the assertion of the lien by the owner. Before such possession is granted, the occupant or the person with a security or other interest in the property shall pay the amount of the lien asserted to the clerk of court in which the action is pending, or post a bond for double the amount. The clerk shall then issue an order to the owner to relinquish possession of the property to the occupant or other party.

(b) Notice and Hearing:

(1) If the property upon which the lien is claimed is a motor vehicle, the lienor, following the expiration of the 15-day period provided by subsection (a), shall give notice to the Division of Motor Vehicles that a lien is asserted and that a sale is proposed. The lienor shall remit to the Division a fee of two dollars ($2.00); and shall also furnish the Division with the last known address of the occupant. The Division of Motor Vehicles shall issue notice by registered or certified mail, return receipt requested to the person having legal title to the vehicle, if reasonably ascertainable, and to the occupant, if different, at his last known address. The notice shall:

   a. State: (i) that a lien is being asserted against the specific vehicle by the lienor or owner of the self-service storage facility, (ii) that the lien is being asserted for rental charges at the self-service storage facility, (iii) the amount of the lien, and (iv) that the lienor intends to sell or otherwise dispose of the vehicle in satisfaction of the lien;

   b. Inform the person having legal title and the occupant of their right to a judicial hearing at which a determination will be made as to the validity of the lien prior to a sale taking place; and

   c. State that the legal title holder and the occupant have a period of 10 days from the date of receipt of the notice in which to notify the Division of Motor Vehicles by registered or certified mail, return receipt requested, that a hearing is desired to contest the sale of the vehicle pursuant to the lien.

The person with legal title or the occupant must, within 10 days of receipt of the notice from the Division of Motor Vehicles, notify the Division of his desire to contest the sale of the vehicle pursuant to the lien, and that the Division should so notify lienor.

Failure of the person with legal title or the occupant to notify the Division that a hearing is desired shall be deemed a waiver of the right to a hearing prior to sale of the vehicle against which the lien is asserted. Upon such failure, the Division shall so notify the lienor; the lienor may proceed to enforce the lien by a public sale as provided by this section; and the Division shall transfer title to the property pursuant to such sale.

If the Division is notified within the 10-day period provided in this section that a hearing is desired prior to the sale, the lien may be enforced by a public sale as provided in this section and the Division will transfer title only pursuant to the order of a court of competent jurisdiction.

(2) If the property upon which the lien is claimed is other than a motor vehicle, the lienor following the expiration of the 15-day period provided by subsection (a) shall issue notice to the person having a security or other interest in the property, if reasonably ascertainable, and to the occupant, if different, at his last known address by registered or certified mail, return receipt requested.

The notice shall:

a. State: (i) that a lien is being asserted against the specific property by the lienor, (ii) that the lien is being asserted for rental charges at the self-service storage facility, (iii) the amount of the lien, and (iv) that the lienor intends to sell or otherwise dispose of the property in satisfaction of the lien;

b. Provide a brief and general description of the personal property subject to the lien. The description shall be reasonably adequate to permit the person notified to identify it, except that any container including, but not limited to, a trunk, valise, or box that is locked, fastened, sealed, or tied in a manner which deters immediate access to its contents may be described as such without describing its contents;

c. Inform the person with a security or other interest in the property and occupant, if different, of their right to a judicial hearing at which a determination will be made as to the validity of the lien prior to a sale taking place;

d. State that the person with a security or other interest in the property or the occupant, if different, has a period of 10 days from the date of receipt of the notice to notify the lienor by registered, or certified mail, return receipt requested, that a hearing is desired, and that if the legal title holder or occupant wishes to contest the sale of his property pursuant to the lien he should notify the lienor that a hearing is desired.

The person with a security or other interest in the property or the occupant must, within 10 days of receipt of the notice from the lienor, notify the lienor of his desire for a hearing, and state whether or not he wishes to contest the sale of the property pursuant to the lien.

Failure of the person with a security or other interest in the property, or the occupant to notify the lienor that a hearing is desired shall be deemed a waiver of the right to a hearing prior to the sale of the property against which the lien is asserted. Upon such failure the lienor may proceed to enforce the lien by a public sale as provided by this section.

If the lienor is notified, within the 10-day period as provided by this section, that a hearing is desired prior to the sale, the lien may be enforced by a public sale as provided in this section only pursuant to the order of a court of competent jurisdiction.

(c) Public Sale. —

(1) Not less than 20 days prior to sale by public sale the lienor:

a. Shall cause notice to be mailed to the person having legal title to the property if reasonably ascertainable, to the occupant if different, and to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained, provided that notices provided pursuant to subsection (b) hereof shall be sufficient for these purposes if such notices contain the information required by subsection (d) hereof; and

b. Shall advertise the sale by posting a copy of the notice of sale at the courthouse door in the county where the sale is to be held; and shall publish notice of sale once a week for two consecutive weeks in a newspaper of general circulation in the same county, the date of the last publication being not less than five days prior to the sale.

(2) The sale must be held on a day other than Sunday and between the hours of 9:00 A.M. and 4:00 P.M.:

a. At the self-service storage facility or at the nearest suitable place to where the property is held or stored; or

b. In the county where the obligation secured by the lien was contracted for.

(3) A lienor may purchase at public sale.

(d) Notice of Sale. — The notice of sale shall include:

(1) The name and address of the lienor;

(2) A statement to the effect that various items of personal property are being sold pursuant to the assertion of a lien for rental at the self-service storage facility;

(3) The place, date, and time of the sale. (1981 (Reg. Sess., 1982), c. 1275, s. 1; 2006-264, s. 38.5.)

Effect of Amendments. — Session Laws 2006-264, s. 38.5, effective August 27, 2006, substituted “9:00 A.M.” for “10:00 A.M.” in the introductory language of subdivision (c)(2).

§ 44A-44. Right of redemption; good faith purchaser’s right; disposition of proceeds; lienor’s liability.

(a) Before the sale authorized by G.S. 44A-43, or other disposition of the property, the occupant may pay the amount necessary to satisfy the lien plus the reasonable expenses incurred by the owner for the preservation of the property and thereby redeem the property. Upon receipt of such payment, the owner shall return the personal property to the occupant; and thereafter shall have no further claim against such personal property on account of the lien which was asserted.

(b) A purchaser in good faith, and without knowledge of any defect in the sale of the personal property sold to satisfy a lien provided for in this Article takes the property free of any rights of persons against whom the lien was valid.

(c) Proceeds of a sale under this section shall be applied as follows:

(1) Payment of reasonable expenses incurred in connection with the sale;

(2) Payment of the obligation secured by any security interest that was perfected at the time the occupant stored the property at the self-service storage facility;

(3) Payment of the obligation secured by the self-service storage facility lien;

(4) Any balance shall be paid to the occupant or other person lawfully entitled thereto; but if such person cannot be found, the balance shall be paid to the clerk of superior court of the county in which the sale took place, to be held by the clerk for the person entitled thereto.

(d) If the lienor fails to comply substantially with any of the provisions of this section, he shall be liable to the occupant or any other party injured by such noncompliance in the sum of one hundred dollars ($100.00), together with reasonable attorney's fees as awarded by the court. Damages provided by this section shall be in addition to actual damages to which any party is otherwise entitled. (1981 (Reg. Sess., 1982), c. 1275, s. 1.)

§ 44A-45. Article is supplemental to lien created by contract.

Nothing in this Article shall be construed as in any manner impairing or affecting the right of parties to create liens by contract or agreement. (1981 (Reg. Sess., 1982), c. 1275, s. 1.)

§ 44A-46. Application.

All rental agreements entered into before September 1, 1982, and not extended or renewed after that date, and the rights and duties and interests flowing from them, shall remain valid, and may be enforced or terminated in accordance with their terms or as permitted by any other law of this State. (1981 (Reg. Sess., 1982), c. 1275, s. 1.)

§§ 44A-47 through 44A-49: Reserved for future codification purposes.

ARTICLE 5.

Aircraft Labor and Storage Liens.

§ 44A-50. Definitions.

As used in this Article, the following terms mean:

(1) Aircraft. — As the term is defined in G.S. 63-1(3), or any engine, part, component, or accessory, whether affixed to or separate from the aircraft.
(2) Lienor. — A person entitled to a lien under this Article.
(3) Owner. — As the term is defined in G.S. 44A-1(3) for an aircraft, or any person authorized by an owner, as defined in G.S. 44A-1(3), to perform, contract, or arrange for the provision of labor, skill, materials, or storage with respect to any aircraft.
(4) Person. — Any individual, corporation, association, partnership, whether limited or general, limited liability company, or other entity. (2006-222, s. 1.1.)

Editor's Note. — Session Laws 2006-222, s. 1.3, made this Article effective October 1, 2006, and applicable to labor, skills, or materials furnished on an aircraft, or storage provided for an aircraft, on or after that date.

§ 44A-55. Persons entitled to a lien on an aircraft.

Any person who has expended labor, skill, or materials on an aircraft or has furnished storage for an aircraft at the request of its owner has a perfected lien on the aircraft beginning on the date the expenditure of labor, skill, or materials or the storage commenced, for the contract price for the expenditure of labor, skill, or materials or for the storage, or, in the absence of a contract price, for the reasonable worth of the expenditure of labor, skill, or materials, or of the storage. The lien under this section survives even if the possession of the aircraft is surrendered by the lienor. (2006-222, s. 1.1.)

§ 44A-60. Notice of lien on an aircraft.

(a) The lien under G.S. 44A-55 expires 120 days after the date the lienor voluntarily surrenders possession of the aircraft, unless the lienor, prior to the expiration of the 120-day period, files a notice of lien in the office of the clerk of court of the county in which the labor, skill, or materials were expended on the aircraft, or the storage was furnished for the aircraft.

(b) The notice of lien shall state all of the following:

(1) The name of the lienor.
(2) The name of the registered owner of the aircraft, if known.
(3) The name of the person with whom the lienor entered into a contract for labor, skill, or materials on the aircraft, or storage of the aircraft.
(4) A description of the aircraft sufficient for identification.
(5) The amount for which the lien is claimed.
(6) The dates upon which the expenditure of labor, skill, materials, or storage was commenced and completed, or, if not completed, the date through which the claimed amount is calculated.

(c) The notice of lien shall be sworn to or affirmed, and subscribed by the lienor, or by someone on the lienor's behalf having personal knowledge of the facts.

(d) The notice of lien shall be in substantially the following form:

"NOTICE OF LIEN ON AIRCRAFT

[Lienor] Lienor, v. [Owner] Owner

Notice is hereby given that [Lienor](name) claims a lien upon ______________________ [aircraft](describe the aircraft) for labor, skill, or materials expended on, and for storage furnished for, this aircraft; that the name of the registered owner or reputed owner, if the aircraft is not registered or the registered owner is not known, is [Owner](name), that the labor, skill, or materials were expended on the aircraft commencing the ______ day of ____________, and storage was furnished on the aircraft commencing the ______ day of ____________, and the labor, skill, materials, and storage furnished by the lienor [was completed] [is ongoing] on the ______ day of ____________; that 120 days have not elapsed since the aircraft was released by the lienor; that the amount the lienor demands for the labor, skill, materials, and storage furnished, as of the date hereof is $____________ (amount); that no part thereof has been paid except $____________ (amount); and that there is now due and remaining unpaid, after deducting all credits and offsets, the sum of $____________ (amount), in which amount [Lienor](name) claims a lien upon the aircraft.

(Signed) __________________ (Lienor)
Address of Lienor ______________________________

State of North Carolina
County of __________________
Sworn to (or affirmed) and subscribed before me this day by [name of principal].
Date:______________________________ [Official Signature of Notary]
______________________________ [Notary's printed or typed name], Notary Public
______________________________ My Commission Expires:[Date]
[Official Seal]"
(2006-222, s. 1.1.)

§ 44A-65. Notice of lien filed by the clerk of court.

Upon presentation of a notice of lien pursuant to this Article, the clerk of court shall file the notice of lien and shall index the notice of lien in a record maintained by the clerk for that purpose. (2006-222, s. 1.1.)

§ 44A-70. Priority of a lien on an aircraft.

The lien under this Article shall have priority over perfected and unperfected security interests. (2006-222, s. 1.1.)

§ 44A-75. Termination of a lien on an aircraft.

Any lien under this Article shall be terminated upon receipt by the lienor of the full amount owed for the labor, skill, or materials on the aircraft, and for storage of the aircraft, which amount shall not be limited to any amount shown on the notice of lien filed under G.S. 44A-60, if a notice of lien has been filed by the lienor. Upon receipt of the amount owed, the lienor or the lienor's agent shall release the aircraft to the owner, if the aircraft is in the possession of the lienor, and shall, within 20 days following a request in writing by the aircraft owner, file with the clerk of court a notice of satisfaction of lien, if a notice of lien has been filed by the lienor. A notice of satisfaction of lien shall state that the amount owed for the lienor's expenditure of labor, skill, or materials on the aircraft, and for the storage of the aircraft, has been paid and the lien against the aircraft has been terminated. The notice of satisfaction of lien shall be sworn to or affirmed, and subscribed by the lienor or by someone on the lienor's behalf having personal knowledge of the facts. Upon the filing of a notice of satisfaction of lien, the clerk of court shall make an entry of acknowledgment of satisfaction in the index. (2006-222, s. 1.1.)

§ 44A-80. Fees.

The clerk of court shall collect fees for filing, copying, and certifying any document under this Article as set forth in G.S. 7A-308. (2006-222, s. 1.1.)

§ 44A-85. Enforcement of lien by sale.

A lien filed under this Article may be enforced in accordance with G.S. 44A-4, and the proceeds of sale shall be applied as set forth in G.S. 44A-5, except that the three-day time period set forth in G.S. 44A-4(a) for the lienor to file a contrary statement of the amount of the lien at the time of the filing of a complaint by the owner shall be extended to 30 days. An owner may seek immediate possession of an aircraft in accordance with G.S. 44A-4. (2006-222, s. 1.1.)

§ 44A-90. Title of purchaser.

(a) A purchaser for value at a properly conducted sale under this Article, and a purchaser for value without constructive notice of a defect in the sale, whether or not the purchaser is the lienor or an agent of the lienor, acquires title to the property free of any interests over which the lienor was entitled to priority.

(b) Upon the completion of a sale conducted under this Article, the lienor or a person acting on behalf of the lienor, who conducted the sale shall furnish to the purchaser for value a bill of sale for the aircraft signed by the person who conducted the sale that includes a statement that the sale was conducted in accordance with this Article. (2006-222, s. 1.1.)

Chapter 45.

Mortgages and Deeds of Trust.

Article 1.

Chattel Securities.

Sec.
45-1 through 45-3.1. [Repealed.]

Article 2.

Right to Foreclose or Sell under Power.

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45-12, 45-13. [Repealed.]
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45-15. Registration of substitution constructive notice.
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45-21.10. Requirement of cash deposit at sale.
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Article 2C.

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Article 5.

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Instruments to Secure Certain Home Loans.

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Instruments to Secure Equity Lines of Credit.

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ARTICLE 1.

Chattel Securities.

§§ 45-1 through 45-3.1: Repealed by Sessions Laws 1967, c. 562, s. 2.

ARTICLE 2.

Right to Foreclose or Sell under Power.

§ 45-4. Representative succeeds on death of mortgagee or trustee in deeds of trust; parties to action.

When the mortgagee in a mortgage, or the trustee in a deed in trust, executed for the purpose of securing a debt, containing a power of sale, dies before the payment of the debt secured in such mortgage or deed in trust, all the title, rights, powers and duties of such mortgagee or trustee pass to and devolve upon the executor or administrator or collector of such mortgagee or trustee, including the right to bring an action of foreclosure in any of the courts of this State as prescribed for trustees or mortgagees, and in such action it is unnecessary to make the heirs at law of such deceased mortgagee or trustee parties thereto. (1887, c. 147; 1895, c. 431; 1901, c. 186; 1905, c. 425; Rev., s. 1031; C.S., s. 2578; 1933, c. 199.)

North Carolina Home Protection Pilot Program and Loan Fund. — Session Laws 2007-323, ss. 22.1(a)-(f), provide for continuation and expansion of the North Carolina Home Protection Pilot Program. See note at G.S. 122A-1. For previous similar provisions, see Session Laws 2005-276, ss. 20.2(a)-(f).

CASE NOTES

Power of Sale Vests in Executor of Mortgagee. — When a power of sale in a mortgage is given to the mortgagee, his executors, etc., upon default, and the mortgagee dies leaving a will under which his executors qualify, the power of sale vests in the executors by virtue of this section and the contract in the mortgage. Scott v. Blades Lumber Co., 144 N.C. 44, 56 S.E. 548 (1907).

Even Absent Stipulation to That Effect. — The executor of a mortgagee may exercise the power of sale contained in the mortgage when the deed in terms confers such power upon the mortgagee and his executors. This section was intended to confer the power of sale upon executors and administrators when such power is not given in the deed. Yount v. Morrison, 109 N.C. 520, 13 S.E. 892 (1891).

Joint Exercise of Power of Sale by Executors of Mortgagee. — While the executors of a deceased mortgagee may exercise the power of sale in the mortgage, where there are two executors of the deceased mortgagee the power must be exercised by them jointly. Combs v. Porter, 231 N.C. 585, 58 S.E.2d 100 (1950).

When Objection to Foreclosure to Be Raised. — If the foreclosure proceeding was not authorized for any reason or if it was irregularly conducted (e.g., the notice was incorrect or inadequate in certain respects; the affidavit of default was based on hearsay), it was incumbent on the mortgagor to raise that issue in that proceeding either by objection or motion in the cause. Douglas v. Pennamco, Inc., 75 N.C. App. 644, 331 S.E.2d 298, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

Collateral Attack Not Permitted. — The law does not permit a collateral attack on a foreclosure proceeding and judgment. Douglas v. Pennamco, Inc., 75 N.C. App. 644, 331 S.E.2d 298, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

Cited in Allred v. Trexler Lumber Co., 194 N.C. 547, 140 S.E. 157 (1927); Nall v. McConnell, 211 N.C. 258, 190 S.E. 210 (1937); Gregg v. Williamson, 246 N.C. 356, 98 S.E.2d 481 (1957); Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975); Thompson v. Wrenn, 61 N.C. App. 582, 301 S.E.2d 103 (1983); Fisher v. First Union Mtg. Corp., 80 Bankr. 58 (Bankr. M.D.N.C. 1987).

§ 45-5. Foreclosures by representatives validated.

In all actions which were brought or prosecuted prior to the fourth day of March, 1905, for the foreclosure of any mortgage or deed in trust by any executor or administrator of any deceased mortgagee or trustee where the heirs of the mortgagee were duly made parties and regular and orderly decrees of foreclosure entered by the court and sale had by a commissioner appointed by the court for that purpose and deed made after confirmation, the title so conveyed to purchaser at such judicial sale shall be deemed and held to be vested in such purchaser, whether the heir of such deceased mortgagee or trustee was a party to such foreclosure proceeding or not, and such heir of any deceased mortgagee is estopped to bring or prosecute any further action against such purchaser for the recovery of such property or foreclosure of such mortgage or deed in trust. (1905, c. 425, s. 2; Rev., s. 1032; C.S., s. 2579.)

§ 45-6. Renunciation by representative; clerk appoints trustee.

The executor or administrator of any deceased mortgagee or trustee in any mortgage or deed of trust heretofore or hereafter executed may renounce in writing, before the clerk of the superior court before whom he qualifies, the trust under the mortgage or deed of trust at the time he qualifies as executor or administrator, or at any time thereafter before he intermeddles with or exercises any of the duties under said mortgage or deed of trust, except to preserve the property until a trustee can be appointed. In every such case of renunciation the clerk of the superior court of any county wherein the said mortgage or deed of trust is registered has power and authority, upon proper proceedings instituted before him, as in other cases of special proceedings, to appoint some person to act as trustee and execute said mortgage or deed of trust. The clerk, in addition to recording his proceedings in his book of orders and decrees, shall record a separate instrument, as required by G.S. 161-14.1, containing the name of the substituted trustee or mortgagee and may enter the name of the substituted trustee or mortgagee on the margin of the deed in trust or the mortgage in the book of the office of the register of deeds of said county. (1905, c. 128; Rev., s. 1038; C.S., s. 2580; 1991, c. 114, s. 5.)

Cross References. — As to resignation, removal and renunciation of trustees, and appointment of successors, see G.S. 36A-22. As to appointment of successor to incompetent trustee, see also G.S. 45-9.

CASE NOTES

Cited in Spain v. Hines, 214 N.C. 432, 200 S.E. 25 (1938).

§ 45-7. Agent to sell under power may be appointed by parol.

All sales of real property, under a power of sale contained in any mortgage or deed of trust to secure the payment of money, by any mortgagee or trustee, through an agent or attorney for that purpose, appointed orally or in writing by such mortgagee or trustee, whether such writing has been or shall be registered or not, shall be valid, whether or not such mortgagee or trustee was or shall be present at such sale. (1895, c. 117; Rev., s. 1035; C.S., s. 2581; 1967, c. 562, s. 2.)

CASE NOTES

Recitals in Deed Prima Facie Correct. — Recitals in a trustee's deed that the trustee made the sale in pursuance of the power contained in the deed of trust are taken as prima facie correct. Hayes v. Ferguson, 206 N.C. 414, 174 S.E. 121 (1934).

§ 45-8. Survivorship among donees of power of sale.

In all mortgages and deeds of trust of real property wherein two or more persons, as trustees or otherwise, are given power to sell the property therein conveyed or embraced, and one or more of such persons dies, any one of the persons surviving having such power may make sale of such property in the manner directed in such deed, and execute such assurances of title as are proper and lawful under the power so given; and the act of such person, in pursuance of said power, shall be as valid and binding as if the same had been done by all the persons on whom the power was conferred. (1885, c. 327, s. 2; Rev., s. 1033; C.S., s. 2582; 1967, c. 562, s. 2.)

Legal Periodicals. — See 13 N.C.L. Rev. 93 (1935).

CASE NOTES

Execution of Power by Survivor Trustee in Mortgage. — Where one of two trustees in a power of sale mortgage dies, the survivor may execute the trust, this being a trust coupled with an interest. Cawfield v. Owens, 129 N.C. 286, 40 S.E. 62 (1901).

Cited in Gregg v. Williamson, 246 N.C. 356, 98 S.E.2d 481 (1957).

§ 45-9. Clerk appoints successor to incompetent trustee.

When the sole or last surviving trustee named in a will or deed of trust dies, removes from the county where the will was probated or deed executed and/or recorded and from the State, or in any way becomes incompetent to execute the said trust, or is a nonresident of this State, or has disappeared from the community of his residence and his whereabouts remains unknown in such community for a period of three months and cannot, after diligent inquiry be ascertained, the clerk of the superior court of the county wherein the will was probated or deed of trust was executed and/or recorded is authorized and empowered, in proceedings to which all persons interested shall be made parties, to appoint some discreet and competent person to act as trustee and execute the trust according to its true intent and meaning, and as fully as if originally appointed: Provided, that in all actions or proceedings had under this section prior to January 1, 1900, before the clerks of the superior court in which any trustee was appointed to execute a deed of trust where any trustee of a deed of trust has died, removed from the county where the deed was executed and from the State, or in any way become incompetent to execute the said trust, whether such appointment of such trustee by order or decree, or otherwise, was made upon the application or petition of any person or persons ex parte, or whether made in proceedings where all the proper parties were made, are in all things confirmed and made valid so far as regards the parties to said actions and proceedings to the same extent as if all proper parties had originally been made in such actions or proceedings. (1869-70, c. 188; 1873-4, c. 126; Code, s. 1276; 1901, c. 576; Rev., s. 1037; C.S., s. 2583; 1933, c. 493.)

CASE NOTES

Upon the death of a trustee, the clerk of the superior court may appoint another under this section, who may proceed to execute the trust according to the terms of the deed. Wright v. Fort, 126 N.C. 615, 36 S.E. 113 (1900).

As to appointment of trustees upon the death of the last survivor of a board of trustees, see Thornton v. Harris, 140 N.C. 498, 53 S.E. 341 (1906).

Appointment upon Appeal to Superior Court. — Where the clerk of the superior court, for want of jurisdiction, dismisses a proceeding for the appointment of a trustee, on appeal the judge of the superior court may make such appointment. Roseman v. Roseman, 127 N.C. 494, 37 S.E. 518 (1900).

Section Inapplicable to Active Express Trust. — The provisions of this section may not be held applicable to an active express trust. Cheshire v. First Presbyterian Church, 221 N.C. 205, 19 S.E.2d 855 (1942).

Where a trustee is substituted in accordance with the method expressed in a deed of trust, no proceedings are necessary under this section; and a deed made by the substitute trustee passes the title to the purchaser at a foreclosure sale. Thompson v. State, 223 N.C. 340, 26 S.E.2d 902 (1943).

Where the terms as to foreclosure in a deed of trust on lands to secure borrowed money have been complied with as to the substitution of the trustee, the method expressed for this purpose is contractual and does not arise under this section requiring certain proceedings to be taken in the courts; and a deed made by a substituted trustee in accordance with the agreement passes the title to the purchaser at the foreclosure sale. Raleigh Real Estate & Trust Co. v. Padgett, 194 N.C. 727, 140 S.E. 714 (1927).

Succession of Administrator C.T.A. to Trusteeship. — Where an executor named in a will is thereby also appointed a trustee and renounces or dies, the administrator cum testamento annexo appointed in his stead succeeds to the trusteeship; and hence an appointment by the clerk of the court, under this section, of a trustee in place of the executor is void and clothes the appointee with no power. State ex rel. Clark v. Peebles, 120 N.C. 31, 26 S.E. 924 (1897), modified on rehearing, 122 N.C. 161, 29 S.E. 783 (1898).

Title of New Trustee. — Under this section, when a trustee dies, all of the parties in interest may join in a petition to the superior court to have a new trustee appointed, and upon the passing of the decree the substituted trustee holds the legal title upon the same trusts as the original trustee, so far as it is competent for the court to confer them. McAfee v. Green, 143 N.C. 411, 55 S.E. 828 (1906).

Meaning of "All Persons Interested". — "All persons interested," in a proceeding for the removal of a trustee and the appointment of a substitute trustee under this section, include only the trustor, the trustee or trustees, and all of the cestuis que trustent whose interests are secured by the deed of trust in which the trustee or trustees are sought to be removed and another substituted. Thompson v. State, 223 N.C. 340, 26 S.E.2d 902 (1943).

All "Persons Interested" Must Be Made Parties. — The appointment of a trustee in cases where the former trustee has died, removed from the county, or become incompetent cannot be done on an ex parte motion or petition. The application for such appointment is in the nature of a civil action, and all "persons interested" must be made parties and have full time and opportunity to set up their respective claims. Guion v. Melvin, 69 N.C. 242 (1873).

Personal Powers of Original Trustee Cannot Be Transferred. — Where the powers to be exercised by the original trustee are of a personal nature depending upon his discretion, such powers cannot be conferred upon the appointed trustee. Young v. Young, 97 N.C. 132, 2 S.E. 78 (1887).

Bond of Substituted Trustee Unnecessary. — It is not necessary in substituting one trustee for another in pursuance of this section to require a bond of the substituted trustee. Strayhorn v. Green, 92 N.C. 119 (1885).

Cited in New York Life Ins. Co. v. Lassiter, 209 N.C. 156, 183 S.E. 616 (1936); Nall v. McConnell, 211 N.C. 258, 190 S.E. 210 (1937); Cheshire v. First Presbyterian Church, 222 N.C. 280, 22 S.E.2d 566 (1942); Mast v. Blackburn, 248 N.C. 231, 102 S.E.2d 812 (1958).

§ 45-10. Substitution of trustees in mortgages and deeds of trust.

In addition to the rights and remedies now provided by law, the holders or owners of a majority in amount of the indebtedness, notes, bonds, or other instruments evidencing a promise or promises to pay money and secured by mortgages, deeds of trust, or other instruments conveying real property, or creating a lien thereon, may, in their discretion, substitute a trustee whether the trustee then named in the instrument is the original or a substituted trustee, by the execution of a written document properly recorded pursuant to Chapter 47 of the North Carolina General Statutes. (1931, c. 78, ss. 1, 2; 1935, c. 227; 1943, c. 543; 1967, c. 562, s. 2; 1975, c. 66; 1985, c. 320; c. 689, s. 14.)

Legal Periodicals. — As to the effect of the 1943 amendment, see 9 N.C.L. Rev. 402 (1931).

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Section Becomes Part of Contract. — Where a deed of trust is executed after the effective date of this section, the provisions of this section enter into and become a part of the contract, and a later statute providing a more economical and expeditious procedure for such substitution, so long as the rights of the parties, especially those of the cestui que trust, are not injuriously affected, does not violate the constitutional provisions. Bateman v. Sterrett, 201 N.C. 59, 159 S.E. 14 (1931).

A substituted trustee succeeds to all the rights, titles and duties of the original trustee, and has the power to foreclose the instrument according to its terms upon default. Pearce v. Watkins, 219 N.C. 636, 14 S.E.2d 653 (1941).

A sale of the property by the substituted trustee in accordance with the terms of the instrument is valid, the appointment of a substitute trustee not being a conveyance of any interest in land. North Carolina Mtg. Corp. v. Morgan, 208 N.C. 743, 182 S.E. 450 (1935).

Substitute Trustee May Execute Deed to Purchaser. — A trustee, duly substituted for the original trustee under the provisions of the deed of trust and the statute, may execute a deed to the purchaser at a sale duly conducted by the original trustee. Pendergrast v. Home Mtg. Co., 211 N.C. 126, 189 S.E. 118 (1937); Pearce v. Watkins, 219 N.C. 636, 14 S.E.2d 653 (1941).

Cited in New York Life Ins. Co. v. Lassiter, 209 N.C. 156, 183 S.E. 616 (1936); Thompson v. State, 223 N.C. 340, 26 S.E.2d 902 (1943); Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963); In re Sale of Land of Warrick, 1 N.C. App. 387, 161 S.E.2d 630 (1968).

§ 45-11. Appointment of substitute trustee upon application of subsequent or prior lienholders; effect of substitution.

When any person, firm, corporation, county, city or town holding a lien on real property upon which there is a subsequent or prior lien created by a mortgage, deed of trust or other instrument, the mortgagee or trustee therein named being dead or having otherwise become incompetent to act, files a written application with the clerk of the superior court of the county in which said property is located, setting forth the facts showing that said mortgagee or trustee is then dead or has become incompetent to act, the said clerk of the superior court, upon a proper finding of fact that said mortgagee or trustee is dead or has become incompetent to act, shall enter an order appointing some suitable and competent person, firm or corporation as substitute trustee upon whom service of process may be made, and said substitute trustee shall thereupon be vested with full power and authority to defend any action instituted to foreclose said property as fully as if he had been the original mortgagee or trustee named; but the substitute trustee shall have no power to cancel said mortgage or deed of trust without the joinder of the holder of the notes secured thereby. Said application shall not be made prior to the expiration of 30 days from the date the original mortgagee or trustee becomes incompetent to act. (1941, c. 115, s. 1; 1967, c. 562, s. 2.)

Legal Periodicals. — For comment on this section, see 19 N.C.L. Rev. 507 (1941).

§ 45-12: Repealed by Session Laws 1973, c. 1208.

§ 45-13: Repealed by Session Laws 1981, c. 599, s. 12.

§ 45-14. Acts of trustee prior to removal not invalidated.

If any such trustee who has been substituted as provided in G.S. 45-10 or in G.S. 45-11 shall have performed any functions as such trustee and shall thereafter be removed as provided in G.S. 45-10 to 45-17, such removal shall not invalidate or affect the validity of such acts insofar as any purchaser or third person shall be affected or interested, and any conveyances made by such trustee before removal if otherwise valid, shall be and remain valid and effectual to all intents and purposes, but if any trustee upon such hearing is declared to have been wrongfully removed, he shall have his right of action against the substituted trustee for any compensation that he would have received in case he had not been wrongfully removed from such trust. (1931, c. 78, s. 5; 1941, c. 115, s. 3.)

§ 45-15. Registration of substitution constructive notice.

The registration of such paper-writing designating a new trustee under G.S. 45-10 or under G.S. 45-11 shall be from and after registration, constructive notice to all persons, and no appeal or other proceedings shall be instituted to contest the same after one year from and after such registration. (1931, c. 78, s. 6; 1941, c. 115, s. 4.)

§ 45-16. Register of deeds to make marginal entry of substituted trustee.

Whenever any substituted trustee shall be appointed as provided in G.S. 45-10 through G.S. 45-17 and such designation of such substituted trustee shall have been registered, then it shall be the duty of the register of deeds to index the substitution of trustee as required by G.S. 161-14.1, indicating the place of registration of such appointment of a substituted trustee, and this shall be done as many times as a trustee may be substituted as provided for in G.S. 45-10 through G.S. 45-17. Whenever practical, the register of deeds may also make an appropriate notation on the margin of the registration of the mortgage, deed of trust, or other instrument securing the payment of money. It shall be competent for the holder of such deed of trust, or deeds of trust, mortgage or mortgages, wherein the same trustee is named, to execute one instrument applying to all such deeds of trust or mortgages, in the substitution of a trustee for any of the causes set forth in G.S. 45-10, and in said instrument to recite and name the mortgages and/or deeds of trust affected by giving the names of the grantors, the trustee and, if registered, the book and page of such registration. This may be done as many times as a trustee may be substituted as provided for in G.S. 45-10 through G.S. 45-17, and in which cases the register of deeds shall make, as to each recited instrument, mortgage or deed of trust, the notation provided for in this section. (1931, c. 78, s. 7; 1991, c. 114, s. 6; 1993, c. 425, s. 2.)

§ 45-17. Substitution made as often as justifiable.

The powers set out in G.S. 45-10 and in G.S. 45-11 may be exercised as often and as many times as the right to make such substitution may arise under the terms of such section, and all the privileges and requirements and rights to contest the same as set out in G.S. 45-10 to 45-17 shall apply to each deed of trust or mortgage and to each substitution. (1931, c. 78, s. 8; 1941, c. 115, s. 5.)

§ 45-18. Validation of certain acts of substituted trustees.

Whenever before January 1, 1979, a trustee has been substituted in a deed of trust in the manner provided by G.S. 45-10 to 45-17, but the instrument executed by the holder and/or owners of all or a majority in amount of the indebtedness, notes, bonds, or other instruments secured by said deed of trust, has not been registered as provided by said sections until after the substitute trustee has exercised some or all of the powers conferred by said deed of trust upon the trustee therein, including the advertising of the property conveyed by said deed of trust for sale, the sale thereof, and the execution of a deed by such substituted trustee to the purchaser at such sale, all such acts of said substituted trustee shall be deemed valid and effective in the same manner and to the same extent as if said instrument substituting said trustee, had been registered prior to the performance by said substituted trustee of any one or more of said acts, or other acts authorized by such deed of trust. (1939, c. 13; 1963, c. 241; 1967, c. 945; 1969, c. 477; 1971, c. 57; 1973, c. 20; 1979, c. 580.)

§ 45-19. Mortgage to guardian; powers pass to succeeding guardian.

When a guardian to whom a mortgage has been executed dies or is removed or resigns before the payment of the debt secured in such mortgage, all the rights, powers and duties of such mortgagee shall devolve upon the succeeding guardian. (1905, c. 433; Rev., s. 1034; C.S., s. 2584.)

§ 45-20. Sales by mortgagees and trustees confirmed.

All sales of real property made prior to February 10, 1905, by mortgagees and trustees under powers of sale contained in any mortgage or deed of trust in compliance with the powers, terms, conditions and advertisement set forth and required in any such mortgage or deed of trust, are hereby in all respects ratified and confirmed. (Ex. Sess. 1920, c. 27; C.S., s. 2584(a).)

§ 45-20.1. Validation of trustees' deeds where seals omitted.

All deeds executed prior to January 1, 1991, by any trustee or substitute trustee in the exercise of the power of sale vested in him under any deed, deed of trust, mortgage, will, or other instrument in which the trustee or substitute trustee has omitted to affix his seal after his signature are validated. (1943, c. 171; 1981, c. 183, s. 1; 1983, c. 398, s. 1; 1985, c. 70, s. 1; 1987, c. 277, s. 1; 1989, c. 390, s. 1; 1991, c. 489, s. 1.)

§ 45-20.2: Repealed by Session Laws 1981, c. 183, s. 2.

Cross References. — For present section incorporating the provisions of the repealed section, see G.S. 45-20.1.

§ 45-20.3. Validation of deeds where seal omitted on power of attorney.

All deeds and other conveyances executed prior to January 1, 1991, by any attorney-in-fact in the exercise of a power of attorney are valid even though the signature of the principal was not affixed under seal on the instrument creating the power of attorney. (1991, c. 489, s. 1.1.)

§ 45-21. Validation of appointment of and conveyances to corporations as trustees.

In all deeds of trust made prior to March 15, 1941, wherein property has been conveyed to corporations as trustees to secure indebtedness, the appointment of said corporations as trustees, the conveyances to said corporate trustees, and the action taken under the powers of such deeds of trust by said corporate trustees are hereby confirmed and validated to the same extent as if such corporate trustees had been individual trustees. (1941, c. 245, s. 1.)

Legal Periodicals. — For comment on this section, see 19 N.C.L. Rev. 507 (1941).

CASE NOTES

Cited in Cooper v. Smith, 24 Bankr. 19 (Bankr. W.D.N.C. 1982).

ARTICLE 2A.

Sales Under Power of Sale.

Part 1. General Provisions.

§ 45-21.1. Definitions; construction.

(a) The following definitions apply in this Article:

(1) "Resale" means a resale of real property or a resale of any leasehold interest created by a lease of real property held pursuant to G.S. 45-21.30.

(2) "Sale" means a sale of real property or a sale of any leasehold interest created by a lease of real property pursuant to (i) an express power of sale contained in a mortgage, deed of trust, leasehold mortgage, or leasehold deed of trust or (ii) a "power of sale", under this Article, authorized by other statutory provisions.

(b) The following constructions apply in this Article:

(1) The terms "mortgage" or "deed of trust" include leasehold mortgages or leasehold deeds of trust.

(2) The terms "mortgagee" or "trustee" include any person or entity exercising a power of sale pursuant to this Article.

(3) The terms "real property" or "property" include any leasehold interest created by a lease of real property. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1991, c. 255, s. 1; 1993, c. 305, s. 1.)

Cross References. — As to judicial sales, see G.S. 1-339.1 through 1-339.40. As to execution sales, see G.S. 1-339.41 through 1-339.71.

North Carolina Home Protection Pilot Program and Loan Fund. — Session Laws 2007-323, ss. 22.1(a)-(f), provide for continuation and expansion of the North Carolina Home Protection Pilot Program. See note at G.S. 122A-1. For previous similar provisions, see Session Laws 2005-276, ss. 20.2(a)-(f).

Legal Periodicals. — For discussion of this Article, see 27 N.C.L. Rev. 479 (1949).

For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

CASE NOTES

Editor's Note. *— Some of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Two methods of foreclosure were possible in North Carolina: Foreclosure by action and foreclosure by power of sale. Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

This Article and §§ 1-339.1 to 1-339.40 Provide Exclusive Means of Foreclosure. — Foreclosure may be by judicial sale pursuant to G.S. 1-339.1 through 1-339.40, or, if expressly provided in the deed or mortgage, by power of sale under this Article. These statutes provide the exclusive means for foreclosure in North Carolina, and it was error for the trial court to provide for foreclosure in any other manner. Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 297 (1984).

Foreclosure pursuant to a power of sale is strictly regulated by this Article, which requires a hearing before the clerk of superior court to determine four issues. If the clerk determines the existence of each item, the clerk then authorizes the trustee to proceed with the sale pursuant to the power of sale contained in the mortgage instrument itself. This procedure enables the trustee or mortgagee to conduct the foreclosure sale with a level of judicial involvement somewhat less than that required in a foreclosure by action. If the mortgage contains a power of sale, the mortgagee or trustee may elect to proceed under this Article or may choose to proceed under foreclosure by action. Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

This Article is not pursuant to judicial action; the article does not affect any right to foreclosure by action in court, and is not applicable to any such action. United Carolina Bank v. Tucker, 99 N.C. App. 95, 392 S.E.2d 410 (1990).

Proceedings Under Article Are Special Proceedings. — Since rights sought to be enforced under this Article are instituted by filing notice instead of a complaint and summons and are prosecuted without regular pleadings, they are properly characterized as "special proceedings." Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

Order Construing Validity of Debt and Right to Foreclose May Be Res Judicata. — An order entered by the clerk of superior court construing the validity of the debt and the trustee's right to foreclose, pursuant to this Article may be res judicata as to a subsequent action based on the issues decided in the clerk's order. Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

Foreclosure by action requires formal

judicial proceedings initiated by summons and complaint in the county where the property is located and culminating in a judicial sale of the foreclosed property if the mortgagee prevails. Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

This Article does not apply to or prevent bringing of foreclosure by action. However, when a mortgagee or trustee elects to proceed under G.S. 45-21.1 et seq., issues decided thereunder as to the validity of the debt and the trustee's right to foreclose are res judicata and cannot be relitigated in an action for strict judicial foreclosure. Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

Requirement of Resale After Lifting of Automatic Stay. — If a bankruptcy petition is filed (1) after the notice and hearing provided for in G.S. 45-21.16 has been completed and (2) after the clerk of superior court has authorized the foreclosure and (3) prior to the expiration of the upset bid period, then if the automatic stay of 11 U.S.C.S. § 362 is subsequently lifted with respect to the foreclosure, the foreclosing trustee need not comply with the notice and hearing procedure again, but, pursuant to G.S. 45-21.22(c), may proceed to readvertise the property and sell it in accordance with G.S. 45-21.1 and G.S. 45-21.17A; thus, where the debtors filed for an automatic stay after a mortgagee had started foreclosure proceedings but before the 10 day upset period, once the stay was annulled by the bankruptcy judge, the foreclosing trustee was required to pursue foreclosure again by readvertising and selling the property in accordance with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A. Beneficial Mortg. Co. of N.C., Inc. v. Barrington & Jones Law Firm, P.A., 164 N.C. App. 41, 595 S.E.2d 705, 2004 N.C. App. LEXIS 727 (2004).

No Redemption Period for Junior Lien Holders. — Because North Carolina has no redemption statute, in the sense that a debtor or junior lien holder has no special right to repurchase property from a buyer after the completion of a foreclosure sale, and instead deals with the power of sale foreclosures within 10 days of a public auction pursuant to G.S. 45-21.27, the government had to rely on the language in 26 U.S.C.S. § 7526(d)(1) which stated that the Secretary could redeem within 120 days from the date of sale, and not the language referring to redemption under state law. Ellis v. United States, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 16090 (M.D.N.C. July 22, 2005).

Applied in City of Durham v. Keen, 40 N.C. App. 652, 253 S.E.2d 585 (1979).

Cited in In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

§ 45-21.2. Article not applicable to foreclosure by court action.

This Article does not affect any right to foreclosure by action in court, and is not applicable to any such action. (1949, c. 720, s. 1.)

CASE NOTES

Applied in Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985).

Cited in Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965); Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555 (1986).

§ 45-21.3: Repealed by Session Laws 1993, c. 305, s. 2, effective October 1, 1993, and applicable to instruments recorded prior to, on, or after that date.

§ 45-21.4. Place of sale of real property.

(a) Every sale of real property shall be held in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A sale of a single tract of real property situated in two or more counties may be held in any one of the counties in which any part of the tract is situated. As used in this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons, or whether it may have been subdivided into other units or lots, or whether it is sold as a whole or in parts.

(c) When a mortgage or deed of trust with power of sale of real property designates the place of sale within the county, the sale shall be held at the place so designated.

(d) When a mortgage or deed of trust with power of sale of real property confers upon the mortgagee or trustee the right to designate the place of sale, the sale shall be held at the place designated by the notice of sale, which place shall be either on the premises to be sold or as follows:

(1) Property situated wholly within a single county shall be sold at the courthouse door of the county in which the land is situated.

(2) A single tract of property situated in two or more counties may be sold at the courthouse door of any one of the counties in which some part of the real property is situated.

(e) When a mortgage or deed of trust with power of sale of real property does not designate, or confer upon the mortgagee or trustee the right to designate, the place of sale, or when it designates as the place of sale some county in which no part of the property is situated, such real property shall be sold as follows:

(1) Property situated wholly within a single county shall be sold at the courthouse door of the county in which the land is situated.

(2) A single tract of property situated in two or more counties may be sold at the courthouse door of any one of the counties in which some part of the real property is situated. (1949, c. 720, s. 1; 1975, c. 57, s. 1.)

CASE NOTES

Cited in Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

§§ **45-21.5, 45-21.6:** Repealed by Session Laws 1967, c. 562, s. 2.

§ 45-21.7. Sale of separate tracts in different counties.

(a) When the property to be sold consists of separate tracts of real property situated in different counties, there shall be a separate advertisement, sale and report of sale of the property in each county. The report of sale for the property in any one county shall be filed with the clerk of the superior court of the county in which such property is situated. The sale of each such tract shall be subject to separate upset bids. The clerk of the superior court of the county where the property is situated has jurisdiction with respect to upset bids of property situated within his county. To the extent the clerk deems necessary, the sale of each separate tract within his county, with respect to which an upset bid is received, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(b) The exercise of the power of sale with respect to a separate tract of property in one county does not extinguish or otherwise affect the right to exercise the power of sale with respect to tracts of property in another county to satisfy the obligation secured by the mortgage or deed of trust. (1949, c. 720, s. 1; 1993, c. 305, s. 3.)

§ 45-21.8. Sale as a whole or in parts.

(a) When the instrument pursuant to which a sale is to be held contains provisions with respect to whether the property therein described is to be sold as a whole or in parts, the terms of the instrument shall be complied with.

(b) When the instrument contains no provisions with respect to whether the property therein described is to be sold as a whole or in parts, the person exercising the power of sale may, in his discretion, subject to the provisions of G.S. 45-21.9, sell the property as a whole or in such parts or parcels thereof as are separately described in the instrument, or he may offer the property for sale by each method and sell the property by the method which produces the highest price.

(b1) When real property is sold in parts, the sale of any such part is subject to a separate upset bid; and, to the extent the clerk of superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(c) This section does not affect the equitable principle of marshaling assets. (1949, c. 720, s. 1; 1993, c. 305, s. 4.)

CASE NOTES

Cited in Pannill Knitting Co. v. Golden Corral Corp., 89 N.C. App. 675, 366 S.E.2d 891 (1988); In re Allan & Warmbold Constr. Co., 88 N.C. App. 693, 364 S.E.2d 723 (1988).

§ 45-21.9. Amount to be sold when property sold in parts; sale of remainder if necessary.

(a) When a person exercising a power of sale sells property in parts pursuant to G.S. 45-21.8 he shall sell as many of such separately described units and parcels as in his judgment seems necessary to satisfy the obligation secured by the instrument pursuant to which the sale is being made, and the costs and expenses of the sale.

(b) If the proceeds of a sale of only a part of the property are insufficient to satisfy the obligation secured by the instrument pursuant to which the sale is made and the costs and expenses of the sale, the person authorized to exercise the power of sale may readvertise the unsold property and may sell as many additional units or parcels thereof as in his judgment seems necessary to satisfy the remainder of the secured obligation and the costs and expenses of the sale. As to any such sale, it shall not be necessary to comply with the provisions of G.S. 45-21.16 but the requirements of G.S. 45-21.17 relating to notices of sale shall be complied with.

(c) When the entire obligation has been satisfied by a sale of only a part of the property with respect to which a power of sale exists, the lien on the part of the property not so sold is discharged.

(d) The fact that more property is sold than is necessary to satisfy the obligation secured by the instrument pursuant to which the power of sale is exercised does not affect the validity of the title of any purchaser of property at any such sale. (1949, c. 720, s. 1; 1975, c. 492, s. 15.)

CASE NOTES

Cited in Pannill Knitting Co. v. Golden Corral Corp., 89 N.C. App. 675, 366 S.E.2d 891 (1988).

§ 45-21.9A. Simultaneous foreclosure of two or more instruments.

When two or more mortgages or deeds of trust held by the same person are secured in whole or in part by the same property, and there are no intervening liens, except for ad valorem taxes, between such mortgages or deeds of trust, the obligations secured by such mortgages or deeds of trust may be combined and the property sold once to satisfy the combined obligations if (i) powers of sale are provided in all such instruments; (ii) there is no provision in any such instrument which would not permit such a procedure; (iii) all the terms of all such instruments requiring compliance by the lender in connection with foreclosure sales are complied with; and (iv) all requirements of this Chapter governing power of sale foreclosures are met with respect to all such instruments. The proceeds of any sale shall be applied as provided in this Chapter. As between the combined obligations being foreclosed, proceeds shall be applied in the order of priority of the instruments securing them, and any deficiencies shall be determined accordingly. (1985, c. 515, s. 1; 1993, c. 305, s. 5.)

§ 45-21.10. Requirement of cash deposit at sale.

(a) If a mortgage or deed of trust contains provisions with respect to a cash deposit at the sale, the terms of the instrument shall be complied with.

(b) If the instrument contains no provision with respect to a cash deposit at the sale, the mortgagee or trustee may require the highest bidder immediately to make a cash deposit not to exceed the greater of five percent (5%) of the amount of the bid or seven hundred fifty dollars ($750.00).

(c) If the highest bidder fails to make the required deposit, the person holding the sale may at the same time and place immediately reoffer the property for sale. (1949, c. 720, s. 1; 1993, c. 305, s. 6.)

CASE NOTES

Trustee's Discretion as to Whether Cash Deposit Required. — A trustee's advertisement for a foreclosure sale which states that the "highest bidder will be required to make a cash deposit" does not eliminate the trustee's exercise of discretion as to whether he will require the cash deposit when the terms of the deed of trust do not require a cash deposit. White v. Lemon Tree Inn, 35 N.C. App. 117, 239 S.E.2d 878 (1978).

§ 45-21.11. Application of statute of limitations to serial notes.

When a series of notes maturing at different times is secured by a mortgage or deed of trust and the exercise of the power of sale for the satisfaction of one or more of the notes is barred by the statute of limitations, that fact does not bar the exercise of the power of sale for the satisfaction of indebtedness represented by other notes of the series not so barred. (1949, c. 720, s. 1; 1967, c. 562, s. 2.)

§ 45-21.12. Power of sale barred when foreclosure barred.

(a) Except as provided in subsection (b), no person shall exercise any power of sale contained in any mortgage or deed of trust, or provided by statute, when an action to foreclose the mortgage or deed of trust, is barred by the statute of limitations.

(b) If a sale pursuant to a power of sale contained in a mortgage or deed of trust, or provided by statute, is commenced within the time allowed by the statute of limitations to foreclose such mortgage or deed of trust, the sale may be completed although such completion is effected after the time when commencement of an action to foreclose would be barred by the statute. For the purpose of this section, a sale is commenced when the notice of hearing or the notice of sale is first filed, given, served, posted, or published, whichever occurs first, as provided by this Article or by the terms of the instrument pursuant to which the power of sale is being exercised. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1969, c. 984, s. 1; 1977, c. 359, s. 1.)

Cross References. — As to statute of limitations on foreclosure, see G.S. 1-47(3).

Legal Periodicals. — For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under repealed G.S. 45-26, which was somewhat similar to this section.*

Former § 45-26 was not a mere statute of limitation, and was not required to be pleaded by a party whose rights might be affected. It simply destroyed, by direct prohibition, the authority of any power of sale made in the mortgage contract or conveyance. Spain v. Hines, 214 N.C. 432, 200 S.E. 25 (1938). See also, 17 N.C.L. Rev. 448 (1939).

Construction Against Exercise of Power. — Where reasonable doubt existed as to the interpretation of former G.S. 45-26, it was required to be strictly construed against the exercise of the power of foreclosure and doubt would be resolved in favor of the holder of the equitable title. Spain v. Hines, 214 N.C. 432, 200 S.E. 25 (1938).

As to applicability of statute to contracts in existence at effective date, see Graves v. Howard, 159 N.C. 594, 75 S.E. 998 (1912).

Exercise of Power in Mortgage Subject to 10-Year Limitation. — While formerly there was no bar to the execution of a power of sale contained in a mortgage of lands, by former G.S. 45-26 mortgages then executed were made subject to the 10-year statute. Jenkins v. Griffin, 175 N.C. 184, 95 S.E. 166 (1918).

The holding in Cone v. Hyatt, 132 N.C. 810, 44 S.E. 678 (1903) that the power of sale in a deed of trust or mortgage was not barred by the statute of limitation, though an action for foreclosure thereon was barred, was changed by former G.S. 45-26. See Lester Piano Co. v. Loven, 207 N.C. 96, 176 S.E. 290 (1934).

The provisions of G.S. 1-47(3), relating to the bar of actions to foreclose mortgages of real property, were required to be read into former G.S. 45-26; and it appears that a power of sale contained in a mortgage becomes inoperative and unenforceable when not exercised within 10 years after the forfeiture of the mortgage, or after the power of sale becomes absolute, or within 10 years after the last payment on the same "where the mortgagor or grantor has been in possession of the property." Ownbey v. Parkway Properties, Inc., 222 N.C. 54, 21 S.E.2d 900 (1942).

Ten-Year Period Runs from Maturity of Note or Notes Secured. — The right to exercise any power of sale contained in a deed of trust is barred after 10 years from the maturity of any note or notes secured thereby, where no payments have been made thereon extending the statute. Lowe v. Jackson, 263 N.C. 634, 140 S.E.2d 1 (1965).

Or from Last Payment Thereon. — The power referred to in this section must be exercised within the 10-year period following the maturity of the note, or from the last payment thereon. Lowe v. Jackson, 263 N.C. 634, 140 S.E.2d 1 (1965).

Statute Does Not Commence Running until Debt Is Due. — The statute of limitations does not begin to run against the principal of a mortgage of lands until it is due, and the power of sale contained in the mortgage may be exercised within 10 years after the maturity of the principal. Scott v. Blades Lumber Co., 144 N.C. 44, 56 S.E. 548 (1907).

As to limitation when power of sale for default of interest is optional, see Scott v. Blades Lumber Co., 144 N.C. 44, 56 S.E. 548 (1907).

As to notes in series, with acceleration clause, see E.H. & J.A. Meadows Co. v. Bryan, 195 N.C. 398, 142 S.E. 487 (1928). See also, § 45-21.11.

Restraint of Foreclosure. — Where notes secured by a mortgage were barred by the statute of limitations, and the power of sale contained in the instrument was barred by the lapse of over 10 years from the date of the last payment on the notes, the trustee's contention that the mortgagor would have to pay the amount of the notes in order to be entitled to the equitable relief of restraining the foreclosure, on the principle that he who seeks equity must do equity, was unavailing. Serls v. Gibbs, 205 N.C. 246, 171 S.E. 56 (1933).

Foreclosure Deed Held Voidable. — A foreclosure deed executed pursuant to a sale held after the power of sale was barred by former G.S. 45-26 was held voidable and not void. Edwards v. Hair, 215 N.C. 662, 2 S.E.2d 859 (1939).

Burden of Proof on Attack of Foreclosure Deed. — An instruction that the burden was on defendant, the purchaser at the sale, to prove that the power of sale was not barred by former G.S. 45-26 at the time of foreclosure, was error, the burden being upon plaintiff to prove that the foreclosure deed, attacked by her, was inoperative. Edwards v. Hair, 215 N.C. 662, 2 S.E.2d 859 (1939).

Applied in In re Gibbs, 205 N.C. 312, 171 S.E. 55 (1933).

Cited in Demai v. Tart, 221 N.C. 106, 19 S.E.2d 130 (1942); Moore v. Owens, 255 N.C. 336, 121 S.E.2d 540 (1961); In re Lake Townsend Aviation, Inc., 87 N.C. App. 481, 361 S.E.2d 409 (1987).

§ 45-21.13: Repealed by Session Laws 1967, c. 562, s. 2.

§ 45-21.14. Clerk's authority to compel report or accounting; contempt proceeding.

Whenever any person fails to file any report or account, as provided by this Article, or files an incorrect or incomplete report or account, the clerk of the superior court having jurisdiction on his own motion or the motion of any interested party, may issue an order directing such person to file a correct and complete report or account within 20 days after service of the order on him. If such person fails to comply with the order, the clerk may issue an attachment against him for contempt, and may commit him to jail until he files such correct and complete report or account. (1949, c. 720, s. 1.)

Cross References. — As to preliminary report of sale of real property, see G.S. 45-21.26.

CASE NOTES

Cited in Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

§ 45-21.15. Trustee's fees.

(a) When a sale has been held, the trustee is entitled to such compensation, if any, as is stipulated in the instrument.

(b) When no sale has actually been held, compensation for a trustee's services is determined as follows:

(1) If no compensation for the trustee's services in holding a sale is provided for in the instrument, the trustee is not entitled to any compensation;

(2) If compensation is specifically provided for the trustee's services when no sale is actually held, the trustee is entitled to such compensation;

(3) If the instrument provides for compensation for the trustee's services in actually holding a sale, but does not provide compensation for the trustee's services when no sale is actually held, the trustee is entitled to compensation as follows: (i) one-fourth of the completed sale compensation before the trustee files the notice of hearing; (ii) one-half after the filing of the notice of hearing; and (iii) three-fourths after the hearing.

(4) Repealed by Session Laws 1993, c. 305, s. 7. (1949, c. 720, s. 1; 1993, c. 305, s. 7.)

CASE NOTES

Amount Held Proper. — Under the express provisions of the deed of trust instrument, where foreclosure was "commenced, but not completed," trustee was entitled to a "partial commission" computed as five percent of the outstanding indebtedness or the minimum stated in the deed of trust (whichever was greater), and where mortgagor exercised his right of redemption, five percent of that amount was the proper trustee's commission to be paid. In re Newcomb, 112 N.C. App. 67, 434 S.E.2d 648 (1993).

Cited in In re Deed of Trust, 118 N.C. App. 458, 455 S.E.2d 676 (1995).

Part 2. Procedure for Sale.

§ 45-21.16. Notice and hearing.

(a) The mortgagee or trustee granted a power of sale under a mortgage or deed of trust who seeks to exercise such power of sale shall file with the clerk of court a notice of hearing in accordance with the terms of this section. After the notice of hearing is filed, the notice of hearing shall be served upon each party entitled to notice under this section. The notice shall specify a time and place for the hearing before the clerk of court and shall be served not less than 10 days prior to the date of such hearing. The notice shall be served and proof of service shall be made in any manner provided by the Rules of Civil Procedure for service of summons, including service by registered mail or certified mail, return receipt requested. However, in those instances that publication would be authorized, service may be made by posting a notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of the hearing, and if service upon a party cannot be effected after a reasonable and diligent effort in a manner authorized above, notice to such party may be given by posting the notice in a conspicuous place and manner upon the property not less than 20 days prior to the date of hearing. Service by posting may run concurrently with any other effort to effect service. The notice shall be posted by the sheriff. In the event that the service is obtained by posting, an affidavit shall be filed with the clerk of court showing the circumstances warranting the use of service by posting.

If any party is not served or is not timely served prior to the date of the hearing, the clerk shall order the hearing continued to a date and time certain, not less than 10 days from the date scheduled for the original hearing. All notices already timely served remain effective. The mortgagee or trustee shall satisfy the notice requirement of this section with respect to those parties not served or not timely served with respect to the original hearing. Any party timely served, who has not received actual notice of the date to which the hearing has been continued, shall be sent the order of continuance by first-class mail at his last known address.

(b) Notice of hearing shall be served in a manner authorized in subsection (a) upon:

(1) Any person to whom the security interest instrument itself directs notice to be sent in case of default.

(2) Any person obligated to repay the indebtedness against whom the holder thereof intends to assert liability therefor, and any such person not notified shall not be liable for any deficiency remaining after the sale.

(3) Every record owner of the real estate whose interest is of record in the county where the real property is located at the time the notice of hearing is filed in that county. The term "record owner" means any person owning a present or future interest in the real property, which interest is of record at the time that the notice of hearing is filed and would be affected by the foreclosure proceeding, but does not mean or include the trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, judgment, mechanic's or materialman's lien, or other lien or security interest in the real property. Tenants in possession under unrecorded leases or rental agreements shall not be considered record owners.

G.S. 45-21.16 (c)(5a), (c)(7), and (c1) are set out twice. See note.

(c) Notice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice aware of the following:

(1) The particular real estate security interest being foreclosed, with such a description as is necessary to identify the real property, including the date, original amount, original holder, and book and page of the security instrument.

(2) The name and address of the holder of the security instrument at the time that the notice of hearing is filed.

(3) The nature of the default claimed.

(4) The fact, if such be the case, that the secured creditor has accelerated the maturity of the debt.

(5) Any right of the debtor to pay the indebtedness or cure the default if such is permitted.

(5a) **(Effective until April 1, 2008)** The holder has confirmed in writing to the person giving the notice, or if the holder is giving the notice, the holder shall confirm in the notice, that, within 30 days of the date of the notice, the debtor was sent by first-class mail at the debtor's last known address a written statement of the amount of principal and interest that the holder claims in good faith is owed as of the date of the written statement, a daily interest charge based on the contract rate as of the date of the statement, and the amount of other expenses the holder contends it is owed as of the date of the statement.

(5a) **(Effective April 1, 2008)** The holder has confirmed in writing to the person giving the notice, or if the holder is giving the notice, the holder shall confirm in the notice, that, within 30 days of the date of the notice, the debtor was sent by first-class mail at the debtor's last known address a detailed written statement of the amount of principal, interest, and any other fees, expenses, and disbursements that the holder in good faith is claiming to be due as of the date of the written statement, together with a daily interest charge based on the contract rate as of the date of the written statement. Nothing herein is intended to authorize any fees, charges, or methods of charging interest which is not otherwise permitted under contract between the parties and other applicable law.

(5b) **(Effective April 1, 2008)** To the knowledge of the holder, or the servicer acting on the holder's behalf, whether in the two years preceding the date of the statement any requests for information have been made by the borrower to the servicer pursuant to G.S. 45-93 and, if so, whether such requests have been complied with. If the time limits set forth in G.S. 45-93 for complying with any such requests for information have not yet expired as of the date of the notice, the notice shall so state. If the holder is not giving the notice, the holder shall confirm in writing to the person giving the notice the information required by this subsection to be stated in the notice.

(6) Repealed by Session Laws 1977, c. 359, s. 7.

(7) **(Effective until April 1, 2008)** The right of the debtor (or other party served) to appear before the clerk of court at a time and on a date specified, at which appearance he shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held. The notice shall contain a statement that if the debtor does not intend to contest the creditor's allegations of default, the debtor does not have to appear at the hearing and that his failure to attend the hearing will not affect his right to pay the indebtedness and thereby prevent the proposed sale, or to attend the actual sale, should he elect to do so.

G.S. 45-21.16 (c)(5a), (c)(7), and (c1) are set out twice. See note.

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(7) **(Effective April 1, 2008)** The right of the debtor (or other party served) to appear before the clerk of court at a time and on a date specified, at which appearance he shall be afforded the opportunity to show cause as to why the foreclosure should not be allowed to be held. The notice shall contain all of the following:

a. A statement that if the debtor does not intend to contest the creditor's allegations of default, the debtor does not have to appear at the hearing and that the debtor's failure to attend the hearing will not affect the debtor's right to pay the indebtedness and thereby prevent the proposed sale, or to attend the actual sale, should the debtor elect to do so.

b. A statement that the trustee, or substitute trustee, is a neutral party and, while holding that position in the foreclosure proceeding, may not advocate for the secured creditor or for the debtor in the foreclosure proceeding.

c. A statement that the debtor has the right to apply to a judge of the superior court pursuant to G.S. 45-21.34 to enjoin the sale, upon any legal or equitable ground that the court may deem sufficient prior to the time that the rights of the parties to the sale or resale become fixed, provided that the debtor complies with the requirements of G.S. 45-21.34.

d. A statement that the debtor has the right to appear at the hearing and contest the evidence that the clerk is to consider under G.S. 45-21.16(d), and that to authorize the foreclosure the clerk must find the existence of: (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to notice.

e. A statement that if the debtor fails to appear at the hearing, the trustee will ask the clerk for an order to sell the real property being foreclosed.

f. A statement that the debtor has the right to seek the advice of an attorney and that free legal services may be available to the debtor by contacting Legal Aid of North Carolina or other legal services organizations.

(8) That if the foreclosure sale is consummated, the purchaser will be entitled to possession of the real estate as of the date of delivery of his deed, and that the debtor, if still in possession, can then be evicted.

(8a) The name, address, and telephone number of the trustee or mortgagee.

(9) That the debtor should keep the trustee or mortgagee notified in writing of his address so that he can be mailed copies of the notice of foreclosure setting forth the terms under which the sale will be held, and notice of any postponements or resales.

(10) If the notice of hearing is intended to serve also as a notice of sale, such additional information as is set forth in G.S. 45-21.16A.

(11) That the hearing may be held on a date later than that stated in the notice and that the party will be notified of any change in the hearing date.

(c1) **(Effective until April 1, 2008)** The person giving the notice of hearing, if other than the holder, may rely on the written confirmation received from the holder under subdivision (c)(5a) of this section and is not liable for inaccuracies in the written confirmation. Any dispute concerning the mailing or accuracy of the written statement described in subdivision (c)(5a) of this section shall not be considered in a hearing under this section.

G.S. 45-21.16 (c)(5a), (c)(7), and (c1) are set out twice. See note.

(c1) **(Effective April 1, 2008)** The person giving the notice of hearing, if other than the holder, may rely on the written confirmation received from the holder under subdivisions (c)(5a) and (c)(5b) of this section and is not liable for inaccuracies in the written confirmation.

(d) The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. In the event that the property to be sold consists of separate tracts situated in different counties or a single tract in more than one county, only one hearing shall be necessary. However, prior to that hearing, the mortgagee or trustee shall file the notice of hearing in any other county where any portion of the property to be sold is located. Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b), then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article. A certified copy of any authorization or order by the clerk shall be filed in any other county where any portion of the property to be sold is located before the mortgagee or trustee may proceed to advertise and sell any property located in that county. In the event that sales are to be held in more than one county, the provisions of G.S. 45-21.7 apply.

(d1) The act of the clerk in so finding or refusing to so find is a judicial act and may be appealed to the judge of the district or superior court having jurisdiction at any time within 10 days after said act. Appeals from said act of the clerk shall be heard de novo. If an appeal is taken from the clerk's findings, the appealing party shall post a bond with sufficient surety as the clerk deems adequate to protect the opposing party from any probable loss by reason of appeal; and upon posting of the bond the clerk shall stay the foreclosure pending appeal.

(e) In the event of an appeal, either party may demand that the matter be heard at the next succeeding term of the court to which the appeal is taken which convenes 10 or more days after the hearing before the clerk, and such hearing shall take precedence over the trial of other cases except cases of exceptions to homesteads and appeals in summary ejectment actions, provided the presiding judge may in his discretion postpone such hearing if the rights of the parties or the public in any other pending case require that such case be heard first. In those counties where no session of court is scheduled within 30 days from the date of hearing before the clerk, either party may petition any regular or special superior court judge resident in a district or assigned to hold courts in a district where any part of the real estate is located, or the chief district judge of a district where any part of the real estate is located, who shall be authorized to hear the appeal. A certified copy of any order entered as a result of the appeal shall be filed in all counties where the notice of hearing has been filed.

(f) Waiver of the right to notice and hearing provided herein shall not be permitted except as set forth herein. In any case in which the original principal amount of indebtedness secured was one hundred thousand dollars ($100,000), or more, any person entitled to notice and hearing may waive after default the right to notice and hearing by written instrument signed and duly acknowledged by such party. In all other cases, at any time subsequent to service of the notice of hearing provided above, the clerk, upon the request of the mortgagee or trustee, shall mail to all other parties entitled to notice of such hearing a form by which such parties may waive their rights to the hearing. Upon the return of the forms to the clerk bearing the signatures of each such party and that of a witness to each such party's signature (which witness shall not be an agent or employee of the mortgagee or trustee), the clerk in his discretion may dispense with the necessity of a hearing and proceed to issue the order authorizing sale as set forth above.

(g) Any notice, order, or other papers required by this Article to be filed in the office of the clerk of superior court shall be filed in the same manner as a special proceeding. (1975, c. 492, s. 2; 1977, c. 359, ss. 2-10; 1983, c. 335, s. 1; 1983 (Reg. Sess., 1984), c. 1108, ss. 1, 2; 1993, c. 305, s. 8; 1995, c. 509, s. 135.1(g); 1999-137, ss. 1, 2; 2007-351, s. 4.)

Subdivisions (c)(5a) and (7) and Subsection (c1) Set Out Twice. — The first version of subdivisions (c)(5a) and (7) and subsection (c1) set out above are effective until April 1, 2008. The second version of subdivisions (c)(5a) and (7) and subsection (c1) set out above are effective April 1, 2008.

Editor's Note. — The Rules of Civil Procedure, referred to in subsection (a), are codified at G.S. 1A-1.

Session Laws 2005-276, s. 1.2, provides: "This act shall be known as the 'Current Operations and Capital Improvements Appropriations Act of 2005'."

Session Laws 2005-276, s. 20.2(c), provides: "Notwithstanding Chapters 23, 24, and 45 of the General Statutes or any other provision of law, upon the proper filing of an application for loan assistance by a mortgagor under this section, a mortgagee shall not do the following:

"(1) Accelerate the maturity of any mortgage obligation covered under this section.

"(2) Commence or continue any legal action, including mortgage foreclosure pursuant to Chapter 45 of the General Statutes, to recover the mortgage obligation.

"(3) Take possession of any security of the mortgagor for the mortgage obligation.

"(4) Procure or receive a deed in lieu of foreclosure.

"(5) Enter judgment by confession pursuant to a note accompanying a mortgage.

"(6) Proceed to enforce the mortgage obligation pursuant to applicable rules of civil procedure for a period of 120 days following the date of the mortgagor's properly filed application.

"The provisions of this section shall not apply if the mortgagee receives notice from the Agency that the mortgagor's application has been denied.

"If a mortgagee acts as proscribed in subdivisions (1) through (6) of this subsection, a mortgagor shall be entitled to injunctive relief without the necessity of providing a bond. This relief shall be in addition to any defenses available under G.S. 45-21.16(d) and any other remedies at law or equity.

"Upon the Agency's receipt of a properly filed mortgagor's application for loan assistance, the Agency shall mail notice of the application to the mortgagor's mortgagee within five business days of the Agency's receipt of the application. The Agency shall also mail notice of the acceptance or denial of the mortgagor's application to the mortgagee within five days of the Agency's determination. Notice shall be deemed sufficient if sent to the last known address of the mortgagee."

Session Laws 2005-276, s. 46.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 2005-2007 fiscal biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 2005-2007 fiscal biennium."

Session Laws 2005-276, s. 46.5 is a severability clause.

Effect of Amendments. — Session Laws 2007-351, s. 4, effective April 1, 2008, rewrote subdivision (c)(5a); added subdivision (c)(5b); in subdivision (c)(7), rewrote the last sentence and added (c)(7)a. through f.; in subsection (c1), substituted "subdivisions (c)(5a) and (c)(5b)" for "subdivision (c)(5a)" in the first sentence and deleted the former last sentence which read: "Any dispute concerning the mailing or accuracy of the written statement described in subdivision (c)(5a) of this section shall not be considered in a hearing under this section."

Legal Periodicals. — For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

CASE NOTES

***Editor's Note.** — Many of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Legislative Intent. — This section was intended by the legislature to meet minimum due process requirements, not to engraft upon the procedure for foreclosure under a power of sale all the requirements of a formal civil action. In re Foreclosure of Deed of Trust, 46 N.C. App. 654, 266 S.E.2d 686 (1980).

The intent of the General Assembly in enacting the notice and hearing provisions of this section was not to alter the essentially contractual nature of the remedy of foreclosure under a power of sale, but rather to satisfy the minimum due process requirements of notice to interested parties and hearing prior to foreclosure and sale. In re Burgess, 47 N.C. App. 599, 267 S.E.2d 915 (1980).

Minimum Due Process Requirements. — The previous foreclosure statute was declared unconstitutional because it did not provide adequate notice of foreclosure and did not provide a foreclosure hearing, but this section was enacted to satisfy these minimum due process requirements. Fleet Nat'l Bank v. Raleigh Oaks Joint Venture, 117 N.C. App. 387, 451 S.E.2d 325 (1994).

Scope of Section. — Inasmuch as this section was the first legislation enacted which affected foreclosure proceedings after the decision in Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), which held the then existing procedures before the clerk unconstitutional, it is safe to assume that the legislature was responding to the due process requirements set out in that case. This section, therefore, would be concerned solely with procedures taking place before the clerk of court and appeals therefrom to the district or superior court, not with the more traditional and constitutionally permissible procedures for appeal from the district court or the superior court to the Court of Appeals. In re Simon, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

Guaranty Agreements. — By their terms, this section and G.S. 45-21.17 (the anti-deficiency statute) govern only the relationship between mortgagors and mortgagees, and are designed to protect interests in the property to be sold. Contract rights such as those in guaranty agreements do not fall within the coverage of those sections. Private third party guarantors of loans are not required by this section to give notice to those whose obligations they guarantee before seeking indemnity from them. Any notice requirement in such a situation is imposed by the contract between the parties, not by the antideficiency statute. Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992), aff'd sub nom. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

Veterans Administration Subrogation and Indemnification Rights. — When pursuing its subrogation rights, the Veterans Administration must stand in the shoes of the private lender and meet any applicable state law requirements for recovery, but indemnity is an independent right arising under federal law, and is unaffected by state law. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

The term "record owner" in this section was intended to refer to either the original mortgagor of the property or a present owner who has purchased property subject to a mortgage. Seashore Properties, Inc. v. East Fed. Sav. & Loan Ass'n, 47 N.C. App. 675, 267 S.E.2d 693 (1980).

The definition of "holder" in G.S. 25-1-201(20) is applicable to this section. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Subsection (d) of this section does not authorize redetermination of matters that have been finally adjudicated before the clerk. In re Williams, 88 N.C. App. 395, 363 S.E.2d 380 (1988).

Ownership is not indispensable to holdership. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Collateral Estoppel. — The trial court was not prevented by collateral estoppel from "hearing evidence concerning . . . whether the debtor had performed its obligations under the compromise and settlement agreement executed by the parties," where the bankruptcy court, while determining that the debtor was not in compliance with the plan of reorganization, had no jurisdiction over the foreclosure action, could not have granted a decree of foreclosure, and therefore did not litigate that issue. In re Azalea Garden Bd. & Care, Inc., 140 N.C. App. 45, 535 S.E.2d 388, 2000 N.C. App. LEXIS 1094 (2000).

Beneficiaries of Deed of Trust as Holders. — There was ample evidence that the beneficiaries of a deed of trust were holders of a valid debt where the notes secured by the deed of trust were payable to the beneficiaries on order, the notes were not endorsed, and the notes were in the possession of the original beneficiary-payees. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

The hearing provided for in this section was not intended to settle all matters in controversy between the parties; the appropriate means for invoking equity jurisdiction is an action pursuant to G.S. 45-21.34. Golf Vistas, Inc. v. Mortgage Investors, 39 N.C. App. 230, 249 S.E.2d 815 (1978).

The notice and hearing required by this section were designed to enable the mortgagor to utilize the injunctive relief already available in this section. The hearing was not intended to settle all matters in controversy between mortgagor and mortgagee, nor was it designed to provide a second procedure for invoking equitable relief. In re Watts, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

Issues to Be Determined by Clerk and on Hearing De Novo. — Under this section, there are only four issues before the clerk at a foreclosure hearing: the existence of a valid debt of which the party seeking to foreclose is the holder, the existence of default, the trustee's right to foreclose, and the sufficiency of notice to the record owners of the hearing. The clerk's findings are appealable to the superior court within 10 days for a hearing de novo, but the court's authority is likewise limited. In re Helms, 55 N.C. App. 68, 284 S.E.2d 553 (1981), cert. denied, 305 N.C. 300, 291 S.E.2d 149 (1982).

Upon appeal from an order of the clerk authorizing the trustee to proceed with sale, the judge is limited upon the hearing de novo to determining the same four issues resolved by the clerk. Those issues are: (1) the existence of a valid debt of which the party seeking to foreclose is the holder; (2) default; (3) the right to foreclose under the instrument; and (4) notice to those entitled to such. In re Foreclosure of Deed of Trust, 46 N.C. App. 654, 266 S.E.2d 686 (1980); In re Fortescue, 75 N.C. App. 127, 330 S.E.2d 219, cert. denied, Board of Comm'rs v. Micks, 118 N.C. 162, 24 S.E. 729 (1896).

Trial court did not exceed its authority by examining the underlying validity of the loan documents in a foreclosure proceeding, because such an inquiry related to the finding of a "valid debt" under G.S. 45-21.16; the trial court properly found that the debt claimed by the lender pursuant to the note was not valid. In re Hudson, — N.C. App. —, 642 S.E.2d 485, 2007 N.C. App. LEXIS 689 (2007).

Limitation on Findings of Fact. — The clerk of superior court is limited to making the four findings of fact specified in this section, and it follows that the superior court judge is similarly limited in the hearing de novo. In re Watts, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

The determination of the amount owed on a debt is beyond the scope of the hearing under this section. In re Burgess, 47 N.C. App. 599, 267 S.E.2d 915 (1980).

A superior court judge is not authorized to invoke equity jurisdiction in a hearing de novo on appeal pursuant to subsection (d) of this section. He is limited to hearing the same matters in controversy which were before the clerk of superior court. In re Watts, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

A judge of the superior court cannot enjoin foreclosure upon any ground other than the ones stated in this section. In re Helms, 55 N.C. App. 68, 284 S.E.2d 553 (1981), cert. denied, 305 N.C. 300, 291 S.E.2d 149 (1982).

The defense set forth in this section constitutes an affirmative defense within the meaning of Fed.R.Civ.P., Rule 8(c). Resolution Trust Corp. v. Southwest Dev. Co., 807 F. Supp. 375 (E.D.N.C.), modified, 837 F. Supp. 122 (E.D.N.C. 1992), aff'd in part and rev'd in part, 14 F.3d 596 (4th Cir. 1993).

Equitable Defenses May Be Asserted in Action Under § 45-21.34. — Because the hearing under this section is designed to provide a less timely and expensive procedure than foreclosure by action, it does not resolve all matters in controversy between mortgagor and mortgagee. If respondents feel that they have equitable defenses to the foreclosure, they should be asserted in an action to enjoin the foreclosure sale under G.S. 45-21.34. In re Helms, 55 N.C. App. 68, 284 S.E.2d 553 (1981), cert. denied, 305 N.C. 300, 291 S.E.2d 149 (1982).

How Equitable Defenses Raised. — Equitable defenses, such as the acceptance of late payments, may not be raised in a foreclosure hearing pursuant to this section, but must instead be asserted in an action to enjoin the foreclosure sale under G.S. 45-21.34. In re Fortescue, 75 N.C. App. 127, 330 S.E.2d 219, cert. denied, 314 N.C. 330, 335 S.E.2d 890 (1985).

The trial court erred in considering an equitable defense to foreclosure in a hearing held pursuant to this section, because the debtor had to pursue such a defense through an action to enjoin the foreclosure pursuant to G.S. 45-21.34. In re Azalea Garden Bd. & Care, Inc., 140 N.C. App. 45, 535 S.E.2d 388, 2000 N.C. App. LEXIS 1094 (2000).

Defense that the mortgagor was incompetent to execute the deed of trust was not available in a pre-foreclosure hearing either before the clerk or before the superior court on appeal; however, such defense could be raised by bringing an action to enjoin the foreclosure under G.S. 45-21.34. In re Godwin, 121 N.C. App. 703, 468 S.E.2d 811 (1996).

Evidence of legal defenses was admissible and proper for consideration in a hearing pursuant to this section where a lender used a deed of trust on residential real property which prohibited conveyance without his consent and provided for acceleration of extract enhanced interest upon conveyance of the security property. In re Foreclosure of Deed of Trust, 55 N.C. App. 373, 285 S.E.2d 615, aff'd, 306 N.C. 451, 293 S.E.2d 798 (1982).

Valid Debt Must Be Shown. — A party seeking to go forward with foreclosure under a power of sale must establish by competent evidence the existence of a valid debt of which he is the holder. Connolly v. Potts, 63 N.C. App. 547, 306 S.E.2d 123 (1983).

Evidence of Valid Debt. — The introduction of a promissory note, along with evidence of execution and delivery, in the absence of probative evidence to the contrary, will support the finding of a valid debt in a proceeding to foreclose under a power of sale. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Subdivision (d)(i) of this section permits the clerk to find a valid debt of which the party seeking to foreclose is a holder if there is competent evidence that the party seeking to foreclose is the holder of some valid debt, irrespective of the exact amount owed. In re Burgess, 47 N.C. App. 599, 267 S.E.2d 915 (1980).

Evidence of a repurchase agreement, whereby seller agrees with the lender that seller will repurchase goods sold to debtor in the event of default by debtor on the loan used to finance the sale, is proper evidence of the existence of a valid debt and the right to foreclose. Hofler v. Hill, 58 N.C. App. 201, 293 S.E.2d 238 (1982), modified and aff'd, 311 N.C. 325, 317 S.E.2d 670 (1984).

In an action by a lender to foreclose a deed of trust securing a note, where the borrower failed to refute the presumption of consideration for a note under seal, there was no competent evidence to support a conclusion that a valid debt did not exist. In re Blue Ridge Holdings Ltd. Partnership, 129 N.C. App. 534, 500 S.E.2d 446 (1998).

Valid Debt Not Shown. — Where defendants executed a promissory note and deed of trust with the understanding that photo processing equipment would be assigned to them, but authorization for the assignment was never obtained, and the defendants did not have possession of the equipment there was a failure of consideration and no valid debt was created between the parties. In re Land Covered By Certain Deed of Trust, 123 N.C. App. 133, 472 S.E.2d 369 (1996).

Where all parties to an appeal agreed that the defendants' signatures on a loan application were forged and the president of the bank, a long-time friend of one defendant's father, accepted his representation of the signatures as authentic, the superior court correctly found that there was no "valid debt" for plaintiff/bank to enforce, that the loans were not ratified because the loan maker did not act as defendants' agent, and defendants did not receive, directly or indirectly, any of the loan proceeds; foreclosure under power of sale was properly denied. Espinosa v. Martin, 135 N.C. App. 305, 520 S.E.2d 108 (1999).

No Valid Debt and No Default. — Where person executed notes and deed of trust based upon the understanding and for the specific consideration that no criminal proceedings would be instituted against her and criminal proceedings subsequently were instituted, the notes and deed of trust were without consideration, and the lower court was correct in finding (1) no valid debt existed and (2) there was no default on the notes or deed of trust, thereby properly disallowing the foreclosure proceeding. In re Kitchens, 113 N.C. App. 175, 437 S.E.2d 511 (1993).

Possession is significant in determining whether a person is the holder of a valid debt, and the absence of possession defeats that status. Connolly v. Potts, 63 N.C. App. 547, 306 S.E.2d 123 (1983).

Failure to Contradict Evidence of Possession and Past Due Note. — If the respondent in a proceeding to foreclose under a power of sale fails to offer any evidence to contradict evidence of possession and of a past due note when it is introduced in a foreclosure proceeding, the trial court's finding of default will not be disturbed on appeal. In re Cooke, 37 N.C. App. 575, 246 S.E.2d 801 (1978).

Determining which property is legally secured by a deed of trust is a proper issue and element of proof before the Clerk of Superior Court. Therefore, if a party contends that the property is not secured, or should no longer be secured by the deed of trust, such contention may be raised as a defense to the four requisite findings under this section. In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

Foreclosure under a power of sale in a mortgage is not favored in the law, and its exercise by the mortgagee will be watched with jealousy. In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

Duty of Court to Consider All Relevant Documents. — The trial court's denial of the creditor's right to foreclose was in error where the court determined the rights of the parties under the deed of trust only, and failed to apply the provisions of the original promissory note, modified by the compromise and settlement agreement and the amended plan of reorganization. In re Azalea Garden Bd. & Care, Inc., 140 N.C. App. 45, 535 S.E.2d 388, 2000 N.C. App. LEXIS 1094 (2000).

Evidence of Right to Foreclose. — Subdivision (d)(iii) of this section permits the clerk to find a right to foreclose under the instrument if there is competent evidence that the terms of the deed of trust permit the exercise of the power of sale under the circumstances of the particular case. In re Burgess, 47 N.C. App. 599, 267 S.E.2d 915 (1980).

Foreclosure under Original Deed of Trust Where Second Deed of Trust Invalid. — Where second deed of trust was given by respondents as security for second loan, which was used to pay off first loan, the parties intending the second note and deed of trust to replace and be substituted for the original note and deed of trust, but failure of the respondents to affix the proper signatures to the second deed of trust caused it to be invalid and amounted to substantial failure of consideration for the second loan agreement, the second loan agreement was rendered a nullity, and the parties' duties under the original loan agreement were revived. Thus, where respondents were in default under the original debt petitioner had a right to foreclose under the original deed of trust. Bowers v. Bowers, 74 N.C. App. 708, 329 S.E.2d 725, cert. denied, 314 N.C. 540, 335 S.E.2d 14 (1985).

The statutory scheme set forth in this section and § 45-21.17 applies directly to the Department of Veterans Affairs (VA) when it exercises its subrogation rights under state law to recover amounts paid to cover deficiencies after defaults on VA guaranteed loans. Under a subrogation theory, the VA's rights are the same as those of the lender who foreclosed, and thus are governed by state foreclosure law such as the North Carolina antideficiency statute. The VA therefore lost its right to subrogation against plaintiff-borrower when bank-lender failed to comply with the statutory notice requirements. Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992), aff'd sub nom. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

No trial by jury is required in hearings conducted under this section. In re Foreclosure of Deed of Trust, 46 N.C. App. 654, 266 S.E.2d 686 (1980).

Measure of Damages. — The language of this section is considerably broader than the language under either G.S. 45-21.34 or G.S. 1-292. It must be concluded, therefore, that the legislature intended that the courts have great latitude in measuring damages under this section. In re Simon, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

Interest accruing on the indebtedness during the pendency of a stay would be a proper measure of damages under a bond conforming to the language of this section. In re Simon, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

Request for Equitable Relief Denied. — Superior court correctly declined to address the plaintiff/bank's argument for equitable relief, as such an action would have exceeded its permissible scope of review in a foreclosure action. Espinosa v. Martin, 135 N.C. App. 305, 520 S.E.2d 108 (1999).

Testimony of Trustee Held Proper. — Where the debtors challenged the trial court's jurisdiction on the grounds that the trustee's service of the notice of hearing was inadequate, the trial court properly allowed the foreclosing creditor to rebut the debtors' assertion by calling the trustees as witness and inquiring as to his efforts to serve the debtors, since the trustee had a statutory duty to effect valid service of process and did not adversely affect his proper status as a "disinterested third party" in the deed of trust relationship. In re Foreclosure of Real Prop. Under Deed of Trust from Brown, 156 N.C. App. 477, 577 S.E.2d 398, 2003 N.C. App. LEXIS 179 (2003).

Admission of Affidavit Held Proper. — Necessity for expeditious procedure in foreclosure actions substantially outweighed any concerns about the efficacy of allowing a loan servicer's employee, who lived out of state, to testify by affidavit, and the trial court properly admitted her affidavit into evidence. In re Foreclosure of Real Prop. Under Deed of Trust from Brown, 156 N.C. App. 477, 577 S.E.2d 398, 2003 N.C. App. LEXIS 179 (2003).

Proof of Service. — Homeowners were entitled to attack foreclosure proceeding either by a motion in the cause or by an independent action where the officer's return was insufficient on its face to show service upon homeowner husband in that the return did not show the place where the papers were left. Hassell v. Wilson, 301 N.C. 307, 272 S.E.2d 77 (1980).

Although an officer's return was insufficient to show service upon plaintiff husband in mortgage foreclosure proceedings because it did not show the place where the papers were left, such defect was not necessarily fatal to the foreclosure proceedings; the matter would be remanded for the trial judge to determine, within his discretion, whether the sheriff's return ought to be amended so as to comport with facts regarding the place and manner of service. Hassell v. Wilson, 301 N.C. 307, 272 S.E.2d 77 (1980).

Service by Posting. — This section allows service upon a party by posting the notice only in those instances where the party's name and address are not reasonably ascertainable; otherwise, posting will suffice only when "supplemented" by notice mailed to the party's last known address or by personal service. Federal Land Bank v. Lackey, 94 N.C. App. 553, 380 S.E.2d 538 (1989), aff'd, 326 N.C. 478, 390 S.E.2d 138 (1990).

Under this section, service by posting may run concurrently with any other effort to effect service; therefore, when the notice was posted on the property concurrent with the attempt to serve defendants by mail, the notice requirement was satisfied. McArdle Corp. v. Patterson, 115 N.C. App. 528, 445 S.E.2d 604 (1994), aff'd, 340 N.C. 356, 457 S.E.2d 596 (1995).

Original Obligor Entitled to Notice. — Where original obligors negotiated a deed of trust with trustee, and second obligors assumed the loan but original obligors were not released and remained personally liable for the debt, trial court erred in granting summary judgment to trustee since original obligor was not properly served with notice; though second obligors assumed the original obligor's loan, original obligor remained personally liable for the debt and accordingly, he was entitled to notice of any foreclosure hearing. Federal Land Bank v. Lackey, 94 N.C. App. 553, 380 S.E.2d 538 (1989), aff'd, 326 N.C. 478, 390 S.E.2d 138 (1990).

Requirements of Notice. — Subsection (c) lists the information the notice of hearing must contain and does not include a requirement that the notice contain the names of the parties entitled to notice, nor is such a requirement implied by the statute as a whole. McArdle Corp. v. Patterson, 115 N.C. App. 528, 445 S.E.2d 604 (1994), aff'd, 340 N.C. 356, 457 S.E.2d 596 (1995).

Notice Held Sufficient. — In a foreclosure action, a loan servicer's efforts to serve the debtors prior to posting the property by mailing notice to the address of the subject real property (though the debtors no longer lived there) were "reasonable and diligent" within the meaning of G.S. 45-21.16(a), in light of the fact that the debtors had actual notice of the hearing. In re Foreclosure of Real Prop. Under Deed of Trust from Brown, 156 N.C. App. 477, 577 S.E.2d 398, 2003 N.C. App. LEXIS 179 (2003).

Notice Held Insufficient. — The clerk of court erred in permitting a foreclosure sale of property pursuant to a deed of trust where the debtor was not given notice of the foreclosure hearing in a manner prescribed by subsection (a) of this section, a letter to and telephone conservation with the debtor being insufficient and the debtor's actual knowledge of the hearing being irrelevant. PMB, Inc. v. Rosenfeld, 48 N.C. App. 736, 269 S.E.2d 748 (1980), cert. denied, 301 N.C. 722, 274 S.E.2d 231 (1981).

Original obligor's name and address were reasonably ascertainable, and the trustee testified he had original obligor's name and address in his files; therefore, where plaintiff gave notice to original obligor of the foreclosure hearing by posting notice on the property, plaintiff's failure to supplement constructive notice with notice by mail failed to comply with the minimum due process requirements. Federal Land Bank v. Lackey, 94 N.C. App. 553, 380 S.E.2d 538 (1989), aff'd, 326 N.C. 478, 390 S.E.2d 138 (1990).

Where plaintiff's sole attempt at personal service of notice consisted of a certified letter mailed to the business address of a partnership, a postal box number, this solitary venture constituted neither application of "due diligence" as required by Rule 4(j1) nor a "reasonable and diligent effort" as required by subsection (a). Barclays American/Mortgage Corp. v. BECA Enters., 116 N.C. App. 100, 446 S.E.2d 883 (1994).

Notice Not Fatally Defective. — Notice of a foreclosure hearing before the clerk of court was not fatally defective in that the notice, dated December 8, 1978, stated that the hearing would be held on January 3, 1978, rather than 1979. Lovell v. Rowan Mut. Fire Ins. Co., 46 N.C. App. 150, 264 S.E.2d 743 (1980), rev'd on other grounds, 302 N.C. 150, 274 S.E.2d 170 (1981).

Notice Not Required. — The plaintiff-city had no obligation to provide the defendant with notice of the foreclosure proceeding, as mandated by this section, where the foreclosure never progressed to a hearing before the clerk of the superior court. Investors Title Ins. Co. v. Montague, 142 N.C. App. 696, 543 S.E.2d 527, 2001 N.C. App. LEXIS 171 (2001), cert. denied, 353 N.C. 727, 550 S.E.2d 776 (2001).

Mortgage company, not a purchaser in a foreclosure sale, was not not a party protected by G.S. 45-21.21 and was entitled to notice under G.S. 45-21.16 only if it filed a request for notice under G.S. 45-21.17A, which it did not; because the mortgage company was not entitled to notice of sale, it had no standing to dispute the adequacy of that notice on appeal nor did it have standing to argue that the sale was held on a holiday in contravention of G.S. 45-21.23. Beneficial Mtg. Co. v. Hamidpour, 155 N.C. App. 641, 574 S.E.2d 163, 2002 N.C. App. LEXIS 1571 (2002), cert. dismissed, 357 N.C. 163, 580 S.E.2d 359 (2003), cert. denied, 357 N.C. 163, 580 S.E.2d 359 (2003).

If a bankruptcy petition is filed (1) after the notice and hearing provided for in G.S. 45-21.16 has been completed and (2) after the clerk of superior court has authorized the foreclosure and (3) prior to the expiration of the upset bid period, then if the automatic stay of 11 U.S.C.S. § 362 is subsequently lifted with respect to the foreclosure, the foreclosing trustee need not comply with the notice and hearing procedure again, but, pursuant to G.S. 45-21.22(c), may proceed to readvertise the property and sell it in accordance with G.S. 45-21.1 and G.S. 45-21.17A; thus, where the debtors filed for an automatic stay after a mortgagee had started foreclosure proceedings but before the 10 day upset period, once the stay was annulled by the bankruptcy judge, the foreclosing trustee was required to pursue foreclosure again by readvertising and selling the property in accordance with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A. Beneficial Mortg. Co. of N.C., Inc. v. Barrington & Jones Law Firm, P.A., 164 N.C. App. 41, 595 S.E.2d 705, 2004 N.C. App. LEXIS 727 (2004).

Waiver of Notice. — Where a party to a foreclosure hearing argued that he received no notice of the hearing, but the record on appeal showed that he was present at the hearing and participated in it, the party would be held to have waived notice of the foreclosure hearing. In re Norton, 41 N.C. App. 529, 255 S.E.2d 287 (1979).

Failure to Act When Actual Notice Received. — Because defendant received actual notice of the foreclosure hearing and could have taken advantage of the relief provided in G.S. 45-21.34, assuming he had grounds, or he could have objected to the method of service, but instead chose to sit on his rights and allow the foreclosure to proceed, he may not argue now that service on him was inadequate. Fleet Nat'l Bank v. Raleigh Oaks Joint Venture, 117 N.C. App. 387, 451 S.E.2d 325 (1994).

Interest Not Extinguished by Foreclosure Where There Was No Notice. — The City of Durham and N.C. Department of Transportation's property interest in dedicated portion of boulevard was not extinguished by the foreclosure proceedings where they did not receive notice. Tower Dev. Partners v. Zell, 120 N.C. App. 136, 461 S.E.2d 17 (1995).

Assignment Between Notice and Hearing. — This section does not prohibit an assignment or negotiation of the debt instrument during the interval between the date notice is issued and the time of the hearing, and it is silent as to whether additional notification is necessary when an assignment takes place. In re Fortescue, 80 N.C. App. 297, 341 S.E.2d 757 (1986), upholding notice which named the original and present holder of the note and deed of trust where the note and deed were subsequently assigned to another individual, where mortgagor had over nine months actual notice before the trial court's de novo hearing of the assignment.

Second Proceeding Set Aside Where Debt Satisfied in Prior Proceeding. — The mortgage indebtedness that a substitute trustee sought to collect in a foreclosure proceeding instituted in Davidson County, upon a tract of land located partly in Davidson and Randolph counties, was paid off in full during a prior foreclosure in Randolph County. Thus, this second foreclosure was without foundation and the order of the trial court authorizing the foreclosure was set aside. In re Rollins, 75 N.C. App. 656, 331 S.E.2d 303 (1985).

Payment Delinquent Where One Day Past Due. — The 30-day grace period contained in the original promissory note was contained in the clause governing the lender's right to accelerate the debt, and the loan modification agreement contained a new acceleration clause, which provided that the lender could accelerate the debt in the event one monthly payment became "delinquent." The judge properly gave the word "delinquent" its plain meaning, i.e., overdue or late. Consequently, it was clear that the debtor became delinquent in making his payment one day after the agreement provided it was due. In re Fortescue, 75 N.C. App. 127, 330 S.E.2d 219, cert. denied, 314 N.C. 330, 335 S.E.2d 890 (1985).

Mortgagors, by joining in consent order, not only waived their right to appeal from final adjudication based thereon, but also left the case with no unresolved issue to appeal, even though their appeal to the judge was not from the consent order but from the clerk's follow-up order authorizing foreclosure, since the consent order established that the foreclosure issue would be finally set at rest by the subsequent order, and the parties, in effect, agreed and consented to the subsequent order as well. In re Williams, 88 N.C. App. 395, 363 S.E.2d 380 (1988).

Bonds on Appeal. — In foreclosure proceedings a clerk may require a bond by an appealing respondent pursuant to subsection (d) of this section, and a superior court judge may require a bond upon appeal from that court pursuant to G.S. 1-292, and if the bond is not posted, the trustee may proceed with the foreclosure; however, neither statute gives the clerk or the judge the power to make the posting of a bond a condition to the appeal, and it is error for the superior court to dismiss an appeal from that court when the bond required by the court is not posted. In re Coley Properties, Inc., 50 N.C. App. 413, 273 S.E.2d 738 (1981).

This section governs only the bond covering the appeal from the clerk to the trial court; bonds for appeals from the traditional trial courts to the Court of Appeals in foreclosure actions are governed by G.S. 1-292. In re Simon, 36 N.C. App. 51, 243 S.E.2d 163 (1978).

Finding of No Default Proper. — Trial court's judgment denying foreclosure was proper because an owner's testimony that the mortgage company returned the owners' payment check to the owners and failed to respond to the owners' attempts to communicate with it supported the trial court's finding of fact that there was no default. In re Foreclosure of a Deed of Trust, — N.C. App. —, 649 S.E.2d 10, 2007 N.C. App. LEXIS 1736 (2007).

Applied in Phil Mechanic Constr. Co. v. Haywood, 72 N.C. App. 318, 325 S.E.2d 1 (1985); In re Johnson, 72 N.C. App. 485, 325 S.E.2d 502 (1985); In re Micheal Weinman Assocs. Gen. Partnership, 103 N.C. App. 756, 407 S.E.2d 288 (1991).

Quoted in Adams v. Bank United of Tex. F.S.B., 167 N.C. App. 395, 606 S.E.2d 149, 2004 N.C. App. LEXIS 2384 (2004), cert. denied, 359 N.C. 410, — S.E.2d — (2005).

Cited in In re Hill, 36 N.C. App. 765, 245 S.E.2d 378 (1978); Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980); Gore v. Hill, 52 N.C. App. 620, 279 S.E.2d 102 (1981); DuBose v. Gastonia Mut. Sav. & Loan Ass'n, 55 N.C. App. 574, 286 S.E.2d 617 (1982); Connolly v. Potts, 62 N.C. App. 300, 302 S.E.2d 481 (1983); Thompson v. Wrenn, 61 N.C. App. 582, 301 S.E.2d 103 (1983); In re Foreclosure of Deed of Trust, 63 N.C. App. 744, 306 S.E.2d 475 (1983); Hofler v. Hill, 311 N.C. 325, 317 S.E.2d 670 (1984); Walker v. First Fed. Sav. & Loan Ass'n, 93 N.C.

App. 528, 378 S.E.2d 583 (1989); United Carolina Bank v. Tucker, 99 N.C. App. 95, 392 S.E.2d 410 (1990); Williamson v. Savage, 104 N.C. App. 188, 408 S.E.2d 754 (1991); Goforth Properties, Inc. v. Birdsall, 334 N.C. 369, 432 S.E.2d 855 (1993); In re Earl L. Pickett Enters., Inc., 114 N.C. App. 489, 442 S.E.2d 101 (1994); In re Deed of Trust Executed by C & M Invs. of High Point, Inc., 123 N.C. App. 52, 472 S.E.2d 341 (1996); In re Barham, 193 Bankr. 229 (E.D.N.C. 1996).

§ 45-21.16A. Contents of notice of sale.

(a) Except as provided in subsection (b) of this section, the notice of sale shall include all of the following:

(1) Describe the instrument pursuant to which the sale is held, by identifying the original mortgagors and recording data. If the record owner is different from the original mortgagors, the notice shall also list the record owner of the property, as reflected on the records of the register of deeds not more than 10 days prior to posting the notice. The notice may also reflect the owner not reflected on the records if known.

(2) Designate the date, hour and place of sale consistent with the provisions of the instrument and this Article.

(3) Describe the real property to be sold in a manner that is reasonably calculated to inform the public as to what is being sold. The description may be in general terms and may incorporate by reference the description used in the instrument containing the power of sale. Any property described in the instrument containing the power of sale which is not being offered for sale should also be described in a manner to enable prospective purchasers to determine what is and what is not being offered for sale.

(4) Repealed by Session Laws 1967, c. 562, s. 2.

(5) State the terms of the sale provided for by the instrument pursuant to which the sale is held, including the amount of the cash deposit, if any, to be made by the highest bidder at the sale.

(6) Include any other provisions required by the instrument to be included.

(7) State that the property will be sold subject to taxes and special assessments if it is to be so sold.

(8) State whether the property is being sold subject to or together with any subordinate rights or interests provided those rights and interests are sufficiently identified.

(b) In addition to the requirements contained in subsection (a) of this section, the notice of sale of residential real property with less than 15 rental units shall also state all of the following:

(1) That an order for possession of the property may be issued pursuant to G.S. 45-21.29 in favor of the purchaser and against the party or parties in possession by the clerk of superior court of the county in which the property is sold.

(2) Any person who occupies the property pursuant to a rental agreement entered into or renewed on or after October 1, 2007, may, after receiving the notice of sale, terminate the rental agreement upon 10 days' written notice to the landlord. The notice shall also state that upon termination of a rental agreement, the tenant is liable for rent due under the rental agreement prorated to the effective date of the termination. (1949, c. 720, s. 1; 1951, c. 252, s. 1; 1967, c. 562, s. 2; 1975, c. 492, s. 1; 1987, c. 493; 1993, c. 305, s. 9; 2007-353, s. 1.)

Editor's Note. — Session Laws 1975, c. 492, which enacted this section, provides in s. 14: "The words clerk of court as used in this act shall be deemed to include assistant clerk of court."

Cross References. — As to contents of notice of judicial sales, see G.S. 1-339.15. As to contents of notice of executive sales, see G.S. 1-339.51. As to validation of certain foreclosure sales when provisions of subdivision (3) of this section are not complied with, see G.S. 45-21.49.

Effect of Amendments. — Session Laws 2007-353, s. 1, effective October 1, 2007, and applicable to notices of sale issued on or after that date, rewrote subsection (a); in subdivision (a)(3), inserted "by reference" preceding "the description" and substituted "sale" for "sale by reference thereto" in the second sentence; added subsection (b); and made minor stylistic changes throughout.

Legal Periodicals. — For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

CASE NOTES

Editor's Note. — *Some of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Constitutionality. — For case holding the statutes providing procedure for real property mortgage foreclosure, sale, and eviction, as they read prior to the amendment of this Article in 1975, unconstitutional as applied, see Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Foreclosure and sale pursuant to the statutory scheme of this Article as it read prior to amendment in 1975 was prospectively unlawful and void unless the power of sale was determined by the clerk to be a knowing, voluntary, and intelligent waiver of due process rights under U.S. Const., Amend. XIV, or the clerk determined that there had been adequate and timely notice to the mortgagor, coupled with opportunity for a hearing, before any rights were lost. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

State Action. — Direct participation by the clerk in the procedure by which plaintiff was deprived of ownership and threatened to be deprived of possession of her property under this Article as it read prior to amendment in 1975 constituted State action. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

As to sufficiency of description under former G.S. 45-25, see Douglas v. Rhodes, 188 N.C. 580, 125 S.E. 261 (1924); Blount v. Basnight, 209 N.C. 268, 183 S.E. 405 (1936); Peedin v. Oliver, 222 N.C. 665, 24 S.E.2d 519 (1943).

Bank's notice of a foreclosure sale complied with the requirements of G.S. 45-21.16A where the metes and bounds description of the property at issue was identical to that contained in the deed of trust, that description plainly indicated that the property was on three different streets, and there was a reference to a county condo book that showed the exact location and dimension of the property. In re Wiley Brown & Assocs., LLC, — Bankr. —, 2006 Bankr. LEXIS 2851 (Bankr. M.D.N.C. Oct. 11, 2006).

Renotice Required After Lifting of Automatic Stay. — If a bankruptcy petition is filed (1) after the notice and hearing provided for in G.S. 45-21.16 has been completed and (2) after the clerk of superior court has authorized the foreclosure and (3) prior to the expiration of the upset bid period, then if the automatic stay of 11 U.S.C.S. § 362 is subsequently lifted with respect to the foreclosure, the foreclosing trustee need not comply with the notice and hearing procedure again, but, pursuant to G.S. 45-21.22(c), may proceed to readvertise the property and sell it in accordance with G.S. 45-21.1 and G.S. 45-21.17A; thus, where the debtors filed for an automatic stay after a mortgagee had started foreclosure proceedings but before the 10 day upset period, once the stay was annulled by the bankruptcy judge, the foreclosing trustee was required to pursue foreclosure again by readvertising and selling the property in accordance with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A. Beneficial Mortg. Co. of N.C., Inc. v. Barrington & Jones Law Firm, P.A., 164 N.C. App. 41, 595 S.E.2d 705, 2004 N.C. App. LEXIS 727 (2004).

Applied in Financial Servs. Corp. v. Welborn, 269 N.C. 563, 153 S.E.2d 7 (1967); Seashore Properties, Inc. v. East Fed. Sav. & Loan Ass'n, 47 N.C. App. 675, 267 S.E.2d 693 (1980).

Cited in Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172 (1975).

§ 45-21.17. Posting and publishing notice of sale of real property.

In addition to complying with such provisions with respect to posting or publishing notice of sale as are contained in the security instrument,

(1) Notice of sale of real property shall

a. Be posted, in the area designated by the clerk of superior court for posting public notices in the county in which the property is situated, at least 20 days immediately preceding the sale.

b. And in addition thereto,

1. The notice shall be published once a week for at least two successive weeks in a newspaper published and qualified for legal advertising in the county in which the property is situated.

2. If no such newspaper is published in the county, then notice shall be published once a week for at least two successive weeks in a newspaper having a general circulation in the county.

3. In addition to the required newspaper advertisement, the clerk may in his discretion, on application of any interested party, authorize such additional advertisement as in the opinion of the clerk will serve the interest of the parties, and permit the charges for such further advertisement to be taxed as a part of the costs of the foreclosure.

(2) When the notice of sale is published in a newspaper,

a. The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than seven days, including Sundays, and

b. The date of the last publication shall be not more than 10 days preceding the date of the sale.

(3) When the real property to be sold is situated in more than one county, the provisions of subdivisions (1) and (2) shall be complied with in each county in which any part of the property is situated.

(4) The notice of sale shall be mailed by first-class mail at least 20 days prior to the date of sale to each party entitled to notice of the hearing provided by G.S. 45-21.16 whose address is known to the trustee or mortgagee and in addition shall also be mailed by first-class mail to any party desiring a copy of the notice of sale who has complied with G.S. 45-21.17A. If the property is residential and contains less than 15 rental units, the notice of sale shall also be mailed to any person who occupies the property pursuant to a residential rental agreement by name, if known, at the address of the property to be sold. If the name of the person who occupies the property is not known, the notice shall be sent to "occupant" at the address of the property to be sold. Notice of the hearing required by G.S. 45-21.16 shall be sufficient to satisfy the requirement of notice under this section provided such notice contains the information required by G.S. 45-21.16A.

(5) Repealed by Session Laws 1993, c. 305, s. 10.

(6) Any time periods relating to notice of hearing or notice of sale that are provided in the security instrument may commence with and run concurrently with the time periods provided in G.S. 45-21.16, 45-21.17, or 45-21.17A. (1949, c. 720, s. 1; 1965, c. 41; 1967, c. 979, s. 3; 1975, c. 492, s. 3; 1977, c. 359, ss. 11-14; 1985, c. 567, s. 1; 1993, c. 305, s. 10; 2007-353, s. 2.)

Editor's Note. — Session Laws 1975, c. 492, which rewrote this section, provides in s. 14: "The words clerk of court as used in this act shall be deemed to include assistant clerk of court."

Effect of Amendments. — Session Laws 2007-353, s. 2, effective October 1, 2007, and applicable to notices of sale issued on or after that date, added the second and third sentences in subdivision (4).

Legal Periodicals. — For survey of 1972 case law on notice requirements of the nonjudicial foreclosure sale, see 51 N.C.L. Rev. 1110 (1973).

For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

For article discussing installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

CASE NOTES

Editor's Note. — *Many of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Constitutionality. — For case holding the statutes providing procedure for real property mortgage foreclosure, sale, and eviction under this Article as it read prior to amendment in 1975 unconstitutional as applied, see Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Foreclosure and sale pursuant to the statutory scheme of this Article as it read prior to amendment in 1975 was prospectively unlawful and void unless the power of sale was determined by the clerk to be a knowing, voluntary, and intelligent waiver of due process rights under U.S. Const., Amend. XIV, or the clerk determined that there had been adequate and timely notice to the mortgagor, coupled with opportunity for a hearing, before any rights were lost. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Minimum Required by Due Process. — At a minimum, due process requires the trustee to make an initial showing before the clerk or similar neutral official that the mortgagor is in default under the obligation; the mortgagor must of course be afforded the opportunity to rebut and defend the charges. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), decided under this Article as it read prior to amendment in 1975.

The clerk of the court is barred by U.S. Const., Amend. XIV from working a deprivation of the mortgagor's property without prior notice and an opportunity for a timely hearing, unless it is clear that those rights have been expressly waived. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), decided under this Article as it read prior to amendment in 1975.

Absent express waiver, plaintiff is entitled to a good-faith attempt to notify her by means reasonably calculated to inform her of imminent foreclosure. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), decided under this Article as it read prior to amendment in 1975.

Where neither trustee nor bank knew grantor's current Florida address, the trustee had no obligation to mail notice of sale to her by first-class mail. Williamson v. Savage, 104 N.C. App. 188, 408 S.E.2d 754 (1991), decided prior to 1993 amendment.

Purpose of Notice. — The principal object in publishing notice of sale of mortgaged property in the exercise of a power of sale is not so much to notify the grantor or mortgagor as it is to inform the public generally, so that bidders may be present at the sale and a fair price may be obtained. Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412, appeal dismissed, 281 N.C. 314, 188 S.E.2d 898, appeal dismissed and cert. denied, 409 U.S. 1071, 93 S. Ct. 677, 34 L. Ed. 2d 659 (1972), decided under this Article as it read prior to amendment in 1975.

Both Posting and Publication Required. — This section, read as a whole, requires both publishing and posting for full notice. Albemarle Realty & Mtg. Co. v. Peoples Bank, 34 N.C. App. 481, 238 S.E.2d 622 (1977).

The legislature intended to meet the requirements of due process by demanding both posting and publication under this section. Albemarle Realty & Mtg. Co. v. Peoples Bank, 34 N.C. App. 481, 238 S.E.2d 622 (1977).

Parties May Agree on Notice Procedure. — Compliance with the notice procedure agreed upon by the parties, if strictly complied with, is sufficient to give notice of foreclosure by sale. Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412, appeal dismissed, 281 N.C. 314, 188 S.E.2d 898, appeal dismissed and cert. denied, 409 U.S. 1071, 93 S. Ct. 677, 34 L. Ed. 2d 659 (1972), decided under this Article as it read prior to amendment in 1975.

Guaranty Agreements. — By their terms, G.S. 45-21.16 and this section (the anti-deficiency statute) govern only the relationship between mortgagors and mortgagees, and are designed to protect interests in the property to be sold. Contract rights such as those in guaranty agreements do not fall within the statute's coverage. Private third party guarantors of loans are not required by the statute to give notice to those whose obligations they guarantee before seeking indemnity from them. Any notice requirement in such a situation is imposed by the contract between the parties, not by the antideficiency statute. Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992), aff'd sub nom. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

Veterans Administration Subrogation and Indemnification Rights. — When pursuing its subrogation rights, the Veterans Administration must stand in the shoes of the private lender and meet any applicable state law requirements for recovery, but indemnity is an independent right arising under federal law, and is unaffected by state law. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

Advertisement Gives Mortgagor Re-

quired Notice. — The mortgagor is always entitled to notice of sale under foreclosure, but notice is given when the advertisement required by this section is made. Woodell v. Davis, 261 N.C. 160, 134 S.E.2d 160 (1964), decided under this Article as it read prior to amendment in 1975.

For case in which notice of foreclosure by sale was held sufficient to meet minimum due process requirements, see Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412, appeal dismissed, 281 N.C. 314, 188 S.E.2d 898, appeal dismissed and cert. denied, 409 U.S. 1071, 93 S. Ct. 677, 34 L. Ed. 2d 659 (1972), decided under this Article as it read prior to amendment in 1975.

Proof That Date on Notice Was Not Date of Posting. — As long as minimum due process is met, there is no reason to preclude proof that the date on the face of the notice was not the actual date of posting. Albemarle Realty & Mtg. Co. v. Peoples Bank, 34 N.C. App. 481, 238 S.E.2d 622 (1977).

Effect of Notice to Discontinue Publication of Notice of Sale. — A notice from the trustee in a mortgage or deed of trust, directed to a person authorized by him to advertise a sale of the property thereunder, to withhold or discontinue publication of the notice of sale, withdraws from such person any authority to advertise or sell the property and breaks the continuity of publication of notice required by former G.S. 1-325, and no subsequent renewal of authority can bridge the gap or restore the publication to its original status. Smith v. Bank of Pinehurst, 223 N.C. 249, 25 S.E.2d 859 (1943), decided under former provisions.

A hearing prior to foreclosure and sale is essential. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), decided under this Article as it read prior to amendment in 1975.

The provisions of subdivision (4) of this section do not apply to a tax foreclosure sale. City of Durham v. Keen, 40 N.C. App. 652, 253 S.E.2d 585, cert. denied, 297 N.C. 608, 257 S.E.2d 217 (1979).

The statutory scheme set forth in § 45-21.16 and this section applies directly to the Department of Veterans Affairs (VA) when it exercises its subrogation rights under state law to recover amounts paid to cover deficiencies after defaults on VA guaranteed loans. Under a subrogation theory, the VA's rights are the same as those of the lender who foreclosed, and thus are governed by state foreclosure law such as the North Carolina antideficiency statute. The VA therefore lost its right to subrogation against plaintiff-borrower was lost when bank-lender failed to comply with the statutory notice requirements. Boley v. Principi, 144 F.R.D. 305 (E.D.N.C. 1992), aff'd sub nom. Boley v. Brown, 10 F.3d 218 (4th Cir. 1993).

Entitled to Notice. — Mortgage company, not a purchaser in a foreclosure sale, was not not a party protected by G.S. 45-21.21 and was entitled to notice under G.S. 45-21.16 only if it filed a request for notice under G.S. 45-21.17A, which it did not; because the mortgage company was not entitled to notice of sale, it had no standing to dispute the adequacy of that notice on appeal nor did it have standing to argue that the sale was held on a holiday in contravention of G.S. 45-21.23. Beneficial Mtg. Co. v. Hamidpour, 155 N.C. App. 641, 574 S.E.2d 163, 2002 N.C. App. LEXIS 1571 (2002), cert. dismissed, 357 N.C. 163, 580 S.E.2d 359 (2003), cert. denied, 357 N.C. 163, 580 S.E.2d 359 (2003).

Renotice Required After Lifting of Automatic Stay. — If a bankruptcy petition is filed (1) after the notice and hearing provided for in G.S. 45-21.16 has been completed and (2) after the clerk of superior court has authorized the foreclosure and (3) prior to the expiration of the upset bid period, then if the automatic stay of 11 U.S.C.S. § 362 is subsequently lifted with respect to the foreclosure, the foreclosing trustee need not comply with the notice and hearing procedure again, but, pursuant to G.S. 45-21.22(c), may proceed to readvertise the property and sell it in accordance with G.S. 45-21.1 and G.S. 45-21.17A; thus, where the debtors filed for an automatic stay after a mortgagee had started foreclosure proceedings but before the 10 day upset period, once the stay was annulled by the bankruptcy judge, the foreclosing trustee was required to pursue foreclosure again by readvertising and selling the property in accordance with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A. Beneficial Mortg. Co. of N.C., Inc. v. Barrington & Jones Law Firm, P.A., 164 N.C. App. 41, 595 S.E.2d 705, 2004 N.C. App. LEXIS 727 (2004).

Cited in Swindell v. Overton, 62 N.C. App. 160, 302 S.E.2d 841 (1983); Pannill Knitting Co. v. Golden Corral Corp., 89 N.C. App. 675, 366 S.E.2d 891 (1988); In re Barham, 193 Bankr. 229 (E.D.N.C. 1996).

§ 45-21.17A. Requests for copies of notice.

(a) Any person desiring a copy of any notice of sale may, at any time subsequent to the recordation of the security instrument and prior to the filing of notice of hearing provided for in G.S. 45-21.16, cause to be filed for record in the office of the register of deeds of each county where all or any part of the real property is situated, a duly acknowledged request for a copy of such notice of sale. This request shall be a separate instrument entitled "Request for Notice" and shall be signed and acknowledged by the party making the request, shall specify the name and address of the party to whom the notice is to be mailed, shall identify the deed of trust or mortgage by stating the names of the parties thereto, the date of recordation, and the book and page where the same is recorded, and shall be in substantially the following form:

"REQUEST FOR NOTICE"

In accordance with the provisions of G.S. 45-21.17A, request is hereby made that a copy of any notice of sale under the deed of trust (mortgage) recorded on ________, ________, in Book ________, page ________, records of ________ County, North Carolina, executed by ________________ as trustor (mortgagor), in which ________________ is named as beneficiary (mortgagee), and ________________ as trustee, be mailed to ________________ at the following address: ____.

Signature: ________________________

[Acknowledgement]

(b) Register of Deeds' Duties. — Upon the filing for record of such request, the register of deeds shall index in the general index of grantors the names of the trustors (mortgagors) recited therein, and the names of the persons requesting copies, with a marginal entry in the index of the book and page of the recorded security instrument to which the request refers; or upon the filing for record of such request, the register of deeds may, instead of indexing such request on the general index of grantors, stamp upon the face of the security instrument referred to in the request the book and page of each request for notice thereunder.

(c) Mailing Notice. — The mortgagee, trustee, or other person authorized to conduct the sale shall at least 20 days prior to the date of the sale cause to be deposited in the United States mail an envelope with postage prepaid containing a copy of the notice of sale, addressed to each person whose name and address are set forth in the Request for Notice, and directed to the address designated in such request.

(d) Effect of Request on Title. — No request for a copy of any notice filed pursuant to this section nor any statement or allegation in any such request nor any record thereof shall affect the title to real property, or be deemed notice to any person that the person requesting copies of notice has any claim or any right, title or interest in, or lien or charge upon, the property described in the deed of trust or mortgage referred to therein.

(e) Evidence of Compliance. — The affidavit of the mortgagee, trustee, or other person authorized to conduct the sale that copies of the notice of sale have been mailed to all parties filing requests for the same hereunder shall be deemed prima facie true. If on hearing it is proven that a party seeking to have the foreclosure sale set aside or seeking damages resulting from the foreclosure sale was mailed notice in accordance with this section or had actual notice of the sale before it was held (or if a resale was involved, prior to the date of the last resale), then the party shall not prevail. Costs, expenses, and reasonable attorneys' fees incurred by the prevailing party in any action to set aside the foreclosure sale or for damages resulting from the foreclosure sale shall be allowed as of course to the prevailing party.

(f) Action to Set Foreclosure Sale Aside for Failure to Comply. — A person entitled to notice of sale by virtue of this section shall not bring any action to set the sale aside on grounds that he was not mailed the notice of sale unless such action is brought prior to the filing of the final report and account as provided in G.S. 45-21.33, if the property was purchased by someone other than the secured party; or if brought by the secured party, unless such action is brought within six months of the date of such filing and prior to the time the secured party sells the property to a bona fide purchaser for value, if the property was purchased by the secured party. In either event, the party bringing such an action shall also tender an amount exceeding the reported sale price or the amount of the secured party's interest in the property, including all expenses and accrued interest, whichever is greater. Such tender shall be irrevocable pending final adjudication of the action.

(g) Action for Damages from Foreclosure Sale for Failure to Comply. — A person entitled to notice of sale by virtue of this section shall not bring any action for damages resulting from the sale on grounds that he was not mailed the notice unless such action is brought within six months of the date of the filing of the final report and account as provided in G.S. 45-21.33. The party bringing such an action shall also deposit with the clerk a cash or surety bond approved by the clerk and in such amount as the clerk deems adequate to secure the party defending the action for such costs, expenses, and reasonable attorneys' fees to be incurred in the action. (1993, c. 305, s. 11; 1999-456, s. 59.)

CASE NOTES

Requirement to Readvertise After Lifting of Automatic Stay. — If a bankruptcy petition is filed (1) after the notice and hearing provided for in G.S. 45-21.16 has been completed and (2) after the clerk of superior court has authorized the foreclosure and (3) prior to the expiration of the upset bid period, then if the automatic stay of 11 U.S.C.S. § 362 is subsequently lifted with respect to the foreclosure, the foreclosing trustee need not comply with the notice and hearing procedure again, but, pursuant to G.S. 45-21.22(c), may proceed to readvertise the property and sell it in accordance with G.S. 45-21.1 and G.S. 45-21.17A; thus, where the debtors filed for an automatic stay after a mortgagee had started foreclosure proceedings but before the 10 day upset period, once the stay was annulled by the bankruptcy judge, the foreclosing trustee was required to pursue foreclosure again by readvertising and selling the property in accordance with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A. Beneficial Mortg. Co. of N.C., Inc. v. Barrington & Jones Law Firm, P.A., 164 N.C. App. 41, 595 S.E.2d 705, 2004 N.C. App. LEXIS 727 (2004).

Not Requested. — Mortgage company, not a purchaser in a foreclosure sale, was not not a party protected by G.S. 45-21.21 and was entitled to notice under G.S. 45-21.16 only if it filed a request for notice under G.S. 45-21.17A, which it did not; because the mortgage company was not entitled to notice of sale, it had no standing to dispute the adequacy of that notice on appeal nor did it have standing to argue that the sale was held on a holiday in contravention of G.S. 45-21.23. Beneficial Mtg. Co. v. Hamidpour, 155 N.C. App. 641, 574 S.E.2d 163, 2002 N.C. App. LEXIS 1571 (2002), cert. dismissed, 357 N.C. 163, 580 S.E.2d 359 (2003), cert. denied, 357 N.C. 163, 580 S.E.2d 359 (2003).

Foreclosure sale on a mortgage without notice to a junior lienholder or its trustee was proper where neither had filed a request for notice of foreclosure sale as provided in G.S. 45-21.17A(a). In re Foreclosure of Lien by Ridgeloch Homeowners Ass'n, — N.C. App. —, 642 S.E.2d 532, 2007 N.C. App. LEXIS 653 (2007).

§§ 45-21.18, 45-21.19: Repealed by Session Laws 1967, c. 562, s. 2.

§ 45-21.20. Satisfaction of debt after publishing or posting notice, but before completion of sale.

A power of sale is terminated if, prior to the time fixed for a sale, or prior to the expiration of the time for submitting any upset bid after a sale or resale has been held, payment is made or tendered
of —

(1) The obligation secured by the mortgage or deed of trust, and

(2) The expenses incurred with respect to the sale or proposed sale, which in the case of a deed of trust also include compensation for the trustee's services under the conditions set forth in G.S. 45-21.15. (1949, c. 720, s. 1; 1967, c. 562, s. 2.)

CASE NOTES

Payment of Mortgage Within 10-Day Period. — The last and highest bidder at a foreclosure sale of a mortgage on lands is but a proposed purchaser acquiring no right until the statutory provision of 10 days has expired, and the payment of the full mortgage indebtedness to the mortgagee within that time cancels the instrument and all rights arising thereunder. In such case no recovery of damages can be had by the bidder against the mortgagor or a purchaser from him to whom the equity of redemption has been conveyed. Cherry v. Gilliam, 195 N.C. 233, 141 S.E. 594 (1928). See § 45-21.27.

The one who is the last and highest bidder at the foreclosure of a mortgage or deed of trust on lands is but a proposed purchaser within the 10 days before confirmation, and where the mortgagee has become such purchaser and within the 10 days allowed by statute for an increase bid a third person pays the mortgage debt and has the notes and mortgage assigned to him, such person has the right of lien and foreclosure under the terms of the mortgage securing the note. Davis v. Central Life Ins. Co., 197 N.C. 617, 150 S.E. 120 (1929). See § 45-21.27.

Attorney's Fees Upheld. — When a trustee of a deed of trust who is also a licensed attorney performed such extraordinary services as described in G.S. 32-51 in connection with a foreclosure proceeding, counsel was entitled under this section to an award of attorney's fees as an "expense[] incurred with respect to the sale or proposed sale ...." In re Newcomb, 112 N.C. App. 67, 434 S.E.2d 648 (1993).

Cited in Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975); Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991); In re Newcomb, 112 N.C. App. 67, 434 S.E.2d 648 (1993); Ellis v. United States, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 16090 (M.D.N.C. July 22, 2005).

§ 45-21.21. Postponement of sale.

(a) Any person exercising a power of sale may postpone the sale to a day certain not later than 90 days, exclusive of Sunday, after the original date for the sale —

(1) When there are no bidders, or
(2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
(3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or
(4) When he is unable to hold the sale because of illness or for other good reason, or
(5) When other good cause exists.

The person exercising a power of sale may postpone the sale more than once whenever any of the above conditions are met, so long as the sale is held not later than 90 days after the original date for the sale.

(b) Upon postponement of a sale, the person exercising the power of sale shall personally, or through his agent or attorney —

(1) At the time and place advertised for the sale, publicly announce the postponement thereof;
(2) On the same day, attach to or enter on the original notice of sale or a copy thereof, posted at the courthouse door, as provided by G.S. 45-21.17, a notice of the postponement; and
(3) Give written or oral notice of postponement to each party entitled to notice of sale under G.S. 45-21.17.

(c) The posted notice of postponement shall —

(1) State that the sale is postponed,
(2) State the hour and date to which the sale is postponed,
(3) State the reason for the postponement, and

(4) Be signed by the person authorized to hold the sale, or by his agent or attorney.

(d) If a sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor or within 90 days of the date originally fixed for the sale, then prior to such sale taking place the provisions of G.S. 45-21.16 need not be complied with but the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A shall be again complied with, or if on appeal, the appellate court orders the sale to be held, as to such sale so authorized the provisions of G.S. 45-21.16 need not be complied with again but those of G.S. 45-21.16A, 45-21.17, and 45-21.17A shall be.

(e) A sale may be postponed more than once provided the final postponed sale date is not later than 90 days, exclusive of Sunday and legal holidays when the courthouse is closed for transactions, after the original date for the sale. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1975, c. 492, ss. 4-6; 1983, c. 335, s. 2; 1989, c. 257; 1991 (Reg. Sess., 1992), c. 777, s. 1; 1993, c. 305, s. 12; 1995, c. 509, s. 25; 2003-337, s. 3.)

Legal Periodicals. — For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

CASE NOTES

Editor's Note. — *Some of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Persons Protected by Section. — This section provides procedural protections for a mortgagor, not for the purchaser of property, who acts at his own risk and has no basis to assert a sale is invalid because it is postponed in a manner inconsistent with this section. Gore v. Hill, 52 N.C. App. 620, 279 S.E.2d 102 (1981).

Mortgage company, not a purchaser in a foreclosure sale, was not not a party protected by G.S. 45-21.21 and was entitled to notice under G.S. 45-21.16 only if it filed a request for notice under G.S. 45-21.17A, which it did not; because the mortgage company was not entitled to notice of sale, it had no standing to dispute the adequacy of that notice on appeal nor did it have standing to argue that the sale was held on a holiday in contravention of G.S. 45-21.23. Beneficial Mtg. Co. v. Hamidpour, 155 N.C. App. 641, 574 S.E.2d 163, 2002 N.C. App. LEXIS 1571 (2002), cert. dismissed, 357 N.C. 163, 580 S.E.2d 359 (2003), cert. denied, 357 N.C. 163, 580 S.E.2d 359 (2003).

Discretion of Trustee. — The trustee has substantial discretion in discharging his responsibilities, which are to attempt to satisfy the debt while getting the highest price for the mortgagor and protecting the mortgagor's rights and equity. As long as the trustee does not violate the fiduciary duty of the office, and does not give unfair advantages to any party, the exercise of that discretion is not reviewable by the courts. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Cited in Millikan v. Hammond, 8 N.C. App. 429, 174 S.E.2d 835 (1970); C.C. Mangum, Inc. v. Brown, 124 N.C. App. 658, 478 S.E.2d 245 (1996).

§ 45-21.22. Procedure upon dissolution of order restraining or enjoining sale, or upon lifting of automatic bankruptcy stay.

(a) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, provide by order that the sale shall be held without additional notice at the time and place originally fixed therefor, or he may, in his discretion, make an order with respect thereto as provided in subsection (b).

(b) When, after the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he shall by order fix the time and place for the sale to be held upon notice to be given in such manner and for such length of time as he deems advisable.

(c) When, after the entry of any authorization or order by the clerk of superior court pursuant to G.S. 45-21.16 and before the expiration of the 10-day upset bid period, the foreclosure is stayed by the debtor filing a bankruptcy petition and thereafter the stay is lifted, the trustee or mortgagee shall not be required to comply with the provisions of G.S. 45-21.16, but shall advertise and hold the sale in accordance with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A. (1949, c. 720, s. 1; 1993, c. 305, s. 13.)

CASE NOTES

Effect of Automatic Bankruptcy Stay on Upset Period. — Automatic stay provision of 11 U.S.C.S. § 362 of the Bankruptcy Code has the effect of preventing the expiration of the 10-day upset bid period provided for in G.S. 45-21.22, when the debtor files for bankruptcy within that period, thereby preventing the fixing of any rights as to any subject real property protected by a stay as the upset bid period has not run; therefore, where a first mortgagee was the last and highest bidder of a foreclosure trustee's public sale of the debtors' property but the debtors filed for Chapter 13 bankruptcy and stayed the foreclosure, the sale could not be completed and no parties rights as to the property under the foreclosure action were yet "fixed" under G.S. 45-21.27. Beneficial Mortg. Co. of N.C., Inc. v. Barrington & Jones Law Firm, P.A., 164 N.C. App. 41, 595 S.E.2d 705, 2004 N.C. App. LEXIS 727 (2004).

Lifting of Automatic Stay. — If a bankruptcy petition is filed (1) after the notice and hearing provided for in G.S. 45-21.16 has been completed and (2) after the clerk of superior court has authorized the foreclosure and (3) prior to the expiration of the upset bid period, then if the automatic stay of 11 U.S.C.S. § 362 is subsequently lifted with respect to the foreclosure, the foreclosing trustee need not comply with the notice and hearing procedure again, but, pursuant to G.S. 45-21.22(c), may proceed to readvertise the property and sell it in accordance with G.S. 45-21.1 and G.S. 45-21.17A; thus, where the debtors filed for an automatic stay after a mortgagee had started foreclosure proceedings but before the 10 day upset period, once the stay was annulled by the bankruptcy judge, the foreclosing trustee was required to pursue foreclosure again by readvertising and selling the property in accordance with the provisions of G.S. 45-21.16A, 45-21.17, and 45-21.17A. Beneficial Mortg. Co. of N.C., Inc. v. Barrington & Jones Law Firm, P.A., 164 N.C. App. 41, 595 S.E.2d 705, 2004 N.C. App. LEXIS 727 (2004).

Term "lifted" in G.S. 45-21.22(c) incorporates "terminating, annulling, modifying, or conditioning," words all used to reference creditors' relief from the automatic stay. Beneficial Mortg. Co. of N.C., Inc. v. Barrington & Jones Law Firm, P.A., 164 N.C. App. 41, 595 S.E.2d 705, 2004 N.C. App. LEXIS 727 (2004).

Cited in In re Barham, 193 Bankr. 229 (E.D.N.C. 1996).

§ 45-21.23. Time of sale.

A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place. The sale shall be held between the hours of 10:00 A.M. and 4:00 P.M. on any day other than Sunday or a legal holiday when the courthouse is closed for transactions. (1949, c. 720, s. 1; 1993, c. 305, s. 14; 2003-337, s. 4.)

CASE NOTES

Objection to Sale on a Holiday. — Mortgage company, not a purchaser in a foreclosure sale, was not not a party protected by G.S. 45-21.21 and was entitled to notice under G.S. 45-21.16 only if it filed a request for notice under G.S. 45-21.17A, which it did not; because the mortgage company was not entitled to notice of sale, it had no standing to dispute the adequacy of that notice on appeal nor did it have standing to argue that the sale was held on a holiday in contravention of G.S. 45-21.23. Beneficial Mtg. Co. v. Hamidpour, 155 N.C. App. 641, 574 S.E.2d 163, 2002 N.C. App. LEXIS 1571 (2002), cert. dismissed, 357 N.C. 163, 580 S.E.2d 359 (2003), cert. denied, 357 N.C. 163, 580 S.E.2d 359 (2003).

Cited in Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

§ 45-21.24. Continuance of uncompleted sale.

A sale commenced but not completed within the time allowed by G.S. 45-21.23 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A.M. and 4:00 o'clock P.M. the next following day, other than Sunday or a legal holiday when the courthouse is closed for transactions. In case such continuance becomes necessary, the person holding the sale shall publicly announce the time to which the sale is continued. (1949, c. 720, s. 1; 1993, c. 305, s. 15; 2003-337, s. 5.)

CASE NOTES

Cited in Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

§ 45-21.25: Repealed by Session Laws 1967, c. 562, s. 2.

§ 45-21.26. Preliminary report of sale of real property.

(a) The person exercising a power of sale of real property, shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court of the county in which the sale was had.

(b) The report shall be signed by the person authorized to hold the sale, or by his agent or attorney, and shall show —

(1) The authority under which the person making the sale acted;
(2) The name of the mortgagor or grantor;
(3) The name of the mortgagee or trustee;
(4) The date, time and place of the sale;
(5) A reference to the book and page in the office of the register of deeds, where the instrument is recorded or, if not recorded, a description of the property sold, sufficient to identify it, and, if sold in parts, a description of each part so sold;
(6) The name or names of the person or persons to whom the property was sold;
(7) The price at which the property, or each part thereof, was sold, and that such price was the highest bid therefor;
(8) The name of the person making the report; and
(9) The date of the report. (1949, c. 720, s. 1; 1951, c. 252, s. 2.)

CASE NOTES

Constitutionality. — For case holding the statutes providing procedure for real property mortgage foreclosure, sale, and eviction under this Article as it read prior to amendment in 1975 unconstitutional as applied, see Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Foreclosure and sale pursuant to the statutory scheme under this Article as it read prior to amendment in 1975 was prospectively unlawful and void unless the power of sale was determined by the clerk to be a knowing, voluntary, and intelligent waiver of due process rights under U.S. Const., Amend. XIV, or the clerk that determined there had been adequate and timely notice to the mortgagor, coupled with opportunity for a hearing, before any rights were lost. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

The clerk of the court is barred by U.S. Const., Amend. XIV from working a deprivation of the mortgagor's property without prior notice and an opportunity for a timely hearing, unless it is clear that those rights have been expressly waived. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), decided under this Article as it read prior to amendment in 1975.

Verification of Essentials by Clerk. — While the State has left to the trustee the functions of giving notice and conducting the public auction, the essentials thereof are subject to explicit verification by the clerk under this section. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), decided under this Article as it read prior to amendment in 1975.

The filing of a valid report is a necessary precondition to the trustee's power to convey to the highest bidder at the auction. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), decided under this Article as it read prior to amendment in 1975.

Failure to Report Within Five Days. — If a trustee fails to report within the five days directed by this section, the clerk may compel a report under G.S. 45-21.14. When the clerk assumes jurisdiction and orders a resale based on a raised bid, his orders are not void. Gallos v. Lucas, 252 N.C. 480, 113 S.E.2d 923 (1960), decided under this Article as it read prior to amendment in 1975.

If a trustee fails to report a foreclosure sale within the five days as directed by this section, the clerk is authorized to compel such report. Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965), decided under this Article as it read prior to amendment in 1975.

Applied in In re Miller, 72 N.C. App. 494, 325 S.E.2d 490 (1985).

Cited in Carlisle v. Commodore Corp., 15 N.C. App. 650, 190 S.E.2d 703 (1972); Cooper v. Smith, 24 Bankr. 19 (Bankr. W.D.N.C. 1982); In re McDuffie, 114 N.C. App. 86, 440 S.E.2d 865 (1994).

§ 45-21.27. Upset bid on real property; compliance bonds.

(a) An upset bid is an advanced, increased, or raised bid whereby any person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price or last upset bid by a minimum of five percent (5%) thereof, but in any event with a minimum increase of seven hundred fifty dollars ($750.00). Subject to the provisions of subsection (b) of this section, an upset bid shall be made by delivering to the clerk of superior court, with whom the report of sale or last notice of upset bid was filed, a deposit in cash or by certified check or cashier's check satisfactory to the clerk in an amount greater than or equal to five percent (5%) of the amount of the upset bid but in no event less than seven hundred fifty dollars ($750.00). The deposit required by this section shall be filed with the clerk of the superior court, with whom the report of the sale or the last notice of upset bid was filed by the close of normal business hours on the tenth day after the filing of the report of the sale or the last notice of upset bid, and if the tenth day shall fall upon a Sunday or legal holiday when the courthouse is closed for transactions, or upon a day in which the office of the clerk is not open for the regular dispatch of its business, the deposit may be made and the notice of upset bid filed on the day following when said office is open for the regular dispatch of its business. Subject to the provisions of G.S. 45-21.30, there shall be no resales; rather, there may be successive upset bids each of which shall be followed by a period of 10 days for a further upset bid. When an upset bid is not filed following a sale, resale, or prior upset bid within the time specified, the rights of the parties to the sale or resale become fixed.

(b) The clerk of the superior court may require an upset bidder or the highest bidder at a resale held pursuant to G.S. 45-21.30 also to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk. The compliance bond shall be in such amount as the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond, less the amount of any required deposit. The compliance bond shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with the bid.

(c), (d) Repealed by Session Laws 1993, c. 305, s. 16.

(e) At the same time that an upset bid on real property is submitted to the court as provided for in subsection (a) above, together with a compliance bond if one is required, the upset bidder shall simultaneously file with the clerk a notice of upset bid. The notice of upset bid shall:

(1) State the name, address, and telephone number of the upset bidder;
(2) Specify the amount of the upset bid;
(3) Provide that the sale shall remain open for a period of 10 days after the date on which the notice of upset bid is filed for the filing of additional upset bids as permitted by law; and
(4) Be signed by the upset bidder or the attorney or the agent of the upset bidder.

(e1) When an upset bid is made as provided in this section, the clerk shall notify the trustee or mortgagee who shall thereafter mail a written notice of upset bid by first-class mail to the last known address of the last prior bidder and the current record owner(s) of the property.

(f) When an upset bid is made as provided in this section, the last prior bidder, regardless of how the bid was made, shall be released from any further obligation on account of the bid and any deposit or bond provided by him shall be released.

(g) Any person offering to purchase real property by upset bid as permitted in this Article shall be subject to and bound by the terms of the original notice of sale except as modified by court order or the provisions of this Article.

(h) The clerk of superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have the authority to fix and determine all necessary procedural details with respect to upset bids in all instances in which this Article fails to make definite provisions as to that procedure. (1949, c. 720, s. 1; 1963, c. 377; 1967, c. 979, s. 3; 1993, c. 305, s. 16; 2003-337, s. 6.)

Legal Periodicals. — As to former G.S. 45-28, which was similar to G.S. 45-21.27 to 45-21.29 and 45-21.30, see 13 N.C.L. Rev. 15, 300 (1935).

CASE NOTES

Editor's Note. — *Many of the cases cited below were decided under former G.S. 45-28, which was similar to this section and former G.S. 45-21.28, and G.S. 45-21.29 and 45-21.30, and under this Article as it read prior to amendment in 1975. It should be noted that former G.S. 45-28 applied to foreclosure by order of court, to execution sales, and to sales by personal representatives and sales by any person pursuant to a power contained in a will, as well as to sales under power of sale contained in a mortgage or deed of trust. Most of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Constitutionality. — As to constitutionality of provisions under this Article as it read prior to amendment in 1975 regarding procedure for real property mortgage foreclosure, sale, and eviction, see Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

This section exists primarily to protect the mortgagor's equity. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Legislative Intent. — The intent is to extend to private foreclosure sales an effective equivalent of an equity court's power to decree a resale upon the filing of a substantial raised bid. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Former G.S. 45-28 was intended for the protection of mortgagors where sales were made under a power of sale without a decree of foreclosure by the court. In the latter cases there was always an equity to decree a resale when a substantial raise in the bid, usually 10%, had been deposited in court. There being no such protection as to mortgages with power of sale, this statute was passed to extend to mortgagors, whose property had been sold under power of sale without a decree of foreclosure, the same opportunity of a resale. Pringle v. Winston-Salem Bldg. & Loan Ass'n, 182 N.C. 316, 108 S.E. 914 (1921).

Liberal Construction. — This section is to be liberally construed to give the mortgagor the full benefit of the intended protection. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Under former G.S. 45-28 it was held that, while the clerk of the superior court is without authority to order a resale of lands foreclosed under a mortgage without an increase bid filed with him and the payment of the deposit required, the provisions of the statute relating thereto are to be liberally construed to effectuate its intent to protect the mortgagor. Clayton Banking Co. v. Green, 197 N.C. 534, 149 S.E. 689 (1929).

A hearing prior to foreclosure and sale is essential. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

The right to submit an upset bid is obviously not a hearing. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Incorporation of Statute in Mortgages and Deeds of Trust. — The provisions of former G.S. 45-28, concerning the sale of land under a power contained in a mortgage or deed of trust, entered into and controlled the sale under such instruments. In re Sermon's Land, 182 N.C. 122, 108 S.E. 497 (1921).

The provisions of former G.S. 45-28 were, by operation of law, incorporated in all mortgages and deeds of trust and would enter into and control any sale under such instruments. Foust v. Gate City Sav. & Loan Ass'n, 233 N.C. 35, 62 S.E.2d 521 (1950).

This section is by operation of law incorporated into all deeds of trust. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Status of Mortgage and Deed of Trust Sales. — Under former G.S. 45-28 a sale of land under power and a mortgage or deed of trust was given the same status as if made under a judgment or decree of court. Pringle v. Winston-Salem Bldg. & Loan Ass'n, 182 N.C. 316, 108 S.E. 914 (1921).

Power of Court over Judicial Sales Not Affected. — There was nothing in former G.S. 45-28 which deprived the court of its power to prescribe the terms upon which land or other property should be sold under its orders, judgments or decrees. Koonce v. Fort, 204 N.C. 426, 168 S.E. 672 (1933). See § 45-21.2.

Advanced Bids by Mortgagor or Trustor. — Under former G.S. 45-28, the mortgagor or trustor was entitled to procure resales through advanced bids made in conformity with the statute. In re Sale of Land of Sharpe, 230 N.C. 412, 53 S.E.2d 302 (1949).

Procurement of Repeated Resales by Trustor. — The fact that the trustor repeatedly procured resales through the making of advanced bids in compliance with former G.S. 45-28 worked no legal wrong upon the cestui and was within the trustor's right, even though he procured such upset bids for the purpose of delaying foreclosure and the recovery by the cestui of the indebtedness. In re Sale of Land of Sharpe, 230 N.C. 412, 53 S.E.2d 302 (1949). See § 45-21.29.

As to discretion of clerk, see Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Supervisory Powers of Clerk. — The supervisory powers invested in the clerk of the court over sales under a mortgage, deed of trust, etc., by former G.S. 45-28 were not those of general control as exercised by the courts in case of an ordinary judicial sale, but were confined by the statute to sales and resales under the power of sale contained in the instruments, and in accordance with the directions of the statute. Lawrence v. Beck, 185 N.C. 196, 116 S.E. 424 (1923).

As to the supervisory powers given the clerks of the superior courts by former G.S. 45-28, the statute was to be strictly complied with. Redfern v. McGrady, 199 N.C. 128, 154 S.E. 3 (1930).

Supervisory authority conferred by this section relates to resales and does not arise until an upset bid has been filed with the clerk as provided therein. Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

Under former G.S. 45-28 the jurisdiction of the clerk vested at the moment an upset bid was filed with him. Thereafter he had supervisory power over the sale which continued until after the final sale and confirmation thereof. Foust v. Gate City Sav. & Loan Ass'n, 233 N.C. 35, 62 S.E.2d 521 (1950).

Under former G.S. 45-28 it was held that the clerk of the court acquired supervisory power of the sale of land under power contained in a mortgage or deed of trust from the time of an advanced bid paid into his hands, which continued until after the final sale under foreclosure. Lawrence v. Beck, 185 N.C. 196, 116 S.E. 424 (1923).

Power of a clerk to set aside his initial approval is inherent in subsection (b) of this section, and is also authorized by G.S. 45-21.29(j). In re Miller, 72 N.C. App. 494, 325 S.E.2d 490 (1985).

Authority of Clerk to Order Resale. — The only authority conferred by former G.S. 45-28 on the clerk is to order a resale of the property where the bid has been raised as therein prescribed. In re Bauguess, 196 N.C. 278, 145 S.E. 395 (1928). See also, In re Mortgage Sale of Ware Property, 187 N.C. 693, 122 S.E. 660 (1924).

Former G.S. 45-28 controlled as to ordering a resale of lands sold under a power of sale contained in a mortgage or deed of trust, and conferred no power on the clerk to make such order, unless within the 10 days allowed there had been an increased bid, etc., and did not extend to instances wherein a material loss had been sustained by destruction of a house on the lands within the stated period. In re Sermon's Land, 182 N.C. 122, 108 S.E. 497 (1921).

New Hearing Improper. — Trial court erred in allowing trustee to hold a new hearing and sale in foreclosure proceeding which added a new deficiency debtor, after the assistant clerk had held a foreclosure hearing and sale, and the sale of the property had been confirmed by passage of the upset bid period. In re Earl L. Pickett Enters., Inc., 114 N.C. App. 489, 442 S.E.2d 101 (1994).

Report of Sale. — Former G.S. 45-28 did not require that the sale of land under mortgage or deed of trust be reported to the clerk of the court until an advanced bid had been properly made. Pringle v. Winston-Salem Bldg. & Loan Ass'n, 182 N.C. 316, 108 S.E. 914 (1921). See also In re Sermon's Land, 182 N.C. 122, 108 S.E. 497 (1921); Dillingham v. Gardner, 219 N.C. 227, 13 S.E.2d 478 (1941); Peedin v. Oliver, 222 N.C. 665, 24 S.E.2d 519 (1943). See § 45-21.26.

Statutory Period for Filing Upset Bid. — This section provides that an upset bid may be filed with the clerk of superior court at any time within 10 days after the filing of the report of sale. Obviously, if no report of sale has been filed, the 10-day limitation has not begun to run. The trial court committed error in ordering the substitute trustee to convey the properties in accordance with the foreclosure proceedings thus far. The sales should remain open for an upset bid for a period of 10 days from the date this opinion is certified to the clerk of superior court. Carlisle v. Commodore Corp., 15 N.C. App. 650, 190 S.E.2d 703 (1972).

The issuance and service of the temporary restraining order on the substitute trustee halted all proceedings under the foreclosure and tolled the running of the statutory period of 10 days for filing an upset bid. Only nine days elapsed between the date of the sale and the date the substitute trustee was restrained. If the report of sale had been filed on the day of the sale, one day of the statutory 10-day period for filing an upset bid would remain. If the report of sale had been filed on the fifth day after the sale, the maximum time allowed under G.S. 45-21.26, five days of the statutory period of 10 days for filing an upset bid would remain. Carlisle v. Commodore Corp., 15 N.C. App. 650, 190 S.E.2d 703 (1972).

Government's Redemption Was Untimely and Property Went to Upset Bidder. — Title was quieted pursuant to 28 U.S.C.S. § 2409a in the plaintiff to whom title was transferred after he made an upset bid, pursuant to G.S. 45.21-27, because the government's redemption was untimely under 26 U.S.C.S. § 7425(d)(1) since the "date of sale" was the date of the public auction, based on the plain language of 26 C.F.R. § 301.7425-2(b), and not when he made the bid nor when the property was transferred. Ellis v. United States, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 16090 (M.D.N.C. July 22, 2005).

Effect of Automatic Bankruptcy Stay on Redemption Period. — Although the stay created by the filing of a bankruptcy petition is not the same as an injunction granted pursuant to G.S. 45-21.34, the filing of an upset bid in North Carolina is prohibited by the automatic stay of § 362 of the Bankruptcy Code. Since the running of the period during which a debtor may redeem property in North Carolina is tied to the running of the upset bid period, the automatic stay prevents the running of the redemption period as well. In other words, even though the automatic bankruptcy stay does not directly suspend the running of the state statutory redemption period, it indirectly has that effect by preventing the expiration of the ten-day upset bid period. In re DiCello, 80 Bankr. 769 (Bankr. E.D.N.C. 1987).

Bankruptcy court found that because March 25 was Greek Independence Day and was a holiday under G.S. 103-4(3a), the 10-day upset period had not expired under G.S. 45-21.27(a) when the debtor filed bankruptcy after the close of business on March 25, which would otherwise have been the 10th day; thus the bankruptcy court vacated its prior order granting the creditors relief from the automatic stay. In re Country Lake Enters., Inc., 284 Bankr. 223, 2002 Bankr. LEXIS 1161 (Bankr. E.D.N.C. 2002).

Automatic stay provision of 11 U.S.C.S. § 362 of the Bankruptcy Code has the effect of preventing the expiration of the 10-day upset bid period provided for in G.S. 45-21.22, when the debtor files for bankruptcy within that period, thereby preventing the fixing of any rights as to any subject real property protected by a stay as the upset bid period has not run; therefore, where a first mortgagee was the last and highest bidder of a foreclosure trustee's public sale of the debtors' property but the debtors filed for Chapter 13 bankruptcy and stayed the foreclosure, the sale could not be completed and no parties rights as to the property under the foreclosure action were yet "fixed" under G.S. 45-21.27. Beneficial Mortg. Co. of N.C., Inc. v. Barrington & Jones Law Firm, P.A., 164 N.C. App. 41, 595 S.E.2d 705, 2004 N.C. App. LEXIS 727 (2004).

Sale Not Consummated until Expiration of 10 Days. — A last and highest bidder at a foreclosure sale is but a proposed purchaser or preferred bidder during the 10 days allowed by statute for an increase in the bid, and the sale cannot be consummated until after the expiration of 10 days after the public auction. Shelby Bldg. & Loan Ass'n v. Black, 215 N.C. 400, 2 S.E.2d 6 (1939).

In North Carolina, a property has not been "sold at foreclosure sale" under 11 U.S.C. § 1322(c)(1) until all of the state procedural requirements for completion of the sale, including the expiration of the upset bid period, have been met. In re Barham, 193 Bankr. 229 (E.D.N.C. 1996).

Interest of Highest Bidder. — The bidder at the sale during the period of 10 days allowed for the filing of upset bids acquires no interest in the property itself, but only a position similar to a bidder at a judicial sale, before confirmation. He is only considered as a preferred bidder, his right depending upon whether there is an increased bid and a resale of the land ordered under the provisions of the statute. In re Sermon's Land, 182 N.C. 122, 108 S.E. 497 (1921). See also, Richmond County v. Simmons, 209 N.C. 250, 183 S.E. 282 (1936).

No Specific Performance When Sale Reopened. — The principle upon which specific performance of a binding contract to convey lands is enforceable has no application to the successful bidder at a sale under the power contained in a mortgage or deed of trust of lands during the 10 days allowed for the filing of upset bids, for, within that time, there is no binding contract of purchase, and the bargain is incomplete. In re Sermon's Land, 182 N.C. 122, 108 S.E. 497 (1921).

Assignment of Bid. — While the last and highest bidder at a sale under a mortgage acquires no title until the expiration of the 10-day period, he is a preferred bidder and may assign his bid, but his assignee takes only such interest as he had. Creech v. Wilder, 212 N.C. 162, 193 S.E. 281 (1937).

For case in which land was conveyed before expiration of statutory time, see Wise v. Short, 181 N.C. 320, 107 S.E. 134 (1921).

Revocation of Order for Deed. — It is the duty of the clerk of the superior court to readvertise and resell the mortgaged property as often as the statute is complied with, and the last and highest bidder at a prior sale acquires no rights in the property until his bid has finally been accepted and the order made for the deed to be made to him; and such order having been made by the clerk prematurely, it is proper for him to make an entry revoking it and order a resale, and an injunction will not lie to restrain the resale where the order has been thus revoked and the statute complied with. Hanna v. Carolina Mtg. Co., 197 N.C. 184, 148 S.E. 31 (1929).

Payment of Mortgage Within 10-Day Period. — The last and highest bidder at a foreclosure sale of a mortgage on lands is but a proposed purchaser under this section acquiring no right until the statutory provision of 10 days has expired, and the payment of the full mortgage indebtedness to the mortgagee within that time cancels the instrument and all rights arising thereunder. In such case no recovery of damages can be had by the bidder against the mortgagor or a purchaser from him to whom the equity of redemption has been conveyed. Cherry v. Gilliam, 195 N.C. 233, 141 S.E. 594 (1928). See § 45-21.20.

The one who is the last and highest bidder at the foreclosure of a mortgage or deed of trust on lands is but a proposed purchaser within the 10 days before confirmation, and where the mortgagee has become such purchaser and within the 10 days allowed by statute for an increase bid a third person pays the mortgage debt and has the notes and mortgage assigned to him, such person has the right of lien and foreclosure under the terms of the mortgage securing the note. Davis v. Central Life Ins. Co., 197 N.C. 617, 150 S.E. 120 (1929).

Where an assignee, under a mistaken impression of ownership as the highest bidder at a foreclosure sale, satisfied a first deed of trust, there was no legal or equitable obligation on a subsequent purchaser by way of an upset bid to repay the assignee for satisfaction of the first deed of trust. Homeq v. Watkins, 154 N.C. App. 731, 572 S.E.2d 871, 2002 N.C. App. LEXIS 1527 (2002), cert. denied, 356 N.C. 671, 577 S.E.2d 119 (2003).

No Redemption Period for Junior Lien Holders. — Because North Carolina has no redemption statute, in the sense that a debtor or junior lien holder has no special right to repurchase property from a buyer after the completion of a foreclosure sale, and instead deals with the power of sale foreclosures within 10 days of a public auction pursuant to G.S. 45-21.27, the government had to rely on the language in 26 U.S.C.S. § 7526(d)(1) which stated that the Secretary could redeem within 120 days from the date of sale, and not the language referring to redemption under state law. Ellis v. United States, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 16090 (M.D.N.C. July 22, 2005).

Deposit of Advanced Bid with Clerk. — Under the facts, in case presenting the question of a valid resale of mortgaged land under the provisions of former G.S. 45-28, objection that only 2% of the proposed advanced bid was deposited with the clerk was untenable. Briggs v. Asheville Developers, 191 N.C. 784, 133 S.E. 3 (1926).

Clerk Cannot Require Larger Deposit Than That Required by Statute. — Under former G.S. 45-28, it was held that the clerk had no authority to require a cash deposit for an upset bid in excess of that prescribed by the statute, or to require a person desirous of making an advance bid to deposit 15% of such bid in cash or certified or cashier's check. In re Sale of Land of Sharpe, 230 N.C. 412, 53 S.E.2d 302 (1949).

Time of Making Deposit. — Under repealed G.S. 45-28 it was held that when, within the statutory time limit, the offerer had communicated with the clerk of the court by telephone and offered to come from an adjacent town and make a sufficient deposit and was informed by the clerk that it would be sufficient to send a cashier's check by mail on that day, and a good cashier's check was accordingly mailed, a substantial compliance with the statute was made, though the check was received by the clerk after the expiration of the time limit of the statute. Clayton Banking Co. v. Green, 197 N.C. 534, 149 S.E. 689 (1929).

Rights of Owner of Equity of Redemption. — Where lands had been many times resold under former G.S. 45-28 and the owner of the equity of redemption had not protected himself at the sales, he could not have the deed at the final sale set aside for irregularity when the last purchaser was an innocent purchaser for value in good faith. Brown v. Sheets, 197 N.C. 268, 148 S.E. 233 (1929). See also, Phipps v. Wyatt, 199 N.C. 727, 155 S.E. 721 (1930).

As to sale not subject to collateral attack, see First Carolina's Joint-Stock Land Bank v. Stewart, 208 N.C. 139, 179 S.E. 463 (1935).

Effect of Recitals in Deed as to Compliance with Statute. — Where the question in controversy in a suit for specific performance against the purchaser is whether there has been a compliance with former G.S. 45-28 as to a resale under a mortgage upon the raise of a bid at a prior sale, the recitals relating thereto in the deed tendered by the mortgagor are only prima facie evidence of such facts, and standing alone are insufficient to sustain the judgment. Briggs v. Asheville Developers, 191 N.C. 784, 133 S.E. 3 (1926).

As to commissions allowed under former G.S. 45-28, see Pringle v. Winston-Salem Bldg. & Loan Ass'n, 182 N.C. 316, 108 S.E. 914 (1921); In re Sale of E. Hollowell Land, 194 N.C. 222, 139 S.E. 169 (1927); Tidewater Brokerage Co. v. Southern Trust Co., 203 N.C. 182, 165 S.E. 353 (1932). See § 45-21.15.

Jurisdiction of Judge on Appeal. — The discretion vested in the superior court judge on appeal from the clerk, under G.S. 1-276 [see now G.S. 1-301.1 et seq.], to hear and determine the matter in controversy, cannot confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, for the clerk has no authority to further pass thereon in the absence of an increased bid. In re Mortgage Sale of Ware Property, 187 N.C. 693, 122 S.E. 660 (1924).

Irregularity Requiring Vacation of Confirmation and Deed. — After upset bid under former G.S. 45-28, the property in suit, having a market value of from $5,500.00 to $6,000.00, was actually sold for $825.00. The trustee erroneously reported the bid as $6,400.00, which report was on record in the clerk's office from the date of the sale until confirmation. It was held that the irregularity was of such substantial nature as to require a court of equity to vacate the confirmation and the deed pursuant thereto without requiring the trustors to prove that anyone was misled or failed to file an upset bid by reason of the erroneous report. Foust v. Gate City Sav. & Loan Ass'n, 233 N.C. 35, 62 S.E.2d 521 (1950).

Applied in Vance v. Vance, 203 N.C. 667, 166 S.E. 901 (1932); Howard v. Ray, 222 N.C. 710, 24 S.E.2d 529 (1943); McCullen v. Durham, 229 N.C. 418, 50 S.E.2d 511 (1948).

Cited in In re Hardin, 248 N.C. 66, 102 S.E.2d 420 (1958); Allied Mtg. & Dev. Co. v. Pitts, 272 N.C. 196, 158 S.E.2d 53 (1967); In re Burgess, 57 N.C. App. 268, 291 S.E.2d 323 (1982); In re Keziah, 53 Bankr. 116 (W.D.N.C. 1985); In re Adams, 86 Bankr. 867 (Bankr. E.D.N.C. 1988); United Carolina Bank v. Tucker, 99 N.C. App. 95, 392 S.E.2d 410 (1990).

§ 45-21.28: Repealed by Session Laws 1993, c. 305, s. 17, effective October 1, 1993, and applicable to instruments recorded prior to, on, or after that date.

§ 45-21.29. Orders for possession.

(a)-(j) Repealed by Session Laws 1993, c. 305, s. 18.

(k) Orders for possession of real property sold pursuant to this Article, in favor of the purchaser and against any party or parties in possession at the time of application therefor, may be issued by the clerk of the superior court of the county in which the property is sold if all of the following apply:

(1) The property has been sold in the exercise of the power of sale contained in any mortgage, deed of trust, leasehold mortgage, leasehold deed of trust, or a power of sale authorized by any other statutory provisions.

(2) Repealed by Session Laws 1993, c. 305, s. 18.

(2a) The provisions of this Article have been complied with.

(3) The sale has been consummated, and the purchase price has been paid.

(4) The purchaser has acquired title to and is entitled to possession of the real property sold.

(5) Ten days' notice has been given to the party or parties who remain in possession at the time application is made, or, in the case of residen-

tial property containing 15 or more rental units, 30 days' notice has been given to the party or parties who remain in possession at the time the application is made.

(6) Application is made by petition to the clerk by the mortgagee, the trustee, the purchaser of the property, or any authorized representative of the mortgagee, trustee, or purchaser of the property.

(*l*) An order for possession issued pursuant to G.S. 45-21.29(k) shall be directed to the sheriff and shall authorize the sheriff to remove all occupants and their personal property from the premises and to put the purchaser in possession, and shall be executed in accordance with the procedure for executing a writ or order for possession in a summary ejectment proceeding under G.S. 42-36.2. The purchaser shall have the same rights and remedies in connection with the execution of an order for possession and the disposition of personal property following execution as are provided to a landlord under North Carolina law, including Chapters 42 and 44A of the General Statutes.

(m) When the real property sold is situated in more than one county, the provisions of subsection (*l*) of this section shall be complied with in each county in which any part of the property is situated. (1949, c. 720, s. 1; 1951, c. 252, s. 3; 1965, c. 299; 1967, c. 979, s. 3; 1975, c. 492, ss. 7-9; 1987, c. 627, s. 3; 1993, c. 305, s. 18; 2007-353, s. 4.)

Effect of Amendments. — Session Laws 2007-353, s. 4, effective October 1, 2007, substituted "sold if all of the following apply" for "sold, when" at the end of the introductory paragraph of subsection (k); rewrote subdivision (k)(5); substituted "the sheriff" for "him" in the first sentence of subsection (*l*); and made minor stylistic changes throughout.

Legal Periodicals. — For survey of 1972 case law on notice requirements of the nonjudicial foreclosure sale, see 51 N.C.L. Rev. 1110 (1973).

For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

CASE NOTES

Editor's Note. — *Many of the cases in the following note were decided under repealed G.S. 45-28, which was similar to G.S. 45-21.27, former G.S. 45-21.28, this section and G.S. 45-21.30, and under this Article as it read prior to amendment in 1975. Most of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Constitutionality. — For case holding the statutes providing procedure for real property mortgage foreclosure, sale, and eviction under this Article as it read prior to amendment in 1975 are unconstitutional as applied, see Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Foreclosure and sale pursuant to the statutory scheme of this Article as it read prior to amendment in 1975 was prospectively unlawful and void unless the power of sale was determined by the clerk to be a knowing, voluntary, and intelligent waiver of due process rights under U.S. Const., Amend. XIV, or the clerk determined that there had been adequate and timely notice to the mortgagor, coupled with opportunity for a hearing, before any rights were lost. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Clerk of the court is barred by U.S. Const., Amend. XIV from working a deprivation of the mortgagor's property without prior notice and an opportunity for a timely hearing, unless it is clear that those rights have been expressly waived. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Minimum Requirements of Due Process. — At a minimum, due process requires the trustee to make an initial showing before the clerk or similar neutral official that the mortgagor is in default under the obligation; the mortgagor must of course be afforded the opportunity to rebut and defend the charges. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Both Posting and Publication Required. — The legislature intended to meet the requirements of due process by demanding both posting and publication under this section. Albemarle Realty & Mtg. Co. v. Peoples Bank, 34 N.C. App. 481, 238 S.E.2d 622 (1977).

Statutory Provisions Incorporated. — Statutory provisions are, by operation of law, incorporated in all mortgages and deeds of trusts and control any sale under such instruments. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969); Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412, appeal dismissed, 281 N.C. 314, 188 S.E.2d 898, appeal dismissed and cert. denied, 409 U.S. 1071, 93 S. Ct. 677, 34 L. Ed. 2d 659 (1972).

The jurisdiction of the clerk vests at the moment an upset bid is filed with him. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Clerk May Not Make Orders Abrogating Rights Conferred by Statute. — The provision of former G.S. 45-28 that the clerk should make such orders as might be just and necessary to safeguard the interests of all parties did not authorize him to enter orders abrogating rights conferred by the statute. In re Sale of Land of Sharpe, 230 N.C. 412, 53 S.E.2d 302 (1949).

The provision of this section that on the resale of real property the clerk shall make all such orders as may be just and necessary to safeguard the interests of all parties extends to orders securing the rights of the parties as defined by statute, but not to orders abrogating or abridging such rights. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Power of a clerk to set aside his initial approval is inherent in G.S. 45-21.27(b), and is also authorized by subsection (j) of this section. In re Miller, 72 N.C. App. 494, 325 S.E.2d 490 (1985).

Clerk to Order Resale After Each Upset Bid. — Under former G.S. 45-28 it was held that the clerk of the superior court was required to order a resale of property foreclosed under power contained in a deed of trust each time an advance bid was made in accordance with the statute, regardless of how often an upset bid might be placed. In re Sale of Land of Sharpe, 230 N.C. 412, 53 S.E.2d 302 (1949). See note to § 45-21.27.

Where a resale is ordered the bidder at the first sale is released from any and all obligation by reason of his bid. Richmond County v. Simmons, 209 N.C. 250, 183 S.E. 282 (1936).

Keeping Resale Open for 10 Days. — Under the provisions of former G.S. 45-28 as to resale of mortgaged lands upon a raised bid, it was required that the matter be kept open by the clerk for 10 days thereafter. Briggs v. Asheville Developers, 191 N.C. 784, 133 S.E. 3 (1926).

Effect of Automatic Bankruptcy Stay on Redemption Period. — Although the stay created by the filing of a bankruptcy petition is not the same as an injunction granted pursuant to G.S. 45-21.34, the filing of an upset bid in North Carolina is prohibited by the automatic stay of § 362 of the Bankruptcy Code. Since the running of the period during which a debtor may redeem property in North Carolina is tied to the running of the upset bid period, the automatic stay prevents the running of the redemption period as well. In other words, even though the automatic bankruptcy stay does not directly suspend the running of the state statutory redemption period, it indirectly has that effect by preventing the expiration of the ten-day upset bid period. In re DiCello, 80 Bankr. 769 (Bankr. E.D.N.C. 1987).

Striking Out Order for Resale. — Where, on account of an upset bid, an order for a resale has been entered, it is error 11 days thereafter to strike out such order and declare the sale final, in prejudice of further rights of mortgagors. Virginia Trust Co. v. Powell, 189 N.C. 372, 127 S.E. 242 (1925).

Inadequacy of Purchase Price. — Mere inadequacy of the purchase price realized at a foreclosure sale, standing alone, is not sufficient to upset a sale duly and regularly made in strict conformity with the power of sale. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Where there is an irregularity in the sale, gross inadequacy of purchase price may be considered on the question of the materiality of the irregularity. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

Gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties. In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969).

The order of the clerk to deliver title required by former § 45-28 was merely ministerial in its nature, and its omission, when in fact the trustee had, after complying with all the terms of the power of sale, made title to the purchaser, did not invalidate the foreclosure or render the title acquired by the purchaser as grantee in the deed of the trustee void. Cheek v. Squires, 200 N.C. 661, 158 S.E. 198 (1931). See also, Lawrence v. Beck, 185 N.C. 196, 116 S.E. 424 (1923).

The law presumes regularity in the execution of the power of sale in a deed of trust duly executed and regular upon its face. Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412, appeal dismissed, 281 N.C. 314, 188 S.E.2d 898, appeal dismissed and cert. denied, 409 U.S. 1071, 93 S. Ct. 677, 34 L. Ed. 2d 659 (1972).

Burden on Attacking Party. — If there is any failure to advertise a sale properly, the burden is on the attacking party to show it. Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412, appeal dismissed, 281 N.C. 314, 188 S.E.2d 898, appeal dismissed and cert. denied, 409 U.S. 1071, 93 S. Ct. 677, 34 L. Ed. 2d 659 (1972).

Insurable Interest of Mortgagor. — In a foreclosure, until the purchase price is paid and the deed is delivered, the mortgagor retains some interests in the property. These interests constitute some sufficient risk of pecuniary loss and chance of benefit that the mortgagor has an insurable interest in the property. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Conversion Not Found. — Where the evidence sufficiently demonstrated that defendant obtained plaintiff's personal property in accord with statutorily mandated procedures under this section and G.S. 42-36.2(b), it did not convert plaintiff's property by removing and storing it. Smithers v. Tru-Pak Moving Sys., 121 N.C. App. 542, 468 S.E.2d 410 (1996).

Applied in In re Sale of Land of Warrick, 1 N.C. App. 387, 161 S.E.2d 630 (1968); Hassell v. Wilson, 44 N.C. App. 434, 261 S.E.2d 227 (1980); In re Burgess, 57 N.C. App. 268, 291 S.E.2d 323 (1982).

Cited in Gallos v. Lucas, 252 N.C. 480, 113 S.E.2d 923 (1960); Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965); Carlisle v. Commodore Corp., 15 N.C. App. 650, 190 S.E.2d 703 (1972); Econo-Travel Motor Hotel Corp. v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979).

§ 45-21.29A. No necessity for confirmation of sale.

No confirmation of sales or resales of real property made pursuant to this Article shall be required. If an upset bid is not filed following a sale, resale, or prior upset bid within the period specified in this Article, the rights of the parties to the sale or resale become fixed. (1967, c. 979, s. 3; 1993, c. 305, s. 19.)

CASE NOTES

Editor's Note. — *Some of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

The rights fixed by this section are solely contractual in nature and do not involve any transfer of title. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

The rights fixed by this section are subject to the provisions of § 39-39. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

The only rights that are "fixed" under this section upon expiration of the 10-day period are the contractual rights of the high bidder to delivery of the deed upon tender of the purchase price and of the trustee to hold the bidder liable for that price. The rights of other parties, including those in possession, are not necessarily affected. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Orders confirming foreclosure sales are not required in North Carolina unless the sale is a resale necessitated by an upset bid. In re Adams, 86 Bankr. 867 (Bankr. E.D.N.C. 1988).

In North Carolina, a property has not been "sold at foreclosure sale" under 11 U.S.C. § 1322(c)(1) until all of the state procedural requirements for completion of the sale, including the expiration of the upset bid period, have been met. In re Barham, 193 Bankr. 229 (E.D.N.C. 1996).

Nothing in this section shifts the risk of loss prior to closing to the high bidder. In fact, the high bidder cannot compel relinquishment of the premises until the price has been paid in full, and the morgagor remains subject to personal liability on the note until then. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Insurable Interest of Mortgagor. — In a foreclosure, until the purchase price is paid and the deed is delivered, the mortgagor retains some interests in the property. These interests constitute some sufficient risk of pecuniary loss and chance of benefit that the mortgagor has an insurable interest in the property. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Where no upset bid is filed, confirmation of the sale is not required. Britt v. Smith, 6 N.C. App. 117, 169 S.E.2d 482 (1969).

When Right to Equity of Redemption Is Lost. — In nonjudicial foreclosures where no upset bid is filed, the rights of the parties to the foreclosure sale, i.e., the rights of the trustee under the deed of trust being foreclosed (as seller) and the rights of the purchaser, become fixed at the expiration of the 10-day period for the filing of upset bids. It is at this point that the debtor loses his rights to the equity of redemption he had in the real estate. Cooper v. Smith, 24 Bankr. 19 (Bankr. W.D.N.C. 1982).

Cited in In re Wiley Brown & Assocs., LLC,

— Bankr. —, 2006 Bankr. LEXIS 2851 (Bankr. M.D.N.C. Oct. 11, 2006).

§ 45-21.30. Failure of bidder to make cash deposit or to comply with bid; resale.

(a) If the terms of a sale of real property require the highest bidder to make a cash deposit at the sale, and he fails to make such required deposit, the person holding the sale shall at the same time and place again offer the property for sale.

(b) Repealed by Session Laws 1967, c. 562, s. 2.

(c) When the highest bidder at a sale or resale or any upset bidder fails to comply with his bid upon tender to him of a deed for the real property or after a bona fide attempt to tender such a deed, the clerk of superior court may, upon motion, enter an order authorizing a resale of the real property. The procedure for such resale shall be the same in every respect as is provided by this Article in the case of an original sale of real property except that the provisions of G.S. 45-21.16 are not applicable to the resale.

(d) A defaulting bidder at any sale or resale or any defaulting upset bidder is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all the costs of the resale. Any deposit or compliance bond made by the defaulting bidder shall secure payment of the amount, if any, for which the defaulting bidder remains liable under this section.

(e) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 720, s. 1; 1967, c. 562, s. 2; 1975, c. 492, s. 10; 1977, c. 359, s. 15; 1993, c. 305, s. 20.)

Legal Periodicals. — For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

CASE NOTES

Editor's Note. — *Some of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

A judgment creditor lacks standing to bring an action against a defaulting bidder as that term was used under this section prior to the 1993 amendment. Union Grove Milling & Mfg. Co. v. Faw, 109 N.C. App. 248, 426 S.E.2d 476, aff'd per curium, 335 N.C. 165, 436 S.E.2d 131 (1993).

Deposit When No Upset Bid Is Made. — Under the provisions of former G.S. 45-28, the last and highest bidder at a foreclosure sale obtained no interest in the land until the elapse of the 10-day period for the filing of an increased bid, and although the mortgagee or trustee might, in fixing the terms of the sale, require a reasonable cash deposit to cover the cost of the sale and insure completion of the sale by the purchaser if no upset bid was made, the reasonableness of such deposit might be determined by analogy to the deposit required for an upset bid, and a demand for a cash deposit at the sale amounting to 25% of the bid was unreasonable. Alexander v. Boyd, 204 N.C. 103, 167 S.E. 462 (1933), decided under former § 45-28.

Recovery of Deposit When Resale Is Ordered. — Where the last and highest bidder at a sale of lands has been required to deposit a certain percentage of his bid in cash to show his good faith, he is entitled to receive his deposit back upon the placing of an advanced bid and cash deposit by another and the entering of an order of resale by the clerk. Koonce v. Fort, 204 N.C. 426, 168 S.E. 672 (1933), decided under former § 45-28.

The deposit required by former G.S. 45-28 was to guarantee against loss in a resale of land under foreclosure sale of a mortgage, and where the clerk of the superior court required of a person placing an advanced bid a deposit representing a 5% increase bid, and in addition a deposit to guarantee compliance with the bid, and the lands were resold and bought in by the one making the advanced bid, and he refused to pay the amount because of threatened litigation, and the lands were again resold and brought a surplus over that of the prior resale, there was no loss occasioned by the first resale, and the person making the deposit therefor was entitled to received it back as against the claim therefor of one holding a note secured by a junior mortgage on the same property. Harris v. American Bank & Trust Co., 198 N.C. 605, 152 S.E. 802 (1930), decided under § 45-28.

Discretion of Trustee. — The trustee has substantial discretion in discharging his responsibilities, which are to attempt to satisfy the debt while getting the highest price for the mortgagor and protecting the mortgagor's rights and equity. As long as the trustee does not violate the fiduciary duty of the office, and does not give unfair advantages to any party, the exercise of that discretion is not reviewable by the courts. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

New Hearing Improper. — Trial court erred in allowing trustee to hold a new hearing and sale in foreclosure proceeding which added a new deficiency debtor, after the assistant clerk had held a foreclosure hearing and sale, and the sale of the property had been confirmed by passage of the upset bid period. In re Earl L. Pickett Enters., Inc., 114 N.C. App. 489, 442 S.E.2d 101 (1994).

Insurable Interest of Mortgagor. — In a foreclosure, until the purchase price is paid and the deed is delivered, the mortgagor retains some interests in the property. These interests constitute some sufficient risk of pecuniary loss and chance of benefit that the mortgagor has an insurable interest in the property. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. denied, 318 N.C. 284, 348 S.E.2d 344 (1986).

Withdrawal of Upset Bid for Mistake Held Error. — Order permitting an individual to withdraw his upset bid and requiring a resale of foreclosed property, based on the court's finding that he made his bid in the mistaken belief, due to negligently failing to inform himself as to the land that he was bidding on, that he was bidding on all three parcels of land covered by deed of trust, rather than just two, was in error, as there was no equitable basis for allowing him to withdraw it. When the bid was accepted by the trustee as the last and highest, a contract was made, and the mere mistake of one party alone is not sufficient to avoid a contract. In re Allan & Warmbold Constr. Co., 88 N.C. App. 693, 364 S.E.2d 723, cert. denied, 322 N.C. 480, 370 S.E.2d 222 (1988).

Applied in Econo-Travel Motor Hotel Corp. v. Foreman's, Inc., 44 N.C. App. 126, 260 S.E.2d 661 (1979); Econo-Travel Hotel Corp. v. Taylor, 45 N.C. App. 229, 262 S.E.2d 869 (1980).

Cited in In re Otter Pond Inv. Group, Ltd., 79 N.C. App. 644, 339 S.E.2d 854 (1986); United Carolina Bank v. Tucker, 99 N.C. App. 95, 392 S.E.2d 410 (1990); In re Foreclosure of Lien by Ridgeloch Homeowners Ass'n, — N.C. App. —, 642 S.E.2d 532, 2007 N.C. App. LEXIS 653 (2007).

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.

(a) The proceeds of any sale shall be applied by the person making the sale, in the following order, to the payment of —

(1) Costs and expenses of the sale, including the trustee's commission, if any, and a reasonable auctioneer's fee if such expense has been incurred;

(2) Taxes due and unpaid on the property sold, as provided by G.S. 105-385, unless the notice of sale provided that the property be sold subject to taxes thereon and the property was so sold;

(3) Special assessments, or any installments thereof, against the property sold, which are due and unpaid, as provided by G.S. 105-385, unless the notice of sale provided that the property be sold subject to special assessments thereon and the property was so sold;

(4) The obligation secured by the mortgage, deed of trust or conditional sale contract.

(b) Any surplus remaining after the application of the proceeds of the sale as set out in subsection (a) shall be paid to the person or persons entitled thereto, if the person who made the sale knows who is entitled thereto. Otherwise, the surplus shall be paid to the clerk of the superior court of the county where the sale was had—

(1) In all cases when the owner of the property sold is dead and there is no qualified and acting personal representative of his estate, and

(2) In all cases when he is unable to locate the persons entitled thereto, and

(3) In all cases when the mortgagee, trustee or vendor is, for any cause, in doubt as to who is entitled to such surplus money, and

(4) In all cases when adverse claims thereto are asserted.

(c) Such payment to the clerk discharges the mortgagee, trustee or vendor from liability to the extent of the amount so paid.

(d) The clerk shall receive such money from the mortgagee, trustee or vendor and shall execute a receipt therefor.

(e) The clerk is liable on his official bond for the safekeeping of money so received until it is paid to the party or parties entitled thereto, or until it is paid out under the order of a court of competent jurisdiction. (1949, c. 720, s. 1; 1951, c. 252, s. 1; 1967, c. 562, s. 2; 1981, c. 682, s. 10.)

CASE NOTES

Trustee's Authority to Make Disbursements. — Chapter 45, Article 2A contains no language that suggests the trustee must seek or obtain approval from either the clerk of the superior court or the court prior to making the disbursements permitted in subsection (a), and where the instrument giving rise to foreclosure grants no one the right to contest the disbursements, the disbursements made pursuant to subsection (a) are within the sole province of the trustee. In re Deed of Trust, 118 N.C. App. 458, 455 S.E.2d 676 (1995).

Application of the proceeds of a foreclosure sale were within the sole province of the trustee, who was not required to receive preapproval from the clerk of the superior court, or the superior court, regarding the application of the proceeds. In re Webber, 148 N.C. App. 158, 557 S.E.2d 645, 2001 N.C. App. LEXIS 1272 (2001).

Surplus money arising upon a sale of land under a decree of foreclosure stands in place of the land itself in respect to liens thereon or vested rights therein. It is constructively, at least, real property, and belongs to the mortgagor or his assigns. In re Castillian Apts., Inc., 281 N.C. 709, 190 S.E.2d 161 (1972).

Obligation to Pay Costs and Expenses. — Payment of costs and expenses required by subsection (a) is not the obligation of a purchase money debtor whose deed of trust is being foreclosed; nor is it, strictly speaking, the obligation of the buyer at the foreclosure sale. Instead, these statutory costs and expenses, including the trustee's commission, are simply obligations arising from the foreclosure sale which must be paid by the trustee before the remainder of the proceeds may be distributed. Merritt v. Ridge, 323 N.C. 330, 372 S.E.2d 559 (1988); Whitley v. Griffin, 737 F. Supp. 345 (E.D.N.C. 1990).

Statutory costs and expenses, including the trustee's commission, were simply obligations arising from the foreclosure sale which had to be paid by the trustee before the remainder of the proceeds could be distributed. In re Webber, 148 N.C. App. 158, 557 S.E.2d 645, 2001 N.C. App. LEXIS 1272 (2001).

Payment of Surplus to Clerk of Superior Court. — A trustee, upon completion of foreclosure on entirety property, is authorized by this section to pay the surplus to the clerk of superior court. Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973).

Liability of Trustee for Failure to Pay Over Surplus to Clerk. — Under subdivision (b)(4) of this section, the trustee or mortgagee must pay into the hands of the clerk of the superior court the surplus remaining after foreclosure in all cases where adverse claims to the funds are asserted, and trustee who pays such funds into the hands of the administrator of deceased trustor remains liable therefor until they are paid into the hands of the clerk as provided by law. Lenior County v. Outlaw, 241 N.C. 97, 84 S.E.2d 330 (1954).

There is no limit to the amount of funds that may be paid to the clerk of a superior court under the provisions of this section, the limitation of the amount payable to the clerk under the provisions of former G.S. 28-68 not being applicable to the surplus realized upon the foreclosure of a mortgage or deed of trust. Lenoir County v. Outlaw, 241 N.C. 97, 84 S.E.2d 330 (1954).

The clerk holds surplus money for safekeeping only, having no interest therein other than to protect himself from liability on his official bond. Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973); In re Foreclosure of Deed of Trust, 20 N.C. App. 610, 202 S.E.2d 318 (1974).

Surplus from Foreclosure Sale Not Held by the Entirety. — Since a foreclosure sale of realty under a deed of trust after default is not involuntary, surplus funds so created are not held by the entirety. In re Foreclosure of Deed of Trust, 303 N.C. 514, 279 S.E.2d 566 (1981).

Alternatives of Mortgagee. — Where the owner of lands mortgaged the same as tracts numbered 1 and 2, and later conveyed tract No. 2 to a purchaser in fee simple, and devised tract No. 1 for life with remainder over, it was held under former G.S. 45-29, which was similar in subject matter to this section, that the mortgagee should hold the proceeds of the sale after the satisfaction of his mortgage for the life tenant and remaindermen, who might determine whether the surplus should be invested in accordance with their equities, or the interest of the life tenant be paid in cash under the provisions of G.S. 8-47, or the mortgagee might relieve himself of liability by paying the fund into court pursuant to former G.S. 45-29. Brown v. Jennings, 188 N.C. 155, 124 S.E. 150 (1924).

Payment of Foreclosure Tax. — Where at foreclosure sale the lender was the highest bidder and purchaser, the federal agency was named in the foreclosure deed only through assignment of the lender's bid, and the trustee was required by subsection (a) of this section to pay the foreclosure tax which is simply an obligation of the trustee that must be paid from the proceeds of the foreclosure sale, therefore the foreclosure sales were not instances in which the ultimate burden of paying the tax fell upon the United States or its agencies and thus the tax was collectible. Whitley v. Griffin, 737 F. Supp. 345 (E.D.N.C. 1990).

The auctioneer's fee was formerly payable out of trustee's commissions. See Duffy v. Smith, 132 N.C. 38, 43 S.E. 501 (1903).

Payment of Attorney's Fees. — Although subsection (a) does not have specific reference to attorneys' fees, to the extent the instrument provides for the payment of such fees, they become an "obligation secured by" the instrument, thus, any entitlement to and the amount of attorneys' fees required for the conduct of the sale is also controlled by the instrument and subject to deduction from the sale proceeds. In re Deed of Trust, 118 N.C. App. 458, 455 S.E.2d 676 (1995).

Applied in Staunton Military Academy, Inc. v. Dockery, 244 N.C. 427, 94 S.E.2d 354 (1956); Dixieland Realty Co. v. Wysor, 272 N.C. 172, 158 S.E.2d 7 (1967); Ridley v. Jim Walter Corp., 272 N.C. 673, 158 S.E.2d 869 (1968); Witten Supply Co. v. Redmond, 11 N.C. App. 173, 180 S.E.2d 487 (1971); Koob v. Koob, 16 N.C. App. 326, 192 S.E.2d 40 (1972); Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973); In re C & M Invs., 346 N.C. 127, 484 S.E.2d 546 (1997).

Cited in Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956); Porter v. Citizens Bank of Warrenton, Inc., 251 N.C. 573, 111 S.E.2d 904 (1960); Sullivan v. Johnson, 268 N.C. 443, 150 S.E.2d 777 (1966); Huff v. Trent Academy of Basic Educ., Inc., 53 N.C. App. 113, 280 S.E.2d 17 (1981); Merritt v. Edwards Ridge, 88 N.C. App. 132, 362 S.E.2d 610 (1987); Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991); Goldsboro Milling Co. v. Reaves, 804 F. Supp. 762 (E.D.N.C. 1991).

§ 45-21.32. Special proceeding to determine ownership of surplus.

(a) A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk's office under G.S. 45-21.31, to determine who is entitled thereto.

(b) All other persons who have filed with the clerk notice of their claim to the money or any part thereof, or who, as far as the petitioner or petitioners know, assert any claim to the money or any part thereof, shall be made defendants in the proceeding.

(c) If any answer is filed raising issues of fact as to the ownership of the money, the proceeding shall be transferred to the civil issue docket of the superior court for trial. When a proceeding is so transferred, the clerk may require any party to the proceeding who asserts a claim to the fund by petition or answer to furnish a bond for costs in the amount of two hundred dollars ($200.00) or otherwise comply with the provisions of G.S. 1-109.

(d) The court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy, and shall tax all costs against the losing party or parties who asserted a claim to the fund by petition or answer. (1949, c. 720, s. 1.)

Cross References. — As to special proceedings generally, see G.S. 1-393 et seq.

CASE NOTES

Transfer to Superior Court for Trial. — When respondent files an answer raising issues of fact as to the ownership of money on deposit with the clerk, the proceeding should be transferred to the civil issue docket of the superior court for trial. In re Foreclosure of Deed of Trust, 20 N.C. App. 610, 202 S.E.2d 318 (1974).

Jurisdiction of Superior Court. — The superior court had no jurisdiction of a special proceeding under this section brought by judgment creditors to determine the ownership of surplus funds remaining after a foreclosure sale, where the matter was simply put on the calendar for hearing in the superior court and there was no appeal from an order of the clerk by an aggrieved party. Journeys Int'l, Inc. v. Corbett, 53 N.C. App. 124, 280 S.E.2d 5 (1981).

Determination of Priority of Payment of Surplus Claims. — Where there are adverse claims against the surplus realized upon the foreclosure of a deed of trust after the death of the trustor, and a proceeding is instituted pursuant to this section to determine who is entitled to such funds, it is the clerk and not the administrator who determines the priority of payments, although the administrator claiming the funds is a necessary party. Lenoir County v. Outlaw, 241 N.C. 97, 84 S.E.2d 330 (1954).

Special Proceeding Not Necessary. — The federal government, which sought to enforce an administrative levy served in connection with the collection of federal taxes, was not required under the law to commence a special proceeding in state court in order to determine the ownership of surplus funds from the foreclosure of property which taxpayer and her husband owned as tenants by the entirety or to recover the funds belonging to the taxpayer. United States v. Mauney, 642 F. Supp. 1097 (W.D.N.C. 1986).

As to pleading the statute of limitations, see In re Gibbs, 205 N.C. 312, 171 S.E. 55 (1933).

Applied in Dixieland Realty Co. v. Wysor, 272 N.C. 172, 158 S.E.2d 7 (1967); RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

Cited in Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956); United States v. Williams, 139 F. Supp. 94 (M.D.N.C. 1956); Porter v. Citizens Bank of Warrenton, Inc., 251 N.C. 573, 111 S.E.2d 904 (1960); Smith v. Clerk of Superior Court, 5 N.C. App. 67, 168 S.E.2d 1 (1969); In re Castillian Apts., Inc., 281 N.C. 709, 190 S.E.2d 161 (1972); Koob v. Koob, 283 N.C. 129, 195 S.E.2d 552 (1973); In re Foreclosure of Deed of Trust, 303 N.C. 514, 279 S.E.2d 566 (1981).

§ 45-21.33. Final report of sale of real property.

(a) A person who holds a sale of real property pursuant to a power of sale shall file with the clerk of the superior court of the county where the sale is held a final report and account of his receipts and disbursements within 30 days after the receipt of the proceeds of such sale. Such report shall show whether the property was sold as a whole or in parts and whether all of the property was sold. The report shall also show whether all or only a part of the obligation was satisfied with respect to which the power of sale of property was exercised.

(b) The clerk shall audit the account and record it.

(c) The person who holds the sale shall also file with the clerk —

(1) A copy of the notices of sale and resale, if any, which were posted, and

(2) A copy of the notices of sale and resale, if any, which were published in a newspaper, together with an affidavit of publication thereof, if the notices were so published;

(3) Proof as required by the clerk, which may be by affidavit, that notices of hearing, sale and resale were served upon all parties entitled thereto under G.S. 45-21.16, 45-21.17, 45-21.17A, and 45-21.30. In the absence of an affidavit to the contrary filed with the clerk, an affidavit by the person holding the sale that the notice of sale was posted in the area designated by the clerk of superior court for posting public notices in the county or counties in which the property is situated 20 days prior to the sale shall be proof of compliance with the requirements of G.S. 45-21.17(1)a.

(d) The clerk's fee for auditing and recording the final account is a part of the expenses of the sale, and the person holding the sale shall pay the clerk's fee as part of such expenses. (1949, c. 720, s. 1; 1975, c. 492, s. 11; 1983, c. 799; 1993, c. 305, s. 21; 1995, c. 509, s. 26.)

Editor's Note. — Session Laws 1975, c. 492, which amended this section, provides in s. 14: "The words clerk of court as used in this act shall be deemed to include assistant clerk of court."

Legal Periodicals. — For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

CASE NOTES

Editor's Note. — *Some of the cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Constitutionality. — For case holding the statutes providing procedure for real property mortgage foreclosure, sale, and eviction under this Article as it read prior to amendment in 1975 are unconstitutional as applied, see Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Foreclosure and sale pursuant to the statutory scheme of this Article as it read prior to amendment in 1975 was prospectively unlawful and void unless the power of sale was determined by the clerk to be a knowing, voluntary, and intelligent waiver of due process rights under U.S. Const., Amend. XIV, or the clerk determined that there had been adequate and timely notice to the mortgagor, coupled with opportunity for a hearing, before any rights were lost. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

Clerk of the court is barred by U.S. Const., Amend. XIV from working a deprivation of the mortgagor's property without prior notice and an opportunity for a timely hearing, unless it is clear that those rights have been expressly waived. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), decided under this Article as it read prior to amendment in 1975.

Minimum Requirements of Due Process. — At a minimum, due process requires the trustee to make an initial showing before the clerk or similar neutral official that the mortgagor is in default under the obligation; the mortgagor must of course be afforded the opportunity to rebut and defend the charges. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), decided under this Article as it read prior to amendment in 1975.

The purpose of this section is to have in the files of the clerk proof that the foreclosure sale was properly conducted and that the notice was published. Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172, cert. denied and appeal dismissed, 288 N.C. 238, 217 S.E.2d 678 (1975).

Clerk's Authority in Conducting Audit. — In conducting the "audit" under this section the clerk is merely authorized to determine whether the entries in the report reflect the actual receipts and disbursements made by the trustee. In re Deed of Trust, 118 N.C. App. 458, 455 S.E.2d 676 (1995).

The fact that a properly signed publisher's affidavit was not filed within 30 days of the sale does not invalidate the sale. Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172, cert. denied and appeal dismissed, 288 N.C. 238, 217 S.E.2d 678 (1975).

Cited in Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976); Cooper v. Smith, 24 Bankr. 19 (Bankr. W.D.N.C. 1982); In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales on equitable grounds.

Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the time that the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to enjoin such sale, upon the ground that the amount bid or price offered therefor is inadequate and inequitable and will result in irreparable damage to the owner or other interested person, or upon any other legal or equitable ground which the court may deem sufficient:

Provided, that the court or judge enjoining such sale, whether by a temporary restraining order or injunction to the hearing, shall, as a condition precedent, require of the plaintiff or applicant such bond or deposit as may be necessary to indemnify and save harmless the mortgagee, trustee, cestui que trust, or other person enjoined and affected thereby against costs, depreciation, interest and other damages, if any, which may result from the granting of such order or injunction: Provided further, that in other respects the procedure shall be as is now prescribed by law in cases of injunction and receivership, with the right of appeal to the appellate division from any such order or injunction. (1933, c. 275, s. 1; 1949, c. 720, s. 3; 1969, c. 44, s. 50; 1993, c. 305, s. 22.)

Legal Periodicals. — For review of former G.S. 45-32, which was transferred to this section by Session Laws 1949, c. 720, s. 3, see 11 N.C.L. Rev. 240 (1933).

For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

CASE NOTES

Editor's Note. — *The cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Constitutionality. — This section does not violate any provision of the Constitution of the United States or of this State by which limitations are imposed upon the legislative power of the General Assembly. It does not impair the obligation of the contract entered into by and between the parties to a mortgage or deed of trust; it does not deprive either party of property without due process of law; nor does it confer upon mortgagors or grantors in deeds of trust any exclusive privilege. Woltz v. Asheville Safe Deposit Co., 206 N.C. 239, 173 S.E. 587 (1934).

This section is constitutional and valid. Hopkins v. Swain, 206 N.C. 439, 174 S.E. 409 (1934).

This section and § 45-21.35 must be considered in pari materia with § 1A-1, Rules 2, 3, and 65. Swindell v. Overton, 62 N.C. App. 160, 302 S.E.2d 841 (1983), aff'd in part on other grounds and rev'd in part on other grounds, 310 N.C. 707, 314 S.E.2d 512 (1984).

This section is remedial only, and is valid for that purpose. Woltz v. Asheville Safe Deposit Co., 206 N.C. 239, 173 S.E. 587 (1934).

Common-law equitable principles to set aside a foreclosure sale are not affected by this section and G.S. 45-21.35, which limit injunctive relief in foreclosure proceedings. Swindell v. Overton, 310 N.C. 707, 314 S.E.2d 512 (1984).

Effect of Automatic Bankruptcy Stay on Redemption Period. — Although the stay created by the filing of a bankruptcy petition is not the same as an injunction granted pursuant to this section, the filing of an upset bid in North Carolina is prohibited by the automatic stay of § 362 of the Bankruptcy Code. Since the running of the period during which a debtor may redeem property in North Carolina is tied to the running of the upset bid period, the automatic stay prevents the running of the redemption period as well. In other words, even though the automatic bankruptcy stay does not directly suspend the running of the state statutory redemption period, it indirectly has that effect by preventing the expiration of the ten-day upset bid period. In re DiCello, 80 Bankr. 769 (Bankr. E.D.N.C. 1987).

Right of Bankrupt to Cure Default Held Terminated. — Although under this section a debtor may still seek to permanently enjoin a foreclosure after the sale has been held, and can raise defenses such as that the right to foreclose was waived or that there was no default under the deed of trust, the foreclosure sale may nevertheless become final without any further action by the lender or the trustee on the deed of trust. Thus, where Chapter 13 debtor filed her petition after foreclosure sale had been held, there had been sufficiently serious alterations of the security holder's rights so that her right to cure the default under 11 U.S.C. § 1322(b)(5) was terminated. In re DiCello, 80 Bankr. 769 (Bankr. E.D.N.C. 1987).

Proper Method for Invoking Equity Jurisdiction. — The proper method for invoking equitable jurisdiction to enjoin a foreclosure sale is by bringing an action in the superior court pursuant to this section. In re Watts, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

The hearing provided for in G.S. 45-21.16 was not intended to settle all matters in controversy between the parties, and the appropriate means for invoking equity jurisdiction is an action pursuant to this section. Golf Vistas, Inc. v. Mortgage Investors, 39 N.C. App. 230, 249 S.E.2d 815 (1978).

Because the hearing under G.S. 45-21.16 is designed to provide a less timely and expensive procedure than foreclosure by action, it does not resolve all matters in controversy between mortgagor and mortgagee. If respondents feel that they have equitable defenses to the foreclosure, they should be asserted in an action to enjoin the foreclosure sale under this section. In re Helms, 55 N.C. App. 68, 284 S.E.2d 553 (1981), cert. denied, 305 N.C. 300, 291 S.E.2d 149 (1982).

How Equitable Defenses Raised. — Equitable defenses, such as the acceptance of late payments, may not be raised in a foreclosure hearing pursuant to G.S. 45-21.16, but must instead be asserted in an action to enjoin the foreclosure sale under this section. In re Fortescue, 75 N.C. App. 127, 330 S.E.2d 219, cert. denied, 314 N.C. 330, 335 S.E.2d 890 (1985).

The trial court erred in considering an equitable defense to foreclosure in a hearing held pursuant to G.S. 45-21.16, because the debtor has to pursue such a defense through an action to enjoin the foreclosure pursuant to this section. In re Azalea Garden Bd. & Care, Inc., 140 N.C. App. 45, 535 S.E.2d 388, 2000 N.C. App. LEXIS 1094 (2000).

Applicability. — This section is applicable to a sale made after its enactment under a power of sale contained in a mortgage or deed of trust executed prior to its enactment. Woltz v. Asheville Safe Deposit Co., 206 N.C. 239, 173 S.E. 587 (1934).

"Confirmation" Means Confirmation Required for Consummation. — "Confirmation," as used in this section, refers only to a foreclosure sale where confirmation is required for consummation in accordance with law. Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

And Confirmation of Sale Under Power Is Not Required If No Upset Bid Is Filed. — Where a foreclosure sale is conducted in accordance with the provisions of Article 2A, G.S. 45-21.1 et seq., of this Chapter, and no upset bid is filed as provided in G.S. 45-21.27, there is no legal requirement that the clerk either confirm the sale or direct the execution of a trustee's deed as a prerequisite to legal consummation of such sale by the trustee. Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

Injunctive Relief Is Available Prior to Confirmation. — The injunctive relief provided by this section is available prior to the confirmation of the foreclosure sale. In re Watts, 38 N.C. App. 90, 247 S.E.2d 427 (1978).

This and following sections have no application after confirmation of a foreclosure sale under power contained in the instrument. Whitford v. North Carolina Joint-Stock Land Bank, 207 N.C. 229, 176 S.E. 740 (1934).

A hearing prior to foreclosure and sale is essential. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

The extraordinary injunctive relief available under this section does not suffice as an opportunity for hearing because (1) the burden of proof is clearly on the mortgagor; (2) he most likely must show irreparable damage, as by inadequacy of the bid; and (3) a condition precedent to relief is a bond providing for full indemnification. Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975).

The trustor in a deed of trust is entitled to restrain foreclosure if the note secured by the instrument is not in default. Princeton Realty Corp. v. Kalman, 272 N.C. 201, 159 S.E.2d 193 (1967).

An executor could not restrain foreclosure of a deed of trust executed by his testator prior to his death upon the executor's petition for sale of the lands to make assets, when by the terms of the deed of trust the trustee was authorized to advertise and sell the lands, the right of the trustee to sell the lands being contractual, and the sale by the trustee being subject to the provisions of this and the following sections. Miller v. Shore, 206 N.C. 732, 175 S.E. 133 (1934).

As to continuance of restraining order to final hearing, see Princeton Realty Corp. v. Kalman, 272 N.C. 201, 159 S.E.2d 193 (1967).

Defense that the mortgagor was incompetent to execute the deed of trust was not available in a pre-foreclosure hearing pursuant to G.S. 45-21.16 before either the clerk or the superior court on appeal; however, such defense could be raised by bringing an action to enjoin the foreclosure. In re Godwin, 121 N.C. App. 703, 468 S.E.2d 811 (1996).

Injunction Properly Continued. — Where a mortgagor or trustor instituted suit to enjoin the consummation of a foreclosure sale had under the terms of the instrument, and filed bond to indemnify the mortgagee or cestui que trust against loss, the temporary injunction granted in the cause was properly continued to the hearing upon the court's finding that serious controversy existed between the parties and that plaintiff was entitled to a jury trial upon the issues of fact raised by the pleadings. Little v. Wachovia Bank & Trust Co., 208 N.C. 726, 182 S.E. 491 (1935).

Dissolution of Restraining Order Upheld. — Where the parties expressly waived a jury trial, and the trial court found that the amount bid at the sale represented the fair market value of the lands, and that there was no assurance that a larger sum would be offered if the lands were resold, the findings supported the court's judgment dissolving the temporary order restraining consummation of the sale. Barringer v. Wilmington Sav. & Trust Co., 207 N.C. 505, 177 S.E. 795 (1935).

Discretion of Court to Require Bond. — The condition that plaintiff file bond to indemnify defendant against any loss by reason of delay is within the court's discretionary equitable power, the provisions of this section being constitutional and valid. Whitaker v. Chase, 206 N.C. 335, 174 S.E. 225 (1934); Little v. Wachovia Bank & Trust Co., 208 N.C. 726, 182 S.E. 491 (1935).

Where the mortgagee or cestui que trust is not satisfied with the bond given by the mortgagor or trustor, as provided by this section, his remedy is by motion that plaintiffs be required to increase the penal sum of the bond and give additional sureties, and he may not attack the validity of the order restraining the consummation of the sale upon the ground that the bond is inadequate. Woltz v. Asheville Safe Deposit Co., 206 N.C. 239, 173 S.E. 587 (1934).

Determination of Adequacy of Bid. — Where, in a suit to enjoin the consummation of a foreclosure sale, the issue of whether the bid at the sale was grossly inadequate is raised by the pleadings, the parties are not entitled as a matter of law to have the issue determined by a jury, but the court may hear evidence and determine the issue, and should dismiss the action if it finds that the amount of the bid is the fair value of the land or enjoin the consummation of the sale if it finds that the bid is grossly inadequate. Smith v. Bryant, 209 N.C. 213, 183 S.E. 276 (1936).

Where plaintiffs, trustors in a deed of trust, sought to enjoin the consummation of a foreclosure sale had under the power contained in the instrument, and alleged that the price bid at the sale was grossly inadequate, which allegation was denied in the answer, it was error for the court to grant defendants' motion for nonsuit, plaintiffs being entitled to a hearing and a determination of the issue under the provisions of this section. Smith v. Bryant, 209 N.C. 213, 183 S.E. 276 (1936).

Mere Inadequacy of Price Is Insufficient to Upset Sale. — Mere inadequacy of the purchase price realized at a foreclosure sale, standing alone, is not sufficient to upset a sale, duly and regularly made in strict conformity with the power of sale. Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

Mere inadequacy of the bid at foreclosure is not sufficient, standing alone, to set the sale aside. Britt v. Britt, 26 N.C. App. 132, 215 S.E.2d 172, cert. denied and appeal dismissed, 288 N.C. 238, 217 S.E.2d 678 (1975).

But Court Will Interpose Where Gross Inadequacy Is Coupled with Other Inequity. — Gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties. Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

And Gross Inadequacy May Be Considered in Weighing Materiality of Irregularity. — Where there is an irregularity in the sale, gross inadequacy of purchase price may be considered on the question of the materiality of the irregularity. Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

Motion for Resale After Action for Specific Performance. — Where the last and highest bidder at the sale instituted an action for specific performance, and the personal representative of the deceased mortgagee gave notice in apt time that he would make application to the resident judge of the district out of term and out of the county for an order restraining the consummation of the sale made by him under the mortgage on the grounds of inadequacy of the bid, and for an order for a resale, the court had authority to hear the motion. Hopkins v. Swain, 206 N.C. 439, 174 S.E. 409 (1934).

Failure to Seek Relief After Actual Notice. — Because defendant received actual notice of the foreclosure hearing and could have taken advantage of the relief provided in this section, assuming he had grounds, or he could have objected to the method of service, but instead chose to sit on his rights and allow the foreclosure to proceed, he may not argue now that service on him was inadequate. Fleet Nat'l Bank v. Raleigh Oaks Joint Venture, 117 N.C. App. 387, 451 S.E.2d 325 (1994).

Applied in In re Burgess, 47 N.C. App. 599, 267 S.E.2d 915 (1980).

Cited in Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A.L.R. 886 (1937); Roberson v. Boone, 242 N.C. 598, 89 S.E.2d 158 (1955); In re Hardin, 248 N.C. 66, 102 S.E.2d 420 (1958); In re Register, 5 N.C. App. 29, 167 S.E.2d 802 (1969); Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976); In re Burgess, 57 N.C. App. 268, 291 S.E.2d 323 (1982); Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991); In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993); Goforth Properties, Inc. v. Birdsall, 334 N.C. 369, 432 S.E.2d 855 (1993); Meehan v. Cable, 127 N.C. App. 336, 489 S.E.2d 440 (1997); Adams v. Bank United of Tex. F.S.B., 167 N.C. App. 395, 606 S.E.2d 149, 2004 N.C. App. LEXIS 2384 (2004), cert. denied, 359 N.C. 410, — S.E.2d — (2005); In re Wiley Brown & Assocs., LLC, — Bankr. —, 2006 Bankr. LEXIS 2851 (Bankr. M.D.N.C. Oct. 11, 2006).

§ 45-21.35. Ordering resales; receivers for property; tax payments.

The court or judge granting such order or injunction, or before whom the same is returnable, shall have the right before, but not after, the rights of the parties to the sale or resale becoming fixed pursuant to G.S. 45-21.29A to order a resale by the mortgagee, trustee, commissioner, or other person authorized to make the same in such manner and upon such terms as may be just and equitable: Provided, the rights of all parties in interest, or who may be affected thereby, shall be preserved and protected by bond or indemnity in such form and amount as the court may require, and the court or judge may also appoint a receiver of the property or the rents and proceeds thereof, pending any sale or resale, and may make such order for the payment of taxes or other prior lien as may be necessary, subject to the right of appeal to the appellate division in all cases. (1933, c. 275, s. 2; 1949, c. 720, s. 3; 1969, c. 44, s. 51; 1993, c. 305, s. 23.)

CASE NOTES

Editor's Note. *— The cases below were decided prior to the 1993 amendments to Articles 2A and 2B, which clarified the procedure for foreclosure under power of sale and established a new upset bid procedure.*

Section 45-21.34 and this section must be considered in pari materia with § 1A-1, Rules 2, 3 and 65. Swindell v. Overton, 62 N.C. App. 160, 302 S.E.2d 841 (1983), aff'd in part on other grounds and rev'd in part on other grounds, 310 N.C. 707, 314 S.E.2d 512 (1984).

Common-law equitable principles to set aside a foreclosure sale are not affected by this section and G.S. 45-21.34, which limit injunctive relief in foreclosure proceedings. Swindell v. Overton, 310 N.C. 707, 314 S.E.2d 512 (1984).

Cited in Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552, 108 A.L.R. 886 (1937); Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale made and confirmed prior to April 18, 1933. (1933, c. 275, s. 3; 1949, c. 720, s. 3; 1967, c. 562, s. 2.)

Legal Periodicals. — For note, "Relief During the Depression," see 12 N.C.L. Rev. 366 (1934).

For note on anti-deficiency judgment statute, see 58 N.C.L. Rev. 855 (1980).

For survey of 1980 civil procedure, see 59 N.C.L. Rev. 1053 (1981).

For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

CASE NOTES

Constitutionality. — This section is constitutional and valid. Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 210 N.C. 29, 185 S.E. 482 (1936), aff'd, 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937).

This section has merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity. This does not impair the obligation of the contract. Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937).

Legislative Intent. — The General Assembly's intention to limit the protection of the statute to those who hold a property interest in the mortgaged property is clear. Raleigh Fed. Sav. Bank v. Godwin, 99 N.C. App. 761, 394 S.E.2d 294 (1990).

The protection of this section is only available to those parties who hold a property interest in the mortgaged property and is not applicable to other parties liable on the underlying debt. Resolution Trust Corp. v. Southwest Dev. Co., 807 F. Supp. 375 (E.D.N.C.), modified, 837 F. Supp. 122 (E.D.N.C. 1992), aff'd in part and rev'd in part, 14 F.3d 596 (4th Cir. 1993).

The General Assembly has twice amended Chapter 45 to clarify that foreclosures of leasehold interests are governed by the procedural guidelines in Article 2A and on neither occasion did the General Assembly make changes indicating an intention to include leasehold interests within the coverage of Article 2B. The General Assembly's silence on this subject is convincing proof that defendants, as lessees, lacked standing to assert the defense in this section. Fleet Nat'l Bank v. Raleigh Oaks Joint Venture, 117 N.C. App. 387, 451 S.E.2d 325 (1994).

This section is not "emergency legislation," nor is its purpose to provide a "moratorium" for debtors during a temporary period of depression. Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 210 N.C. 29, 185 S.E. 482 (1936), aff'd, 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937).

This section is designed to protect mortgagors from mortgagees who purchase at sales they have conducted or initiated pursuant to the power of sale in their mortgage contracts with the mortgagors. Northwestern Bank v. Weston, 73 N.C. App. 162, 325 S.E.2d 694, cert. denied, 314 N.C. 117, 332 S.E.2d 483 (1985).

This section recognizes the obligation of a debtor who has secured the payment of his debt by a mortgage or deed of trust to pay his debt in accordance with his contract, and does not impair such obligation. Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 210 N.C. 29, 185 S.E. 482 (1936), aff'd, 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937).

And recognizes the validity of powers of sale contained in mortgages or deeds of trust, but regulates the exercise of such powers by the application of well-settled principles of equity. It provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of the sale. Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 210 N.C. 29, 185 S.E. 482 (1936), aff'd, 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937).

This section alters and modifies one of the existing remedies for realization of the value of the security, but cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement, but limits that right so as to prevent his obtaining more than his due. Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937).

This section has no application to foreclosure sales made pursuant to an order or decree of court. In re Otter Pond Inv. Group, Ltd., 79 N.C. App. 664, 339 S.E.2d 854 (1986).

This section applies only to foreclosure under powers of sale and not to actions to foreclose, and only to instances where the creditor bids in the property, directly or indirectly, and not to instances where the property is bid in by independent third persons. Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 210 N.C. 29, 185 S.E. 482 (1936), aff'd, 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937).

Section Applies to Mortgagee Who Holds Obligation Securing Property for Sale. — This section does not say that it applies to any mortgagee or to a mortgagee who holds an obligation secured by the property for sale. Rather, it applies to the mortgagee, payee or other holder, who holds the obligation thereby secured, i.e., the obligation secured by the property for sale, and under which the sale is held. Northwestern Bank v. Weston, 73 N.C. App. 162, 325 S.E.2d 694, cert. denied, 314 N.C. 117, 332 S.E.2d 483 (1985).

Section Inapplicable. — Where the maker of a note assigned a judgment in its favor to the payee as security and the judgment was sold under order of court and purchased by the payee, who thereafter realized upon the judgment an amount in excess of the sale price, it was held that the note was properly credited with the sale price and not the amount realized by the payee upon the judgment, and that since the bidding at the sale was open to all and the sale was under order of court, the endorser on the note could not assert this section as a defense to his liability, the statute, by the express language of its proviso, not being applicable. Briggs v. Lassiter, 220 N.C. 761, 18 S.E.2d 419 (1942).

Where an action is not one to recover from the estate of a deceased a balance due upon an indebtedness secured by a deed of trust, but is an action to establish the rights of the parties with respect to the proceeds of a life insurance policy assigned by the deceased as security for the debt, the statutory principle of law regulating the recovery of deficiency judgments embodied in this section has no application. Thompson v. Pilot Life Ins. Co., 234 N.C. 434, 67 S.E.2d 444 (1951).

Section Inapplicable to a Lease. — By its own terms this section applies only to sales of real estate and because a lease is a species of personal property, it is outside the scope of this section. Fleet Nat'l Bank v. Raleigh Oaks Joint Venture, 117 N.C. App. 387, 451 S.E.2d 325 (1994).

Burden of Proof. — This section does not relieve the mortgagor of its debt. It simply limits the plaintiff to what it bargained for — repayment in full plus interest. Defendants still must produce evidence that the properties sold were fairly worth the amount of the debt at the time and place of sale, or at least that they were worth substantially more than was bid. NCNB Nat'l Bank v. O'Neill, 102 N.C. App. 313, 401 S.E.2d 858 (1991).

Defense of Mortgagor. — Upon foreclosure under a deed of trust, where the mortgaged property is purchased by the mortgagee, the provisions of this section allow a mortgagor to show, as a defense to an action by the mortgagee for a deficiency, that the purchase price was less than the land's fair market value. Raleigh Fed. Sav. Bank v. Godwin, 99 N.C. App. 761, 394 S.E.2d 294 (1990).

This section is not available as a defense to nonmortgagor defendants in an action to recover the balance due on a promissory note. Only a party with an interest in the mortgaged property may assert this section as a bar to the action. First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

In an action to recover on a note for the purchase of land, where the defendant-buyer did not hold a property interest in the land, there was no merit to defendants' contention that they were comakers under the note and as such were entitled to the protection against deficiency judgments provided by this section, since the protection of this section is limited to persons who hold a property interest in mortgaged property. American Foods, Inc. v. Goodson Farms, Inc., 50 N.C. App. 591, 275 S.E.2d 184, aff'd, 304 N.C. 386, 283 S.E.2d 517 (1981).

Defense Not Available to Guarantors. — Even though one defendant owned 77% of the capital stock of the corporation, and pledged his own assets and extended his own personal credit in order to pay off creditors, defendant guarantors did not possess a property interest in the mortgaged property since title to that property was held solely in the name of the corporation; defendants, therefore, could not assert the defense contained in this section. Borg-Warner Acceptance Corp. v. Johnston, 97 N.C. App. 575, 389 S.E.2d 429 (1990), cert. denied, 333 N.C. 254, 424 S.E.2d 918 (1993).

The defense set out in this section is not available to guarantors — even when they are also property owners — if they are sued to enforce their duties as a guarantor. Poughkeepsie Sav. Bank v. Harris, 833 F. Supp. 551 (W.D.N.C. 1993).

When a mortgagee purchases at its own foreclosure sale, its ability to successfully maintain a deficiency action is governed by this section regardless of whether it brings the deficiency action to collect on its second mortgage. NCNB Nat'l Bank v. O'Neill, 102 N.C. App. 313, 401 S.E.2d 858 (1991).

Protection of Partners. — Each partner, though certainly not enjoying the traditional rights of owners, holds a property interest sufficient to invoke the protection of this section. If it were otherwise, mortgagees could avoid the requirements of this section when foreclosing on property owned by a partnership simply by suing the partners for a deficiency. NCNB Nat'l Bank v. O'Neill, 102 N.C. App. 313, 401 S.E.2d 858 (1991).

This section does not forbid the holder of the note secured by a deed of trust to purchase the property at a foreclosure sale conducted pursuant to the power of sale contained in the deed of trust. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

This section does not entitle debtor to

have credited upon the note whatever profit purchaser may realize upon subsequent sale of the property. There is no principle of law, apart from this section, which entitles the debtor to such credit simply by reason of such subsequent sale of the property at a price greater than the bid at the foreclosure sale. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

But a sale subsequent to the foreclosure sale would be a circumstance indicating the fair value of the property at the time of the foreclosure, the weight to be given it depending upon other circumstances, such as the lapse of time between the foreclosure and the subsequent sale and the known probability, at the time of the foreclosure sale, that such subsequent sale could be made. Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

And Amount Bid Is Not Conclusive as to Value. — The amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property. Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 210 N.C. 29, 185 S.E. 482 (1936), aff'd, 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937).

When Proof of Value of Foreclosed Property May Be Made. — This section permits proof that foreclosed property acquired by creditors was worth the sum that was owed them only in a suit against a mortgagor, trustor or other maker for a deficiency judgment. In re Otter Pond Inv. Group, Ltd., 79 N.C. App. 664, 339 S.E.2d 854 (1986).

Sufficient evidence supported the trial court's finding, under this section, that the foreclosed property was worth far more than the plaintiff bid for it and that the defendant was, therefore, not indebted to plaintiff in any amount. First Citizens Bank & Trust Co. v. Shaut, 138 N.C. App. 153, 530 S.E.2d 581, 2000 N.C. App. LEXIS 549 (2000).

Where defendants, makers of note, were held to have no property interest in mortgaged property, upon default they were not entitled under this section to show that the property was worth the amount of the debt secured by it or that the amount bid was substantially less than its true value. Raleigh Fed. Sav. Bank v. Godwin, 99 N.C. App. 761, 394 S.E.2d 294 (1990).

For case holding this section available to defendant in deficiency action, see United Carolina Bank v. Tucker, 99 N.C. App. 95, 392 S.E.2d 410 (1990).

A deficiency judgment is an imposition of personal liability on the mortgagor for the unpaid balance of the mortgage debt after foreclosure has failed to yield the full amount of debt due. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

Applied in Wachovia Realty Invs. v. Housing, Inc., 28 N.C. App. 385, 221 S.E.2d 381 (1976).

Cited in Thompson v. Angel, 214 N.C. 3, 197 S.E. 618 (1938); Virginia Trust Co. v. Dunlop, 214 N.C. 196, 198 S.E. 645 (1938); Kelly v. Davenport, 7 N.C. App. 670, 173 S.E.2d 600 (1970); Wendell Tractor & Implement Co. v. Lee, 9 N.C. App. 524, 176 S.E.2d 854 (1970); Northwestern Bank v. Barber, 79 N.C. App. 425, 339 S.E.2d 452 (1986).

§ 45-21.37. Certain sections not applicable to tax suits.

Sections 45-21.34 through 45-21.36 do not apply to tax foreclosure suits or tax sales. (1933, c. 275, s. 4; 1949, c. 720, s. 3.)

CASE NOTES

Cited in Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price.

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out. (1933, c. 36; 1949, c. 720, s. 3; c. 856; 1961, c. 604; 1967, c. 562, s. 2.)

Cross References. — For provision that spouse need not join in purchase-money mortgage, see G.S. 39-13.

Legal Periodicals. — As to the effect of this section, see 11 N.C.L. Rev. 219 (1933).

For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For survey of 1978 property law, see 57 N.C.L. Rev. 1103 (1979).

For note on purchase-money mortgages and suit on the note, see 15 Wake Forest L. Rev. 822 (1979).

For note on anti-deficiency judgment statute, see 58 N.C.L. Rev. 855 (1980).

For survey of 1980 property law, see 59 N.C.L. Rev. 1209 (1981).

For article on installment land contracts in North Carolina, see 3 Campbell L. Rev. 29 (1981).

For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

For note discussing North Carolina's Anti-Deficiency Statute and whether suing on the note is a lost option, in light of 313 N.C. 565, 330 S.E.2d 600 (1985), see 22 Wake Forest L. Rev. 389 (1987).

For note, "Real Estate Finance—Subordination Causes: North Carolina Subordinates Substance to Form—MCB Ltd. v. McGowan," 23 Wake Forest L. Rev. 575 (1988).

For article, "North Carolina Extends Its Anti-Deficiency Statute: Merritt v. Edwards Ridge," see 67 N.C.L. Rev. 1446 (1989).

For article, "Legislative Kudzu and the New Millennium: An Opportunity for Reflection and Reform," see 23 Campbell L. Rev. 157 (2001).

CASE NOTES

I. General Consideration.
II. Business property.
III. Recovery of Damages.
IV. Application.

I. GENERAL CONSIDERATION.

The purpose of the anti-deficiency statute is to prevent oppression of a purchase money debtor by a purchase money creditor. The purchase money debtor has both an equitable and statutory right to redeem. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Legislative Intent. — The unique features of this section manifest the legislative intent that the statute as originally enacted should apply only to purchase-money mortgages and deeds of trust given by the vendee to the vendor, and that its application to third parties be limited to assignees of the seller. Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968).

This section was obviously designed to protect a vendor's assignee, who would not know the nature of the transaction. Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968).

The manifest intention of the legislature in this section was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price. Ross Realty Co. v. First Citizens Bank & Trust Co., 296 N.C. 366, 250 S.E.2d 271 (1979); Reavis v. Ecological Dev., Inc., 53 N.C. App. 496, 281 S.E.2d 78 (1981).

The legislature intended to take away from creditors the option of suing upon the note in a purchase-money mortgage transaction. Ross Realty Co. v. First Citizens Bank & Trust Co., 296 N.C. 366, 250 S.E.2d 271 (1979).

This section seeks to protect the purchaser of real property in those instances where the seller also financed the sale. In re Gulledge, 17 Bankr. 311 (Bankr. M.D.N.C. 1982).

At foreclosure, the holder of a purchase money mortgage or deed of trust is limited to the recovery of the security or to the proceeds from the sale of the security. The holder is prohibited from ignoring his security and bringing an in personam action against the mortgagor on the note secured by the deed of trust. The holder is, also, prohibited from bringing an in personam suit after foreclosure to recover a deficiency. In fact, the State's Supreme Court has stated, unequivocally, that the manifest intention of the Legislature in codifying this section was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate. Blanton v. Sisk, 70 N.C. App. 70, 318 S.E.2d 560 (1984).

The legislative intent behind this section is to limit recovery by purchase money mortgagees to the property conveyed. Underlying this intent is a desire to discourage oppressive overpricing at sale and underpricing at foreclosure. Sink v. Egerton, 76 N.C. App. 526, 333 S.E.2d 520 (1985).

The enactment of this section was intended to benefit and protect purchasers of real property. Adams v. Cooper, 114 N.C. App. 459, 442 S.E.2d 141 (1994), rev'd on other grounds, 340 N.C. 242, 460 S.E.2d 120 (1995).

A deficiency judgment is an imposition of personal liability on a mortgagor for the unpaid balance of the mortgage debt after foreclosure has failed to yield the full amount of debt due. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

Effect of Section. — This section limits the seller who finances the purchase of real property to those funds which he obtains from a foreclosure upon the property. In re Gulledge, 17 Bankr. 311 (Bankr. M.D.N.C. 1982).

This section bars an action against the guarantors of a purchase money note to recover the debt for the balance of the purchase price represented by the note. Adams v. Cooper, 340 N.C. 242, 456 S.E.2d 514 (1995).

The 1961 amendment did not change the original meaning of this section; it merely made specific that which had theretofore been implicit. Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968).

The benefits of this section cannot be waived; it effects the broad public purpose of abolishing deficiency judgments in purchase money transactions if foreclosure on the security yields an insufficient fund to satisfy the indebtedness secured, and the protection it offers is afforded to all purchasers of realty who secure any part of the purchase price with a deed of trust on the realty they are purchasing. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

The protection of the anti-deficiency judgment statute was designed for the benefit of the general public and was not intended to be merely a right which could be waived, or which purchasers could be compelled to waive as a prerequisite for obtaining financing. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

And the doctrine of estoppel will not deprive a defendant of his right to assert this section in his defense to a deficiency proceeding; were a purchaser able, either by his action or by contract, to deny to himself the protection afforded him by the legislature, it would be to allow by indirection that which was directly forbidden. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

Purchase Money Debtor Cannot Be Forced to Elect. — Except for ad valorem taxes, property assessments and property insurance premiums paid by the purchase money creditor on behalf of the purchase money debtor, a purchase money debtor cannot be forced to elect between paying an amount in excess of the balance purchase price secured by a purchase money deed of trust or forfeiting the property at foreclosure. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Nor Can Right of Redemption Be Conditioned on Payment of Additional Moneys. — A purchase money debtor's exercise of his right of redemption cannot be conditioned on the payment of additional moneys not secured by the purchase money deed of trust. To hold otherwise would be to make the purchase money debtor personally liable, a consequence the anti-deficiency statute prohibits. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

This section was obviously designed to protect a vendor's assignee, who would not know the nature of the transaction. Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968).

Applicability to Mortgages, etc., Executed in Another State on Foreign Realty. — This section operates to deprive our courts of jurisdiction to enter the deficiency judgments proscribed, and the section applies to all such deficiency judgments, including those predicated upon notes secured by mortgages or deeds of trust executed in another state upon realty lying therein. Bullington v. Angel, 220 N.C. 18, 16 S.E.2d 411 (1941).

For case holding that this section did not limit the jurisdiction of the federal district court in an action by a nonresident for a deficiency judgment amounting to $3,000.00 where the land mortgaged was in Virginia and the deed of trust signed by defendant was a Virginia contract securing notes signed by defendant and made payable at a bank in Roanoke, Virginia, see Bullington v. Angel, 56 F. Supp. 372 (W.D.N.C. 1944), aff'd, Angel v. Bullington, 150 F.2d 679 (4th Cir. 1945), rev'd, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 557 (1947), on the ground that the decision of the North Carolina Supreme Court denying a deficiency judgment in a previous suit on the same contract was res judicata. For article criticizing the decision in Angel v. Bullington, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947), see 26 N.C.L. Rev. 29 (1948). For further comment on this case, see 26 N.C.L. Rev. 60 (1948).

Commercial Transactions Not Excluded. — The 1933 General Assembly of North Carolina did not intend any special exclusion of commercial transactions, such as by "sophisticated business people," from this section. Barnaby v. Boardman, 313 N.C. 565, 330 S.E.2d 600 (1985).

Applied in Fleishel v. Jessup, 242 N.C. 605, 89 S.E.2d 160 (1955); Armel Mgt. Corp. v. Stanhagen, 35 N.C. App. 571, 241 S.E.2d 713 (1978); American Foods, Inc. v. Goodson Farms, Inc., 50 N.C. App. 591, 275 S.E.2d 184 (1981); Deal v. Christenbury, 50 N.C. App. 600, 274 S.E.2d 867 (1981); FMS Mgt. Sys. v. Thomas, 65 N.C. App. 561, 309 S.E.2d 697 (1983).

Cited in Richmond Mtg. & Loan Corp. v. Wachovia Bank & Trust Co., 300 U.S. 124, 57 S. Ct. 338, 81 L. Ed. 552 (1937); Jones v. Casstevens, 222 N.C. 411, 23 S.E.2d 303 (1942); Mitchell v. Battle, 231 N.C. 68, 55 S.E.2d 803 (1949); First Citizens Bank & Trust Co. v. Martin, 44 N.C. App. 261, 261 S.E.2d 145 (1979).

II. BUSINESS PROPERTY.

A defendant's guaranty of the obligations of a corporation under a lease/purchase agreement will not remove him from the protection of the anti-deficiency statute and make him liable for the entire face amount of the note, where the option to purchase was assigned to defendant personally, and defendant exercised it by taking title to the property in himself and personally signing the note and deed of trust; all of the obligations and promises merged in defendant who became an ordinary purchaser of realty who financed his acquisition of the property by a purchase money note and deed of trust. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421, cert. denied, 298 N.C. 293, 259 S.E.2d 911 (1979).

Commercial Transactions Not Excluded. — The 1933 General Assembly of North Carolina did not intend any special exclusion of commercial transactions, such as by "sophisticated business people," from this section. Barnaby v. Boardman, 313 N.C. 565, 330 S.E.2d 600 (1985).

III. RECOVERY OF DAMAGES.

Purchaser Suffers No Loss until Payment or Rendition of Judgment. — Where there has been a foreclosure and the proceeds are insufficient to pay the amount called for in the note, the purchaser has not sustained a loss as contemplated by this section until he has been compelled to pay or judgment has been rendered fixing his liability. Childers v. Parker's, Inc., 259 N.C. 237, 130 S.E.2d 323 (1963).

This section prohibited plaintiff from recovering interest on a purchase money note, where the interest was part of the debt secured by the purchase money deed of trust. Burnette Indus., Inc. v. Danbar of Winston-Salem, Inc., 80 N.C. App. 318, 341 S.E.2d 754, cert. denied, 317 N.C. 701, 347 S.E.2d 37 (1986).

Noteholder Could Recover Debt Only from Property Conveyed. — The holder of a promissory note given by a buyer to a seller for the purchase of land and secured by a deed of trust embracing the land could not release his security and sue on the note, but had to look exclusively to the property conveyed in seeking to recover any balance owed. Barnaby v. Boardman, 313 N.C. 565, 330 S.E.2d 600 (1985).

When the purchase money debtor defaults, the purchase money creditor is limited strictly to the property conveyed in all cases in which the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price. Merritt v. Ridge, 323 N.C. 330, 372 S.E.2d 559 (1988).

Fees of Attorneys of Purchase Money Creditor Not Secured. — Where a promissory note states on its face that it is "given as purchase money, and is secured by a purchase money deed of trust," and the note is incorporated by reference into the deed of trust, attorneys' fees are not part of the purchase price. Hence, even if the trustee were to foreclose on the purchase money deed of trust, the purchase money creditor's attorneys' fees would not be a secured obligation. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

Holder Barred from Recovering Costs and Attorneys' Fees. — This section bars the holder of a purchase money promissory note, given by a buyer of real property to the seller and secured by a purchase money deed of trust embracing the property, from recovering the costs of foreclosure of the deed of trust and sale of the property and related attorneys' fees. Merritt v. Ridge, 323 N.C. 330, 372 S.E.2d 559 (1988), distinguishing Reavis v. Ecological Dev., Inc., 53 N.C. App. 496, 281 S.E.2d 78 (1981).

Effect of § 6-21.2. — Section 6-21.2 deals in general and comprehensive terms with the propriety of attorneys' fees arising from the collection of indebtedness and, therefore, was not controlling in a case in which a seller of real property had accepted a purchase money deed of trust from his buyer and then sought recovery upon default; this section deals with just such a particular situation. Merritt v. Ridge, 323 N.C. 330, 372 S.E.2d 559 (1988).

Duty to Mitigate Damages. — Plaintiffs were required to take only reasonable efforts to mitigate their damages; they were not required to attempt enforcement of either the note or the guaranty when a reasonable person would have concluded such efforts would be futile. Smith v. Childs, 112 N.C. App. 672, 437 S.E.2d 500 (1993).

Purchase Money Creditor Limited to Recovery of Property. — A purchase money deed of trust creditor cannot bring an action on the note to recover the purchase price either before or after foreclosure and is strictly limited to the property which was conveyed for purposes of securing the balance of the purchase price. Colson & Colson Constr. Co. v. Maultsby, 103 N.C. App. 424, 405 S.E.2d 779 (1991).

North Carolina's anti-deficiency statute prevents an action for personal judgment on note and limits the creditor to the property conveyed in deed of trust. Adams v. Cooper, 340 N.C. 242, 460 S.E.2d 120 (1995).

IV. APPLICATION.

Variance Between Prices Obtained. — The objective of the anti-deficiency statute is threatened and this section is properly applicable where there is a wide variance between the purchase prices obtained by the claimant and the amounts obtained upon foreclosure of the properties. In re Gulledge, 17 Bankr. 311 (Bankr. M.D.N.C. 1982).

Where the subsequent purchase price of property at least equaled that amount paid for the property, the objective of this anti-deficiency statute, to protect purchasers from the potentially oppressive tactics of vendors who finance the sale of real property, is not threatened. In re Gulledge, 17 Bankr. 311 (Bankr. M.D.N.C. 1982).

So long as the debt of the purchaser of property is secured by a deed of trust on the property or part of it given by the purchaser to secure payment of the purchase price, the deed of trust is a purchase money deed of trust. Burnette Indus., Inc. v. Danbar of Winston-Salem, Inc., 80 N.C. App. 318, 341 S.E.2d 754.

Sale and Purchase of Real Estate. — Anti-deficiency statute did not apply to the sale and purchase of certain real estate where neither the deed of trust nor the promissory note contained language indicating that they were purchase money instruments. Brumley v. Mallard, L.L.C., 154 N.C. App. 563, 575 S.E.2d 35, 2002 N.C. App. LEXIS 1513 (2002), aff'd, 357 N.C. 247, 580 S.E.2d 691 (2003).

Defaulting purchaser and guarantor could not claim, under the anti-deficiency statute, that a seller who sued them for defaulting on a promissory note related to the sale of certain real estate was obligated to indemnify them because purchase money language was deleted from the promissory note and deed of trust, as these amendments were done by their attorney, and were not supervised by the seller. Brumley v. Mallard, L.L.C., 154 N.C. App. 563, 575 S.E.2d 35, 2002 N.C. App. LEXIS 1513 (2002), aff'd, 357 N.C. 247, 580 S.E.2d 691 (2003).

Sale of Land Under Prior Mortgage. — This section is not available as a defense to an action on a purchase-money note secured by a second mortgage when the land has been sold under the first mortgage for a sum sufficient to pay only the notes secured by the first mortgage, assumed by the purchaser as a part of the purchase price. Brown v. Kirkpatrick, 217 N.C. 486, 8 S.E.2d 601 (1940).

Leasehold Interest Is Outside Scope of Section. — The protection provided by this section only applies to transactions involving the sale of real property; where there was no sale of real property, but only an assignment for valuable consideration of a leasehold interest, the protection provided by this section does not apply. Kavanau Real Estate Trust v. Debnam, 41 N.C. App. 256, 254 S.E.2d 638 (1979).

Thus, this section does not prohibit an in personam action based upon an underlying obligation secured by a mortgage on a leasehold interest. Kavanau Real Estate Trust v. Debnam, 41 N.C. App. 256, 254 S.E.2d 638 (1979).

Purchase Money Instruments. — Where the deed of trust and promissory note were held to be a purchase money instrument, pursuant to this section, plaintiffs were not entitled to a deficiency judgment. Friedlmeier v. Altman, 93 N.C. App. 491, 378 S.E.2d 217 (1989).

The fact that the land sale transaction occurred as part of an agreement settling a dispute between the parties did not prevent its categorization as a purchase money transaction since the existence of additional promises not directly arising out of the land sale transaction did not remove this deed of trust and promissory note from the definition of a purchase money instrument. Friedlmeier v. Altman, 93 N.C. App. 491, 378 S.E.2d 217 (1989).

Where property to be sold at foreclosure under a supplemental deed of trust was not the property conveyed for which a purchase money note and purchase money deed of trust were given, yet the debt to be satisfied was that reflected by the purchase money note, the provisions of supplemental deed of trust purporting to provide additional security for the purchase money note were unenforceable under this section. Goforth Properties, Inc. v. Birdsall, 334 N.C. 369, 432 S.E.2d 855 (1993).

Courts will not apply this section unless deed of trust, on its face, indicates that it is for purchase money for sale of real property. Bigley v. Lombardo, 90 N.C. App. 79, 367 S.E.2d 389 (1988).

Evidence of Indebtedness Must Show

Debt Is for Purchase Money. — A strict reading of this section reveals that this statute does not apply unless the "evidence of indebtedness, " i.e., the note and deed of trust, shows on its face that the debt is for the purchase money for real property. Gambill v. Bare, 32 N.C. App. 597, 232 S.E.2d 870.

Generally, the failure to disclose the character of the instruments renders this section inapplicable. In re Gulledge, 17 Bankr. 311 (Bankr. M.D.N.C. 1982).

Where, in partial payment for land, respondents signed a promissory note secured by a deed of trust covering not only the two parcels of land being purchased but an additional tract of land already owned by respondents, the language of the statute did not limit petitioners to foreclosure on the land actually sold by them to respondents; this section was not applicable as there was no indication on the face of either the promissory note or the deed of trust that the debt was incurred for the purchase of the property secured. In re Fuller, 94 N.C. App. 207, 380 S.E.2d 120.

Where a note and deed of trust cross-refer to each other, and incorporate each other by reference, and only one of the documents clearly indicates the purchase-money nature of the transaction, the other document may be deemed to include the same language indicating the nature of the transaction; therefore, a note which has been executed but not marked as a "purchase-money note" may still conform to the statutory prerequisites for asserting this section as a defense. Chemical Bank v. Belk, 41 N.C. App. 356, 255 S.E.2d 421.

Protection Not Afforded Absent Purchase Money Deed of Trust. — Suit on the second of two separate and distinct notes, secured by a security interest in a 1983 Mazda automobile, not "a deed of trust on the property or part of it, " and executed not at the same time defendant and his partners bought the property, but only when he wanted to buy out his partners a year later, where the security agreement did not secure any portion of the original purchase of real property, but secured a loan of money from plaintiffs to defendant made so that defendant could "buy out " his business partners, was not a purchase money deed of trust, and the protection afforded under this section was not available. Bigley v. Lombardo, 90 N.C. App. 79, 367 S.E.2d 389 (1988).

Liability of Seller If Note and Security Do Not Disclose They Are for Purchase Money. — This section makes the seller liable for losses which the purchaser sustains because of seller's failure to insert a statement that debt is for purchase money in a note and deed of trust prepared by it or under its supervision. Childers v. Parker's, Inc., 259 N.C. 237, 130 S.E.2d 323 (1963).

This section does not apply to a holder of a second purchase money deed of trust or mortgage whose security has been destroyed as a result of foreclosure by a holder of a first purchase money mortgage or deed of trust. Blanton v. Sisk, 70 N.C. App. 70, 318 S.E.2d 560 (1984).

This section does not by its terms prohibit the holder of a note, though secured by a second deed of trust, from obtaining judgment on the note when the property has been sold under another deed of trust having priority of lien. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

Notwithstanding the anti-deficiency statute, a creditor could sue on the purchase money note he held where he had lost the opportunity to foreclose due to an earlier foreclosure by another creditor. Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984).

In Personam Actions Not Barred for Unsecured Notes. — This statute does not act to bar an in personam action where the promissory note is unsecured. Wilkinson v. SRW/Cary Assocs., 112 N.C. App. 846, 437 S.E.2d 3 (1993).

The anti-deficiency statute does not apply to actions by unsecured creditors. Blanton v. Sisk, 70 N.C. App. 70, 318 S.E.2d 560 (1984).

Obligations Under Notes and Deeds of Trust as "Antecedent Debts". — Purchasers of real property who execute purchase money notes and deeds of trust have no personal liability for the underlying indebtedness and the seller's remedy is to foreclose the deed of trust. This does not, however, render the debtors' obligations under the notes and deeds of trust any less an "antecedent debt." Carter v. Homesley (In re Strom), 46 Bankr. 144 (Bankr. E.D.N.C. 1985).

Section Held Inapplicable. — Where the deed of trust covered land other than that purchased from the plaintiffs by the defendants, it could not qualify as a purchase-money deed of trust under this section. This was true because a deed of trust is a purchase-money deed of trust only if it is made as a part of the same transaction in which the debtor purchases land, embraces the land so purchased, and secures all or part of its purchase price. Dobias v. White, 239 N.C. 409, 80 S.E.2d 23 (1954).

A deed of trust given by a vendee to his vendor to secure the purchase price of lands other than those described in the security instrument cannot qualify as a purchase-money deed of trust under this section. This is true because a deed of trust is a purchase-money deed of trust only if it is made as a part of the same transaction in which the debtor purchases the land, embraces the land so purchased, and secures all or part of its purchase price. Childers v. Parker's, Inc., 274 N.C. 256, 162 S.E.2d 481 (1968).

Even if the promissory note and deed of trust contained language indicating that they were purchase money instruments, this section was not applicable to limit petitioners to foreclose on land actually sold by them to respondents; petitioners sought to foreclose on property conveyed under a deed of trust, and this section only prohibits a mortgagee or trustee in a purchase money situation from obtaining a deficiency judgment. In re Fuller, 94 N.C. App. 207, 380 S.E.2d 120.

Where the underlying obligation represented by note was still valid, and the anti-deficiency judgment statute did not apply because the bank was not a seller/purchase-money mortgagee, the trial court was correct in awarding plaintiff a monetary judgment in the amount of the outstanding debt balance, plus interest and late fees. G.E. Capital Mtg. Servs. v. Neely, 135 N.C. App. 187, 519 S.E.2d 553 (1999).

Anti-deficiency statute did not apply to a lease agreement with an option to purchase, containing a liquidated damages provision, where none of the transaction documents purported to be an instrument of debt or securing instrument, and none of the documents stated that the subject property served as security for the balance of its purchase price. Green Park Inn, Inc. v. Moore, 149 N.C. App. 531, 562 S.E.2d 53, 2002 N.C. App. LEXIS 287 (2002).

Unsecured Note with Endorsers. — This section has no application to an unsecured note with endorsers, given by the purchaser of land in addition to a cash payment and a purchase money note secured by deed of trust on the property. Brown v. Owens, 251 N.C. 348, 111 S.E.2d 705 (1959).

Holder of Subordinate Deed of Trust Cannot Bring In Personam Action. — A seller, who is the holder of a subordinate purchase money deed of trust and whose security has been eroded by foreclosure of a senior deed of trust, cannot bring an in personam action for the debt. Sink v. Egerton, 76 N.C. App. 526, 333 S.E.2d 520 (1985).

Anti-deficiency statute prohibits the holder of a second purchase money deed of trust from bringing an in personam action on the note for the debt even though the security has been "destroyed" by foreclosure of the first deed of trust. Paynter v. Maggiolo, 105 N.C. App. 312, 412 S.E.2d 691 (1992).

Article 2C.

Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

§ 45-21.39. Limitation of time for attacking certain foreclosures on ground trustee was agent, etc., of owner of debt.

(a) No action or proceeding shall be brought or defense or counterclaim pleaded later than one year after March 14, 1941, in which a foreclosure sale which occurred prior to January 1, 1941, under a deed of trust conveying real estate as security for a debt is attacked or otherwise questioned upon the ground that the trustee was an officer, director, attorney, agent or employee of the owner of the whole or any part of the debt secured thereby, or upon the ground that the trustee and the owner of the debt or any part thereof have common officers, directors, attorneys, agents or employees.

(b) This section shall not be construed to give or create any cause of action where none existed before March 14, 1941, nor shall the limitation provided in subsection (a) hereof have the effect of barring any cause of action based upon grounds other than those mentioned in said subsection, unless the grounds set out in subsection (a) are an essential part thereof.

(c) This section shall not be construed to enlarge the time in which to bring any action or proceeding or to plead any defense or counterclaim; and the limitation hereby created is in addition to all other limitations now existing. (1941, c. 202; 1949, c. 720, s. 4.)

§ 45-21.40. Real property; validation of deeds made after expiration of statute of limitations where sales made prior thereto.

In all cases where sales of real property have been made under powers of sale contained in mortgages or deeds of trust and such sales have been made within the times which would have been allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust, and the execution and delivery of deeds in consummation of such sales have been delayed until after the expiration of the period which would have been allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust as a result of the filing of raised or increased bids, such deeds in the exercise of the power of sale are hereby validated and are declared to have the same effect as if they had been executed and delivered within the period allowed by the statute of limitations for the commencement of actions to foreclose such mortgages or deeds of trust. (1943, c. 16, s. 2; 1949, c. 720, s. 4.)

§ 45-21.41. Orders signed on days other than first and third Mondays validated; force and effect of deeds.

In all actions for the foreclosure of any mortgage or deed of trust which has heretofore been instituted and prosecuted before the clerk of the superior court of any county in North Carolina, wherein the judgment confirming the sale made by the commissioner appointed in said action, and ordering the said commissioner to execute a deed to the purchaser, was signed by such clerk on a day other than the first or third Monday of a month, such judgment of confirmation shall be and is hereby declared to be valid and of the same force and effect as though signed and docketed on the first or third Monday of any month, and any deed made by any commissioner or commissioners in any such action where the confirmation of sale was made on a day other than a first or third Monday of the month shall be and is hereby declared to have the same force and effect as if the same were executed and delivered pursuant to a judgment of confirmation properly signed and docketed by the clerk of the superior court on a first or third Monday of the month. (1923, c. 53, s. 1; C.S., s. 2593(a); 1949, c. 720, s. 4.)

§ 45-21.42. Validation of deeds where no order or record of confirmation can be found.

In all cases prior to the first day of March, 1974, where sales of property have been made under the power of sale contained in any deed of trust, mortgage or other instrument conveying property to secure a debt or other obligation, or where such sales have been made pursuant to an order of court in foreclosure proceedings and deeds have been executed by any trustee, mortgagee, commissioner, or person appointed by the court, conveying the property, or security, described therein, and said deed, or other instrument so executed, containing the property described therein, to the highest bidder or purchaser of said sale and such deed, or other instrument, contains recitals to the effect that said sale was reported to the clerk of the superior court, or to the court, and/or such sale was duly confirmed by the clerk of the superior court, or court, then and in that event all such deeds, conveyances, or other instruments, containing such recitals are declared to be lawful, valid and binding upon all parties to the proceedings, or parties named in such deeds of trust, mortgages, or other orders or instruments, and are hereby declared to be effective and valid to pass title for the purpose of transferring title to the purchasers at such sales with the same force and effect as if an order of confirmation had been filed in the office of the clerk of the superior court, or with the court, together with necessary reports and other decrees and to the same effect as if a record had been made in the minutes of the court of such orders, decrees and confirmations, provided that nothing contained in this section shall be construed as applicable to or affecting pending litigation. (1945, c. 984; 1949, c. 720, s. 4; 1957, c. 505; 1979, c. 242.)

§ 45-21.43. Validation of certain foreclosure sales.

In all cases where mortgages or deeds of trust on real estate with power of sale have been foreclosed pursuant to said power by proper advertisement and sale in the county where such real estate is located, notwithstanding the wording of such mortgages or deeds of trust providing for advertisement or sale, or both, in some other county, or at some other particular place in the county in which the real estate is located, which place was in fact designated in the notice of sale, all such sales are hereby fully validated, ratified and confirmed and shall be as effective to pass title to the real estate described therein as fully and to the same extent as if such mortgages or deeds of trust had provided for advertisement and sale in the county where such real estate is actually situate. (1951, c. 220; 1961, c. 537.)

§ 45-21.44. Validation of foreclosure sales when provisions of G.S. 45-21.17(2) not complied with.

In all cases prior to May 1, 1990, where mortgages or deeds of trust on real estate with power of sale have been foreclosed pursuant to said power by proper advertisement except that the date of the last publication was from seven to 20 days preceding the date of sale, all such sales are fully validated, ratified, and confirmed and shall be as effective to pass title to the real estate described therein as fully and to the same extent as if the provisions of G.S. 45-21.17(2) had been fully complied with. (1959, c. 52; 1963, c. 1157; 1971, c. 879, s. 1; 1975, c. 454, s. 2; 1985, c. 689, s. 15; 1989 (Reg. Sess., 1990), c. 1024, s. 11.1.)

§ 45-21.45. Validation of foreclosure sales where notice and hearing not provided.

In all cases where mortgages or deeds of trust on real estate with power of sale have been foreclosed pursuant to said power by proper advertisement and sale, but the mortgagor or grantor under such mortgage or deed of trust did not receive actual notice of such foreclosure or have the opportunity of a hearing prior to such foreclosure, all such sales are hereby fully validated, ratified and confirmed and shall be as effective to pass title to the real estate described therein as fully and to the same extent as if such notice and opportunity for hearing had been given, unless an action to set aside such foreclosure is commenced within one year from June 6, 1975. (1975, c. 492, s. 12.)

Legal Periodicals. — For comment discussing changes in North Carolina's foreclosure law, see 54 N.C.L. Rev. 903 (1976).

CASE NOTES

Cited in McCay v. Morris, 46 N.C. App. 791, 266 S.E.2d 5 (1980).

§ 45-21.46. Validation of foreclosure sales where posting and publication not complied with.

(a) In all cases of foreclosure of mortgages or deeds of trust secured by real estate pursuant to power of sale which foreclosures were commenced on or subsequent to June 6, 1975, and consummated prior to June 1, 1983, in which foreclosure sales the requirements for posting and publication of notice of sale set forth in G.S. 45-21.17 were complied with but the requirements of the mortgage or deed of trust as to posting and publication of notice of sale were not complied with, are validated, ratified and confirmed and shall be effective to pass title to real estate to the same extent as though all requirements of the mortgage or deed of trust respecting posting and publication of notice of sale were complied with; unless an action to set aside such foreclosure is commenced before January 1, 1984.

(b) All foreclosures of mortgages or deeds of trust secured by real estate pursuant to power of sale, which foreclosures were commenced on or subsequent to June 1, 1983, and consummated prior to April 1, 1985, in which foreclosure sales the requirements for posting and publication of notice of sale set forth in G.S. 45-21.17 were complied with but the requirements of the mortgage or deed of trust as to posting and publication of notice of sale were not complied with, are validated, ratified and confirmed and shall be effective to pass title to real estate to the same extent as though all requirements of the mortgage or deed of trust respecting posting and publication of notice of sale were complied with; unless an action to set aside such foreclosure is commenced in the period beginning January 1, 1984, and ending January 1, 1986. (1983, c. 582, s. 1; c. 738, s. 1; 1985, c. 341.)

CASE NOTES

Determination of Effect of Deed of Trust. — While the parties are before the clerk of court, the clerk should have the authority to determine not only whether there is a power of sale in the deed of trust, but also whether the property sought to be sold under foreclosure is still legally secured by the deed of trust. In re Michael Weinman Assocs., 333 N.C. 221, 424 S.E.2d 385 (1993).

§ 45-21.47. Validation of foreclosure sales when trustee is officer of owner of debt.

All sales of real property made prior to January 1, 1991, under a power of sale contained in a mortgage or deed of trust for which the trustee was an officer, director, attorney, agent, or employee of the owner of all or part of the debt secured by the mortgage or deed of trust are validated and have the same effect as if the trustee had not been an officer, director, attorney, agent, or employee of the owner of the debt unless an action to set aside the foreclosure is commenced within one year after January 1, 1991. (1983, c. 582, s. 1; 1985, c. 604; 1987, c. 277, s. 10; 1989, c. 390, s. 10; 1991, c. 489, s. 10.)

§ 45-21.48. Validation of certain foreclosure sales that did not comply with posting requirement.

A sale of real property made on or before July 2, 1985, under a power of sale contained in a mortgage or deed of trust, for which a notice of the sale was not posted at the courthouse door for 20 days immediately preceding the sale, as required by G.S. 45-21.17(1), but was posted at the courthouse door for at least 15 days immediately preceding the sale, is declared to be a valid sale to the same extent as if the notice of the sale had been posted for 20 days; unless an action to set aside the foreclosure sale is not barred by the statute of limitations and is commenced on or before October 1, 1985. (1985, c. 567, s. 2.)

§ 45-21.49. Validation of foreclosure sales when provisions of § 45-21.16A(a)(3) not complied with.

(a) Whenever any real property was sold under a power of sale as provided in Article 2A of Chapter 45, and the notice of sale did not describe the improvements on the property to be sold, as required under G.S. 45-21.16A(a)(3), the sale shall not be invalidated because of such omission.

(b) This section shall apply to all sales completed prior to June 1, 1987. (1987, c. 277, s. 10a.)

Editor's Note. — The references in the section catchline and subsection (a) to G.S. 45-21.16A(3) were changed to refer to G.S. 45-21.16A(a)(3) at the direction of the Revisor of Statutes. Session Laws 2007-353, s. 1, inserted the subsection (a) designation in G.S. 45-21.16A.

Article 3.

Mortgage Sales.

§ 45-22: Transferred to G.S. 45-21.39 by Session Laws 1949, c. 720, s. 4.

§§ 45-23 through 45-26: Repealed by Session Laws 1949, c. 720, s. 5.

§ 45-26.1: Transferred to G.S. 45-21.40 by Session Laws 1949, c. 720, s. 4.

§§ 45-27 through 45-30: Repealed by Session Laws 1949, c. 720, s. 5.

§ 45-31: Transferred to G.S. 45-21.41 by Session Laws 1949, c. 720, s. 4.

§§ 45-32 through 45-36: Transferred to G.S. 45-21.34 to 45-21.38 by Session Laws 1949, c. 720, s. 3.

§ 45-36.1: Transferred to G.S. 45-21.42 by Session Laws 1949, c. 720, s. 4.

Article 4.

Satisfaction.

§ 45-36.2. Obligation of good faith.

Every action or duty within this Article imposes an obligation of good faith in its performance or enforcement. (1953, c. 848; 2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.3. Notification by mortgagee of satisfaction of provisions of deed of trust or mortgage, or other instrument; civil penalty.

(a) After the satisfaction of the provisions of any deed of trust or mortgage, or other instrument intended to secure with real property the payment of money or the performance of any other obligation and registered as required by law, the holder of the evidence of the indebtedness, if it is a single instrument, or a duly authorized agent or attorney of such holder shall within 60 days:

(1) Discharge and release of record such documents and forward the cancelled documents to the grantor, trustor or mortgagor; or,

(2) Alternatively, the holder of the evidence of the indebtedness or a duly authorized agent or attorney of such holder, at the request of the grantor, trustor or mortgagor, shall forward said instrument and the deed of trust or mortgage instrument, with payment and satisfaction acknowledged in accordance with the requirements of G.S. 45-37, to the grantor, trustor or mortgagor.

(b) Any person, institution or agent who fails to comply with this section may be required to pay a civil penalty of not more than one thousand dollars ($1,000) in addition to reasonable attorneys' fees and any other damages awarded by the court to the grantor, trustor or mortgagor, or to a subsequent purchaser of the property from the grantor, trustor or mortgagor. A five hundred dollar ($500.00) civil penalty may be recovered by the grantor, trustor or mortgagor, and a five hundred dollar ($500.00) penalty may be recovered by the purchaser of the property from the grantor, trustor or mortgagor. If that purchaser of the property consists of more than a single grantee, then the civil penalty will be divided equally among all of the grantees. A petitioner may recover damages under this section only if he has given the mortgagee, obligee, beneficiary or other responsible party written notice of his intention to bring an action pursuant to this section. Upon receipt of this notice, the mortgagee, obligee, beneficiary or other responsible party shall have 30 days, in addition to the initial 60-day period, to fulfill the requirements of this section.

(c) Should any person, institution or agent who is not the present holder of the evidence of indebtedness be required to pay a civil penalty, attorneys' fees, or other damages under this section, they will have an action against the holder of the evidence of indebtedness for all sums they were required to pay.

(d) This section applies only if the provisions of the deed of trust, mortgage, or other instrument are satisfied before October 1, 2005. (1979, c. 681, s. 1; 1987, c. 662, ss. 1-3; 2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

CASE NOTES

Jurisdiction of Court. — Because a successor judge's summary judgment order was vacated and as a prior judge ruled that an investor's alleged violation of G.S. 45-36.3 was an issue for the jury, the successor judge erred in awarding a civil penalty and attorney fees to the home buyers for the investor's failure to cancel a deed in that the successor judge was without authority to make the awards. Cail v. Cerwin, — N.C. App. —, 648 S.E.2d 510, 2007 N.C. App. LEXIS 1684 (2007).

§ 45-36.4. Definitions.

As used in this Article, the following terms mean:

(1) Address for giving a notification. — For the purpose of a particular type of notification, the most recent address provided in a document by the intended recipient of the notification to the person giving the notification, unless the person giving the notification knows of a more accurate address, in which case the term means that address.

(2) Day. — Calendar day.

(3) Document. — Information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(4) Electronic. — Relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(5) Entitled person. — A person liable for payment or performance of the obligation secured by the real property described in a security instrument, or the landowner.

(6) Good faith. — Honesty in fact and the observance of reasonable commercial standards of fair dealing.

(7) Landowner. — A person that, before foreclosure, has the right of redemption in the real property described in a security instrument. The term does not include a person that holds only a lien on the real property.

(8) Notification. — A document containing information required under this Article and signed by the person required to provide the information.

(9) Original parties. — With respect to a security instrument, each person named as a party to the security instrument on the face thereof as originally recorded. In identifying the original parties to a deed of trust for purposes of this Article, it is not necessary to include the original trustee or trustees named therein.

(10) Payoff amount. — The sum necessary to satisfy a secured obligation.

(11) Payoff statement. — A document containing the information specified in G.S. 45-36.7(d).

(12) Person. — An individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(13) Recording data. — The book and page number or document number that indicates where a document is recorded in the office of the register of deeds.

(14) Register of deeds. — Includes the register of deeds, assistant register of deeds, or deputy register of deeds.

(15) Satisfy. — With respect to a security instrument, to terminate the effectiveness of the security instrument.

(16) Secured creditor. — A person that holds or is the beneficiary of a security interest or that is authorized both to receive payments on behalf of a person that holds a security interest and to record a satisfaction of the security instrument upon receiving full performance of the secured obligation. The term does not include a trustee under a security instrument.

(17) Secured obligation. — An obligation the payment or performance of which is secured by a security interest.

(18) Security instrument. — An agreement, however denominated, that creates or provides for an interest in real property to secure payment or performance of an obligation, whether or not it also creates or

provides for a lien on personal property. The term includes a deed of trust and a mortgage.

(19) Security interest. — An interest in real property created by a security instrument.

(20) Sign. — With present intent to authenticate or adopt a document:
   a. To execute or adopt a tangible symbol; or
   b. To attach to or logically associate with the document an electronic sound, symbol, or process.

(21) State. — A state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(22) Submit for recording. — To deliver, with required fees and taxes, a document sufficient to be recorded under this Article to the register of deeds in the county in which the real property described in the related security instrument is located. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.5. Notification: manner of giving and effective date.

(a) A person gives a notification by any of the following:

(1) Depositing it with the United States Postal Service with first-class postage paid or with a commercially reasonable delivery service with cost of delivery provided, properly addressed to the recipient's address for giving a notification.

(2) Sending it by facsimile transmission, electronic mail, or other electronic transmission to the recipient's address for giving a notification, but only if the recipient agreed to receive notification in that manner.

(3) Causing it to be received at the address for giving a notification within the time that it would have been received if given pursuant to subdivision (1) of this subsection.

(b) A notification is effective on any of the following:

(1) The day after it is deposited with a commercially reasonable delivery service for overnight delivery.

(2) Three days after it is deposited with the United States Postal Service, first-class mail with postage prepaid, or with a commercially reasonable delivery service for delivery other than by overnight delivery.

(3) The day it is given, if given pursuant to subdivision (a)(2) of this section.

(4) The day it is received, if given by a method other than as provided in subdivision (a)(1) or (a)(2) of this section.

(c) If this Article or a notification given pursuant to this Article requires performance on or by a certain day and that day is a Saturday, Sunday, or legal holiday under the laws of this State or the United States, the performance is sufficient if performed on the next day that is not a Saturday, Sunday, or legal holiday. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.6. Document of rescission: effect; liability for wrongful recording.

(a) In this section, "document of rescission" means a document stating that an identified satisfaction or affidavit of satisfaction of a security instrument was recorded erroneously or that a security instrument was satisfied of record erroneously, the secured obligation remains unsatisfied, and the security instrument remains in force.

(b) If a person records a satisfaction or affidavit of satisfaction of a security instrument in error or if a security instrument is satisfied of record erroneously by any other means, the person or the secured creditor may execute and record a document of rescission. The document of rescission must be duly acknowledged before an officer authorized to make acknowledgments. Upon recording, the document rescinds an erroneously recorded satisfaction or affidavit and the erroneous satisfaction of record of the security instrument and reinstates the security instrument.

(c) A recorded document of rescission has no effect on the rights of a person that:

(1) Records an interest in the real property described in a security instrument after the recording of the satisfaction or affidavit of satisfaction of the security instrument or the erroneous satisfaction of record of the security instrument by other means and before the recording of the document of rescission; and

(2) Would otherwise have priority over or take free of the lien created by the security instrument as reinstated under Chapter 47 of the General Statutes.

(d) A person that erroneously or wrongfully records a document of rescission is liable to any person injured thereby for the actual loss caused by the recording and reasonable attorneys' fees and costs. (2005-123, s. 1; 2006-259, s. 52(b); 2006-264, s. 40(a).)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

Effect of Amendments. — Session Laws 2006-264, s. 40(a), as amended by 2006-259, s. 52(b), effective October 1, 2006, added the second sentence in subsection (b).

§ 45-36.7. Payoff statement: request and content.

(a) An entitled person, or an agent authorized by an entitled person to request a payoff statement, may give to the secured creditor a notification requesting a payoff statement for a specified payoff date not more than 30 days after the notification is given. The notification must contain all of the following:

(1) The entitled person's name.

(2) If given by a person other than an entitled person, the name of the person giving the notification and a statement that the person is an authorized agent of the entitled person.

(3) A direction whether the statement is to be sent to the entitled person or that person's authorized agent.

(4) The address to which the creditor must send the statement.

(5) Sufficient information to enable the creditor to identify the secured obligation and the real property encumbered by the security interest.

(b) If a notification under subsection (a) of this section directs the secured creditor to send the payoff statement to a person identified as an authorized agent of the entitled person, the secured creditor must send the statement to the agent, unless the secured creditor knows that the entitled person has not authorized the request.

(c) A person who gives to a secured creditor a notification requesting a payoff statement thereby represents that the person is an entitled person or the authorized agent of an entitled person. A secured creditor may rely on that representation in providing a payoff statement unless the secured creditor knows that the requesting person is neither an entitled person nor the authorized agent of an entitled person. A secured creditor has no duty to make inquiry as to whether, or to verify that, the person requesting a payoff statement is an entitled person or the authorized agent of an entitled person.

(d) Within 10 days after the effective date of a notification that complies with subsection (a) of this section, the secured creditor shall issue a payoff statement and send it as directed pursuant to subdivision (a)(3) of this section in the manner prescribed in G.S. 45-36.5 for giving a notification. A secured creditor that sends a payoff statement to the entitled person or the authorized agent may not claim that the notification did not satisfy subsection (a) of this section. If the person to whom the notification is given once held an interest in the secured obligation but has since assigned that interest, the person need not send a payoff statement but shall give (i) a notification of the assignment to the person to whom the payoff statement otherwise would have been sent, providing the name and address of the assignee, or (ii) a notification to the person to whom the payoff statement otherwise would have been sent, stating that the recipient claims no interest in the security instrument or the secured obligation, that the secured obligation was assigned, but that the identity and address of the assignee is not known.

(e) A payoff statement must contain:

(1) The date on which it was prepared and the payoff amount as of that date, including the amount by type of each fee, charge, or other sum included within the payoff amount;

(2) The information reasonably necessary to calculate the payoff amount as of the requested payoff date, including the per diem interest amount; and

(3) The payment cutoff time, if any, the address or place where payment must be made, and any limitation as to the authorized method of payment.

(f) A payoff statement may contain the amount of any fees authorized under this section not included in the payoff amount. A secured creditor may require the payment in full of any fees authorized under this section before issuing a payoff statement.

(g) A secured creditor may not qualify a payoff amount or state that it is subject to change before the payoff date unless the payoff statement provides information sufficient to permit the entitled person or the person's authorized agent to request an updated payoff amount at no charge and to obtain that updated payoff amount during the secured creditor's normal business hours on the payoff date or the immediately preceding business day.

(h) A secured creditor must provide upon request one payoff statement without charge during any six-month period. A secured creditor may charge a fee of twenty-five dollars ($25.00) for each additional payoff statement requested during that six-month period. However, a secured creditor may not charge a fee for providing an updated payoff amount under subsection (f) of this section or a corrected payoff statement under G.S. 45-36.8(a).

(i) Unless the security instrument provides otherwise, a secured creditor is not required to send a payoff statement by means other than first-class mail. If the creditor agrees to send a statement by another means, it may charge a reasonable fee for complying with the requested manner of delivery.

(j) Except as otherwise provided in G.S. 45-36.12, if a secured creditor to which a notification has been given pursuant to subsection (a) of this section does not send a timely payoff statement that substantially complies with subsection (d) of this section, the creditor is liable to the entitled person for any actual damages caused by the failure, but not punitive damages. A creditor that does not pay the damages provided in this subsection within 30 days after receipt of a notification demanding payment shall also be liable for reasonable attorneys' fees and costs.

(k) This section does not apply unless the notification requesting a payoff statement is given on or after October 1, 2005. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.8. Understated payoff statement: correction; effect.

(a) If a secured creditor determines that the payoff amount it provided in a payoff statement was understated, the creditor may send a corrected payoff statement. If the entitled person or the person's authorized agent receives and has a reasonable opportunity to act upon a corrected payoff statement before making payment, the corrected statement supersedes an earlier statement.

(b) A secured creditor that sends a payoff statement containing an understated payoff amount may not deny the accuracy of the payoff amount as against any person that reasonably and detrimentally relies upon the understated payoff amount.

(c) This Article does not:

(1) Affect the right of a secured creditor to recover any sum that it did not include in a payoff amount from any person liable for payment of the secured obligation; or

(2) Limit any claim or defense that a person liable for payment of a secured obligation may have under law other than this Article. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.9. Secured creditor to submit satisfaction for recording; liability for failure.

(a) A secured creditor shall submit for recording a satisfaction of a security instrument within 30 days after the creditor receives full payment or performance of the secured obligation. If a security instrument secures a line of credit or future advances, the secured obligation is fully performed only if, in addition to full payment, the secured creditor has received a notification requesting the creditor to terminate the line of credit or containing a statement sufficient to terminate the effectiveness of the provision for future advances in the security instrument.

(b) Except as otherwise provided in G.S. 45-36.12, a secured creditor that is required to submit a satisfaction of a security instrument for recording and does not do so by the end of the period specified in subsection (a) of this section is liable to the landowner for any actual damages caused by the failure, but not punitive damages.

(c) Except as otherwise provided in subsection (d) of this section and in G.S. 45-36.12, a secured creditor that is required to submit a satisfaction of a security instrument for recording and does not do so by the end of the period specified in subsection (a) of this section is also liable to the landowner for one thousand dollars ($1,000) and any reasonable attorneys' fees and court costs incurred if, after the expiration of the period specified in subsection (a) of this section, all of the following occur:

(1) The landowner gives the secured creditor a notification, by any method authorized by G.S. 45-36.5 that provides proof of receipt, demanding that the secured creditor submit a satisfaction for recording.
(2) The secured creditor does not submit a satisfaction for recording within 30 days after the secured creditor's receipt of the notification.
(3) The security instrument is not satisfied of record by any of the methods provided in G.S. 45-37(a) within 30 days after the secured creditor's receipt of the notification.

The right to receive the additional one thousand dollars ($1,000) is personal to the landowner who gives the secured creditor notification under this subsection and may not be assigned.

(d) Subsection (c) of this section does not apply if the secured creditor received full payment or performance of the secured obligation before October 1, 2005.

(e) This section does not apply if the security instrument is satisfied of record by any of the methods provided in G.S. 45-37(a) within 30 days after the secured creditor receives full payment or performance of the secured obligation. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.10. Content and effect of satisfaction.

(a) A document is a satisfaction of a security instrument if it does all of the following:

(1) Identifies the type of security instrument, the original parties to the security instrument, the recording data for the security instrument, and the office in which the security instrument is recorded.
(2) States that the person signing the satisfaction is the secured creditor.
(3) Reserved.
(4) Contains language terminating the effectiveness of the security instrument.
(5) Is signed by the secured creditor and acknowledged as required by law for a conveyance of an interest in real property.

(b) The register of deeds shall accept for recording a satisfaction of a security instrument, unless one of the following applies:

(1) The document is submitted by a method or in a medium not authorized for registration by the register of deeds under applicable law.
(2) The document is not signed by the secured creditor and acknowledged as required by law for a conveyance of an interest in real property. The register of deeds shall not be required to verify or make inquiry concerning (i) the truth of the matters stated in any satisfaction document, or (ii) the authority of the person executing any satisfaction document to do so.

(c) The recording of a satisfaction of a security instrument does not by itself extinguish any liability of a person for payment or performance of the secured obligation. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.11. Satisfaction: form.

No particular phrasing is required for a satisfaction of a security instrument. The following form, when properly completed, is sufficient to satisfy the requirements of G.S. 45-36.10(a):

"SATISFACTION OF SECURITY INSTRUMENT

(G.S. 45-36.10; G.S. 45-37(a)(7))

The undersigned is now the secured creditor in the security instrument identified as follows:

Type of Security Instrument: (identify type of security instrument, such as deed of trust or mortgage)

Original Grantor(s): (Identify original grantor(s), trustor(s), or mortgagor(s))

Original Secured Party(ies): (Identify the original beneficiary(ies), mortgagee(s), or secured party(ies) in the security instrument)

Recording Data: The security instrument is recorded in Book ________ at Page ________ or as document number ________________ in the office of the Register of Deeds for ____________________________ County, North Carolina.

This satisfaction terminates the effectiveness of the security instrument.

Date: ________________________________ ________________________________

(Signature of secured creditor)

[Acknowledgment before officer authorized to take acknowledgments]".

(2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.12. Limitation of secured creditor's liability.

A secured creditor is not liable under this Article if it:

(1) Established a reasonable procedure to achieve compliance with its obligations under this Article;

(2) Complied with that procedure in good faith; and

(3) Was unable to comply with its obligations because of circumstances beyond its control. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential

Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.13. Eligibility to serve as satisfaction agent.

No person other than an attorney licensed to practice law in the State of North Carolina may serve as a satisfaction agent under this Article. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.14. Affidavit of satisfaction: notification to secured creditor.

(a) If a secured creditor has not submitted for recording a satisfaction of a security instrument and the security instrument has not been satisfied of record by any of the methods provided by G.S. 45-37(a) within the period specified in G.S. 45-36.9(a), a satisfaction agent acting for and with authority from the landowner may give the secured creditor a notification that the satisfaction agent intends to submit for recording an affidavit of satisfaction of the security instrument. The notification must include all of the following:

(1) The identity and mailing address of the satisfaction agent.

(2) Identification of the security instrument for which a recorded satisfaction is sought, including the names of the original parties to, and the recording data for, the security instrument.

(3) A statement that the satisfaction agent has reasonable grounds to believe that:

a. The person to whom the notification is being given is the secured creditor; and

b. The secured creditor has received full payment or performance of the secured obligation.

(4) A statement that the security instrument has not been satisfied of record.

(5) A statement that the satisfaction agent, acting with the authorization of the owner of the real property described in the security instrument, intends to sign and submit for recording an affidavit of satisfaction of the security instrument unless, within 30 days after the effective date of the notification:

a. The secured creditor submits a satisfaction of the security instrument for recording;

b. The satisfaction agent receives from the secured creditor a notification stating that the secured obligation remains unsatisfied;

c. The satisfaction agent receives from the secured creditor a notification stating that the secured creditor has assigned the security instrument and identifying the name and address of the assignee; or

d. The security instrument is satisfied of record by any of the methods provided in G.S. 45-37(a).

(b) A notification under subsection (a) of this section must be sent by a method authorized by G.S. 45-36.5 that provides proof of receipt to the secured creditor's address for giving a notification for the purpose of requesting a payoff statement or, if the satisfaction agent cannot ascertain that address, to the secured creditor's address for notification for any other purpose.

(c) This Article does not require a person to agree to serve as a satisfaction agent. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.15. Affidavit of satisfaction: authorization to submit for recording.

(a) Subject to subsections (b) and (c) of this section, a satisfaction agent may sign and submit for recording an affidavit of satisfaction of a security instrument complying with G.S. 45-36.16 if:

(1) The secured creditor has not, to the knowledge of the satisfaction agent, submitted for recording a satisfaction of a security instrument or otherwise caused the security instrument to be satisfied of record pursuant to any of the methods provided in G.S. 45-37(a) within 30 days after the effective date of a notification complying with G.S. 45-36.14(a); or

(2) The secured creditor authorizes the satisfaction agent to do so.

(b) A satisfaction agent may not sign and submit for recording an affidavit of satisfaction of a security instrument if it has received a notification under G.S. 45-36.14(a)(5)b. stating that the secured obligation remains unsatisfied.

(c) If a satisfaction agent receives a notification under G.S. 45-36.14(a)(5)c. stating that the security instrument has been assigned, the satisfaction agent may not submit for recording an affidavit of satisfaction of the security instrument without:

(1) Giving a notification of intent to submit for recording an affidavit of satisfaction to the identified assignee at the identified address; and

(2) Complying with G.S. 45-36.14 with respect to the identified assignee. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.16. Affidavit of satisfaction: content.

An affidavit of satisfaction of a security instrument must comply with all of the following:

(1) Identify the type of security instrument, the original parties to the security instrument, the secured creditor, the recording data for the security instrument, and the office in which the security instrument is recorded.

(2) State the basis upon which the person signing the affidavit is a satisfaction agent.

(3) Reserved.

(4) State that the person signing the affidavit has reasonable grounds to believe that the secured creditor has received full payment or performance of the secured obligation.

(5) State that the person signing the affidavit, acting with the authority of the owner of the real property described in the security instrument, gave notification to the secured creditor of its intention to sign and submit for recording an affidavit of satisfaction.

(6) Describe the method by which the person signing the affidavit gave notification in compliance with this Article.

(7) State that:

a. More than 30 days have elapsed since the effective date of that notification, and the person signing the affidavit has no knowledge that the secured creditor has submitted a satisfaction for recording and has not received a notification that the secured obligation remains unsatisfied; or

b. The secured creditor authorized the person signing the affidavit to sign and record an affidavit of satisfaction.

(8) Be signed and acknowledged as required by law for a conveyance of an interest in real property. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.17. Affidavit of satisfaction: form.

No particular phrasing of an affidavit of satisfaction is required. The following form of affidavit, when properly completed, is sufficient to satisfy the requirements of G.S. 45-36.16:

"AFFIDAVIT OF SATISFACTION

____
(Date of Affidavit)

The undersigned hereby states as follows:

1. I am an attorney licensed to practice law in the State of North Carolina.
2. I am signing this Affidavit of Satisfaction to evidence full payment or performance of the obligations secured by real property covered by the following security instrument (the "security instrument") currently held by __________ (the "secured creditor"):

Type of security instrument:

Original parties to security instrument:

County and state of recording:

Recording data for security instrument:

3. I have reasonable grounds to believe that the secured creditor has received full payment or performance of the balance of the obligations secured by the security instrument.
4. With the authorization of the owner of the real property described in the security instrument, I gave notification to the secured creditor by method authorized by G.S. 45-36.5 that provides proof of receipt that I would sign and record an affidavit of satisfaction of the security instrument if, within 30 days after the effective date of the notification, the secured creditor did not submit a satisfaction of the security interest for recording or give notification that the secured obligation remains unsatisfied.

5. [Check appropriate box]

☐ The 30-day period identified in paragraph 4 has elapsed, I have no knowledge that the secured creditor has submitted a satisfaction for recording, and I have not received notification that the secured obligation remains unsatisfied.

☐ The secured creditor responded to the notification in paragraph 4 by authorizing me to execute and record this Affidavit of Satisfaction.

____

(Signature of Satisfaction Agent)

[Acknowledgment before officer authorized to take acknowledgments]" (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.18. Affidavit of satisfaction: effect.

(a) Upon recording, an affidavit substantially complying with the requirements of G.S. 45-36.16 constitutes a satisfaction of the security instrument described in the affidavit.

(b) The recording of an affidavit of satisfaction of a security instrument does not by itself extinguish any liability of a person for payment or performance of the secured obligation.

(c) The register of deeds may not refuse to accept for recording an affidavit of satisfaction of a security instrument unless:

(1) The affidavit is submitted by a method or in a medium not authorized for registration by the register of deeds under applicable law; or

(2) The affidavit is not signed by the satisfaction agent and acknowledged as required by law for a conveyance of an interest in real property. The register of deeds shall not be required to verify or make inquiry concerning (i) the truth of the matters stated in any affidavit of satisfaction, or (ii) the authority of the person executing any affidavit of satisfaction to do so. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.19. Liability of satisfaction agent.

(a) Except as otherwise provided in subsection (b) of this section, a satisfaction agent or any person purporting to be a satisfaction agent that records or submits for recording an affidavit of satisfaction of a security instrument erroneously or with knowledge that the statements contained in the affidavit are false is liable to the secured creditor for any actual damages caused by the recording and reasonable attorneys' fees and costs.

(b) A satisfaction agent that records or submits for recording an affidavit of satisfaction of a security instrument erroneously is not liable if the agent properly complied with this Article and the secured creditor did not respond in a timely manner to the notification pursuant to G.S. 45-36.14(a)(5).

(c) If a satisfaction agent or any person purporting to be a satisfaction agent records or submits for recording an affidavit of satisfaction of a security instrument with knowledge that the statements contained in the affidavit are false, this section does not preclude any of the following:

(1) A court from awarding punitive damages on account of the conduct.

(2) The secured creditor from proceeding against the satisfaction agent or person purporting to be a satisfaction agent under law of this State other than this Article.

(3) The enforcement of any criminal statute prohibiting the conduct. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.20. Trustee's satisfaction of deed of trust: content and effect.

(a) Upon recording, a trustee's satisfaction substantially complying with the requirements of this section constitutes a satisfaction of the deed of trust described in the trustee's satisfaction.

(b) The recording of a trustee's satisfaction does not by itself extinguish any liability of a person for payment or performance of the secured obligation.

(c) This section applies only if the security instrument is a deed of trust. This section is not exclusive. Deeds of trust may also be satisfied of record by methods other than the filing of a trustee's satisfaction.

(d) Document is a trustee's satisfaction of a deed of trust if it complies with all of the following:

(1) Identifies the original parties to the deed of trust, the recording data for the deed of trust, and the office in which the deed of trust is recorded.

(2) States that the person signing the trustee's satisfaction is then serving as trustee or substitute trustee under the terms of the deed of trust.

(3) Contains language terminating the effectiveness of the deed of trust.

(4) Is signed by the trustee or substitute trustee then serving under the terms of the deed of trust and acknowledged as required by law for a conveyance of an interest in real property.

(e) The register of deeds shall accept for recording a trustee's satisfaction of a deed of trust, unless:

(1) The trustee's satisfaction is submitted by a method or in a medium not authorized for registration by the register of deeds under applicable law; or

(2) The trustee's satisfaction is not signed by the trustee or substitute trustee and acknowledged as required by law for a conveyance of an interest in real property. The register of deeds shall not be required to verify or make inquiry concerning (i) the truth of the matters stated in any trustee's satisfaction, or (ii) the authority of the person executing any trustee's satisfaction to do so. (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-36.21. Trustee's satisfaction of deed of trust: form.

No particular phrasing is required for a trustee's satisfaction of a deed of trust. The following form, when properly completed, is sufficient to satisfy the requirements of G.S. 45-36.20:

"TRUSTEE'S SATISFACTION OF DEED OF TRUST
(G.S. 45-36.20; G.S. 45-37(a)(7))

The undersigned is now serving as the trustee or substitute trustee under the terms of the deed of trust identified as follows:

Original Grantor(s): (Identify original grantor(s) or trustor(s))

Original Secured Party(ies): (Identify the original beneficiary(ies) or secured party(ies) in the deed of trust)

Recording Data: The deed of trust is recorded in Book ________ at Page ________ or as document number ________________ in the office of the Register of Deeds for ____________________ County, North Carolina.

This satisfaction terminates the effectiveness of the deed of trust.

Date:____________________________ ________________________________
(Signature of trustee or substitute trustee)

[Acknowledgment before officer authorized to take acknowledgments]" (2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-37. Satisfaction of record of security instruments.

(a) Subject to the provisions of G.S. 45-36.9(a) and G.S. 45-73 relating to security instruments which secure future advances, any security instrument intended to secure the payment of money or the performance of any other obligation registered as required by law may be satisfied of record and thereby discharged and released of record in the following manner:

(1) Security instruments satisfied of record prior to October 1, 2005, pursuant to this subdivision as it was in effect prior to October 1, 2005, shall be deemed satisfied of record, discharged, and released.

(2) By presentation of any original security instrument accompanied with the original bond, note, or other instrument thereby secured to the register of deeds, with the endorsement of payment and satisfaction appearing thereon and made by:
  a. The secured creditor,
  b. The trustee or substitute trustee, if the security instrument is a deed of trust,
  c. An assignee of the secured creditor, or
  d. Any bank, savings and loan association, savings bank, or credit union chartered under the laws of this or any other state or the United States having an office or branch in the State of North Carolina, when so endorsed in the name of the institution by an officer thereof.

The register of deeds is not required to verify or make inquiry concerning the authority of the person making the endorsement of payment and satisfaction to do so. Only upon presentation of the original instruments with endorsement of payment and satisfaction appearing thereon shall the register of deeds record a record of satisfaction as described in G.S. 45-37.2(b). The person so claiming satisfaction, performance or discharge of the debt or other obligation may retain possession of all of the instruments presented. The presentation of the security instrument alone to the register of deeds, with endorsement of payment, satisfaction, performance or discharge, shall be sufficient if the security instrument itself sets forth the obligation secured or the performance of any other obligation and does not call for or recite any note, bond or other instrument secured by it.

(3) By presentation to the register of deeds by:

a. The grantor,

b. The mortgagor, or

c. An agent, attorney or successor in title of the grantor or mortgagor of any original security instrument intended to secure the payment of money or the performance of any other obligation, together with the original bond, note or other instrument secured thereby, or by presentation of the original security instrument alone if such instrument itself sets forth the obligation secured or other obligation to be performed and does not call for or recite any note, bond or other instrument secured by it, if at the time of presentation, all such instruments are more than 10 years old counting from the maturity date of the last obligation secured. If the instrument or instruments so presented have an endorsement of partial payment, satisfaction, performance or discharge within the said period of 10 years, the period of 10 years shall be counted from the date of the most recent endorsement.

Only upon presentation of the original instruments shall the register of deeds record a record of satisfaction as described in G.S. 45-37.2(b).

(4) By presentation to the register of deeds of any original security instrument given to secure the bearer or holder of any negotiable instruments transferable by delivery, together with all the evidences of indebtedness secured thereby, marked paid and satisfied in full and signed by the bearer or holder thereof.

Only upon presentation of the original security instruments, and the originals of evidences of indebtedness properly marked shall the register of deeds record a record of satisfaction as described in G.S. 45-37.2(b), which record of satisfaction shall be valid and binding upon all persons, if no person rightfully entitled to the security instrument or evidences of indebtedness has previously notified the register of deeds by means of a written affidavit of the loss or theft of the security instrument or evidences of indebtedness and has caused the register of deeds to record the affidavit of loss or theft as a separate document, as required by G.S. 161-14.1.

Upon receipt of an affidavit of loss or theft of the security instrument or evidences of indebtedness that identify the security instrument, the original parties to the security instrument, and the recording data for the security instrument, the register of deeds shall record a record of satisfaction, as described in G.S. 45-37.2(b). The security instrument shall not be presented for satisfaction after such recording of a record of satisfaction or marginal entry until the ownership of said instrument shall have been lawfully determined. Nothing in this subdivision (4) shall be construed to impair the negotiability of any instrument otherwise properly negotiable, nor to impair the rights of any innocent purchaser for value thereof.

(5) Security instruments satisfied of record prior to October 1, 2005, pursuant to this subdivision as it was in effect prior to October 1, 2005, shall be deemed satisfied of record, discharged, and released.

(6) Security instruments satisfied of record prior to October 1, 2005, pursuant to this subdivision as it was in effect prior to October 1, 2005, shall be deemed satisfied of record, discharged, and released.

(7) By recording:

a. A satisfaction document that satisfies the requirements of G.S. 45-36.10,

b. An affidavit of satisfaction that satisfies the requirements of G.S. 45-36.16, or

c. A trustee's satisfaction that satisfies the requirements of G.S. 45-36.20, but only if the security instrument is a deed of trust.

The register of deeds shall not be required to verify or make inquiry concerning (i) the truth of the matters stated in any satisfaction document, affidavit of satisfaction, or trustee's satisfaction, or (ii) the authority of the person executing any satisfaction document, affidavit, or trustee's satisfaction to do so.

(b) It shall be conclusively presumed that the conditions of any security instrument securing the payment of money or securing the performance of any other obligation or obligations have been complied with or the debts secured thereby paid or obligations performed, as against creditors or purchasers for valuable consideration from the mortgagor or grantor, from and after the expiration of 15 years from whichever of the following occurs last:

(1) The date when the conditions of the security instrument were required by its terms to have been performed, or

(2) The date of maturity of the last installment of debt or interest secured thereby;

provided that the holder of the indebtedness secured by the security instrument or party secured by any provision thereof may file an affidavit with the register of deeds which affidavit shall specifically state:

(1) The amount of debt unpaid, which is secured by the security instrument; or

(2) In what respect any other condition thereof shall not have been complied with; or

may record a separate instrument signed by the secured creditor and witnessed by the register of deeds stating:

(1) Any payments that have been made on the indebtedness or other obligation secured by the security instrument including the date and amount of payments and

(2) The amount still due or obligations not performed under the security instrument.

The effect of the filing of the affidavit or the recording of a separate instrument made as herein provided shall be to postpone the effective date of the conclusive presumption of satisfaction to a date 15 years from the filing of the affidavit or from the recording of the separate instrument. There shall be only one postponement of the effective date of the conclusive presumption provided for herein. The register of deeds shall record and index the affidavit provided for herein or the separate instrument made as herein provided as a subsequent instrument in accordance with G.S. 161-14.1. This subsection shall not apply to any security instrument made or given by any railroad company, or to any agreement of conditional sale, equipment trust agreement, lease, chattel mortgage or other instrument relating to the sale, purchase or lease of railroad equipment or rolling stock, or of other personal property.

(c) Repealed by Session Laws 1991, c. 114, s. 4.

(d) Repealed by Session Laws 2005-123, s. 1.

(e) Any transaction subject to the provisions of the Uniform Commercial Code, Chapter 25 of the General Statutes, is controlled by the provisions of that act and not by this section.

(f) Whenever this section requires a signature or endorsement, that signature or endorsement shall be followed by the name of the person signing or endorsing the document printed, stamped, or typed so as to be clearly legible.

(g) The satisfaction of record of a security instrument pursuant to this section shall operate and have the same effect as a duly executed and recorded deed of release or reconveyance of the property described in the security instrument and shall release and discharge (i) all the interest of the secured creditor in the real property arising from the security instrument and, (ii) if the security instrument is a deed of trust, all the interest of the trustee or substitute trustee in the real property arising from the deed of trust. (1870-1, c. 217; Code, s. 1271; 1891, c. 180; 1893, c. 36; 1901, c. 46; Rev., s. 1046; 1917, c. 49, s. 1; c. 50, s. 1; C.S., s. 2594; 1923, c. 192, s. 1; c. 195; 1935, c. 47; 1945, c. 988; 1947, c. 880; 1951, c. 292, s. 1; 1967, c. 765, ss. 1-5; 1969, c. 746; 1975, c. 305; 1985, c. 219; 1987, c. 405, s. 1; c. 620, s. 1; 1989, c. 434, s. 1; 1991, c. 114, s. 4; 1995, c. 292, ss. 1, 2, 5; 1995 (Reg. Sess., 1996), c. 604, s. 1; 2005-123, s. 1; 2006-226, s. 12; 2006-259, s. 2; 2006-264, s. 40(b).)

Local Modification. — Dare: 1957, c. 464.

Cross References. — As to requirement of registration for mortgages, deeds of trust, etc., see G.S. 47-20.

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

Session Laws 2006-259, s. 2, which inserted "prior to October 1, 2005" in subdivisions (a)(1), (5) and (6), was repealed by S.L. 2006-259, s. 3, which provided that: "If Senate Bill 1479, 2005 Regular Session (S.L. 2006-226), becomes law, Section 2 of this act is repealed."

Effect of Amendments. — Session Laws 2006-226, s. 12, effective August 10, 2006, inserted "prior to October 1, 2005" the first time it appears in subdivisions (a)(1), (a)(5), and (a)(6).

Session Laws 2006-264, s. 40(b), effective October 10, 2005, inserted "prior to October 1, 2005" the first time it appears in subdivisions (a)(1), (a)(5), and (a)(6).

Legal Periodicals. — For brief comment on the 1947 amendment, see 25 N.C.L. Rev. 407 (1947).

For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 408 (1951).

For article concerning the quest for clear land titles in North Carolina, see 44 N.C.L. Rev. 89 (1965).

CASE NOTES

Constitutionality. — For case holding the 1945 amendment constitutional as applied to preexisting mortgages, see Gregg v. Williamson, 246 N.C. 356, 98 S.E.2d 481 (1957).

As to the history of this section, see Gregg v. Williamson, 246 N.C. 356, 98 S.E.2d 481 (1957).

Purpose. — The primary purpose sought to be accomplished by subdivision (5) of this section as it stood prior to the 1969 amendment (see now subsection (b)) was to promote freer marketability in cases where old and unsatisfied mortgages and deeds of trust, securing debts, were hampering real estate transactions; and this economic purpose is adequately accomplished by furnishing protection to parties who extend credit or purchase for a valuable consideration "from and after" the expiration of the 15-year period. Smith v. Davis, 228 N.C. 172, 45 S.E.2d 51 (1947).

The first clause of the caption or title of the act from which subdivision (5) of this section as it stood prior to the 1969 amendment (see now subsection (b)) was derived indicates the primary purpose of the act, that is, to facilitate the examination of titles. Smith v. Davis, 228 N.C. 172, 45 S.E.2d 51 (1947).

Construction of Section. — This section will be construed to effectuate the legislative intent as gathered from its language, by harmonizing its various parts when this can reasonably be done. Richmond Guano Co. v. Walston, 187 N.C. 667, 122 S.E. 663 (1924).

Retroactivity. — As to the non-retroactive effect of this section prior to the 1945 amendment, which provided for retroactivity, see Roberson v. Matthews, 200 N.C. 241, 156 S.E. 496 (1931); Dixie Grocery Co. v. Hoyle, 204 N.C. 109, 167 S.E. 469 (1933).

As to the retroactive effect of subdivision (5) of this section as it stood prior to the 1969 amendment (see now subsection (b)), see Hicks v. Kearney, 189 N.C. 316, 127 S.E. 205 (1925); Humphrey v. Stephens, 191 N.C. 101, 131 S.E. 383 (1926); Thomas v. Myers, 229 N.C. 234, 49 S.E.2d 478 (1948).

Applicability to Deeds of Trust and Mortgages. — This section, giving to the marginal entry of satisfaction the effect of a reconveyance, applies only to discharge of trust deeds and mortgages. Smith v. King, 107 N.C. 273, 12 S.E. 57 (1890).

Modes of Release. — A mortgage can only be released so as to affect purchasers at a sale under the mortgage by a cancellation on the margin of the registration thereof under this section, or by a reconveyance of the mortgaged property duly recorded. Barber v. Wadsworth, 115 N.C. 29, 20 S.E. 178 (1894).

The mortgagee acknowledges the satisfaction and discharge of the mortgage in the presence of the register of deeds, and he enters satisfaction on the margin of the record of the mortgage, and this entry is signed by the mortgagee; and this, done as required by this section, will operate as a deed of release, or reconveyance of the land embraced by the mortgagee. Otherwise, the mortgagee must reconvey the land by proper deed. Walker v. Mebane, 90 N.C. 259 (1884).

Form and Validity of Cancellation. — This section must be strictly complied with in order to secure the grantee in a subsequent conveyance of the locus in quo against the prior encumbrance, and where this is done, upon exhibit of the cancelled conveyance and notes marked paid, the entry should recite correctly the name of the beneficiary and payment of the note, notes or bonds, as the case may be, by the payee thereof. Mills v. Kemp, 196 N.C. 309, 145 S.E. 557 (1928).

Marginal Entry as Evidence of Payment of Debt. — It is competent to introduce as evidence of payment of an indebtedness secured by mortgage the entry of "satisfied" on the margin of the record signed by the mortgagee and witnessed by the register of deeds. Robinson v. Sampson, 121 N.C. 99, 28 S.E. 189 (1897).

Marginal Entry Not Necessary as Between Parties. — When a mortgage debt has been discharged, the mortgage is no longer operative between the parties, even though it is not marked "satisfied of record." Blake v. Broughton, 107 N.C. 220, 12 S.E. 127 (1890).

Irregular Cancellation as Notice to Subsequent Grantee or Mortgagee. — Where an entry of cancellation was made of record by the register of deeds in cancelling a mortgage under this section, reciting another name as mortgagee, trustee or cestui que trust than that appearing in the registration of the instrument, and stating that the "bond" was marked paid, when the instrument recited four bonds maturing in series, it was sufficient to set a later grantee or mortgagee upon inquiry as to whether the register of deeds had made a mistake in cancelling the mortgage, and fix him with notice of all facts which a reasonable inquiry would have revealed. Mills v. Kemp, 196 N.C. 309, 145 S.E. 557 (1928).

Effect of Forged Cancellation. — When the attorney for the owner of the land agreed to have a mortgage cancelled of record, and thereafter surreptitiously obtained the cancellation stamp of the register of deeds and forged his signature so that it appeared that the mortgage was cancelled under the provisions of subdivision (2) of this section as it stood prior to the 1969 amendment, and relying thereon the proposed purchaser accepted the deed and paid the consideration, it was held that the supposed cancellation of the mortgage was void as against the mortgagee, who had no notice thereof until immediately before bringing his action to have the supposed cancellation declared void. Union Cent. Life Ins. Co. v. Cates, 193 N.C. 456, 137 S.E. 324 (1927).

As against the mortgagee of a third mortgage given on the same lands, wrongful cancellation by a forged entry on the margin in the registration book is a nullity, and the lien continues until the payment of the debt it secures, as prior to that of the third mortgage, when the second mortgage lien has lawfully been cancelled of record. Swindell v. Stephens, 193 N.C. 474, 137 S.E. 420 (1927).

Effect of Prior Fraud on Subsequent Mortgagees. — Where the register of deeds has entered "satisfaction" of a deed of trust, and thereupon subsequent mortgagees, etc., have acted in good faith, the prior fraud or collusion of the parties to the cancelled instrument will not affect the rights of the subsequent mortgagees, when such mortgagees were unaware of or had not participated in the fraud. Richmond Guano Co. v. Walston, 187 N.C. 667, 122 S.E. 663 (1924).

Who May Cancel. — Only the mortgagee or his duly authorized agent or representative was entitled to have mortgage cancelled on the book in the office of the register of deeds under subdivision (1) of this section as it stood prior to the 1969 amendment; and when the mortgagee canceled the instrument in person, under subdivision (1), it was a complete release and discharge of the mortgage, for in such case the statute did not require the exhibition of the mortgage and the note it secured. First Nat'l

Bank v. Sauls, 183 N.C. 165, 110 S.E. 865 (1922).

Where a note secured by a mortgage was assigned and pledged as collateral by the mortgagee to his own note, without an assignment of the mortgage conveying title for the purpose of the security, but only with the surrender of the instrument to the payee of his note, the legal title to the lands remained in the mortgagee, who alone was authorized to cancel the mortgage. First Nat'l Bank v. Sauls, 183 N.C. 165, 110 S.E. 865 (1922).

Under subdivision (2) of this section as it stood prior to the 1969 amendment, no authority was given to the register of deeds to enter cancellation of record upon the cancellation thereof by the mortgagor. Faircloth v. Johnson, 189 N.C. 429, 127 S.E. 346 (1925).

Payee or Mortgagee To Be Sui Juris. — In order to constitute a valid cancellation under subdivision (2) of this section as it stood prior to the 1969 amendment, this section contemplated a payee or mortgagee who was sui juris. Faircloth v. Johnson, 189 N.C. 429, 127 S.E. 346 (1925).

Cancellation by Attorney and Ratification Thereof. — While an attorney at law has no power to cancel or discharge a deed of mortgage without authority conferred by his client, nevertheless, where such attorney informed his client that he was unable to complete an arrangement agreed upon with the debtor for obtaining a new mortgage and the sale of a stock of goods upon which the creditor had a lien, unless a cancellation of an old mortgage was made, and that he would cancel the old mortgage by a day named, unless directed not to do so, and the attorney, receiving no such direction, cancelled the old mortgage, and forwarded to his client the new mortgage and power of sale, and the new mortgage was returned without objection to be registered, this was held to be a ratification by the client of the act of cancellation of the old mortgage. Christian v. Yarborough, 124 N.C. 72, 32 S.E. 383 (1899).

Authority of Trustee to Cancel. — Possession of the papers by the trustee raises a presumption of his authority to cancel deed of trust of record. Williams v. Williams, 220 N.C. 806, 18 S.E.2d 364 (1942).

This section only empowers the trustee to "acknowledge satisfaction of the provisions of such trust, etc.," the entry operating as a reconveyance. It was never contemplated that the trustee could by this means release from an unsatisfied trust specified parts of the land. However, the creditor could be estopped, under certain circumstances, from enforcing his claim against that part of the land undertaken to be released by the trustee if the release was done with the creditor's consent and authority was properly shown. Woodcock v. Merrimon, 122 N.C. 731, 30 S.E. 321 (1898). See also, Browne v. Davis, 109 N.C. 23, 13 S.E. 703 (1891).

Even if an attempted release is under seal it is ineffectual, as the statute authorizing such mode of release confers no power upon a trustee to release specific parts of the property conveyed, and especially where the secured debt remains unsatisfied. Browne v. Davis, 109 N.C. 23, 13 S.E. 703 (1891).

Cancellation by First Mortgagee. — The legal title to mortgaged lands is conveyed by the instrument to the mortgagee, and remains in him until it is transferred or assigned, for the purpose of the security or the cancellation of the instrument, under this section; and where the mortgagor has afterwards conveyed the fee simple title to another, and receives a mortgage back to secure a note for the balance of the purchase price, of which the same mortgagee becomes the holder, his personal cancellation of the first mortgage, without producing it or the note it secures, is a complete discharge or release of the lien thereof; and where he borrows money after such cancellation, and hypothecates the note of the second mortgage as collateral to his own, the lender for the purposes of the security, acting in good faith, has a prior lien on the lands. First Nat'l Bank v. Sauls, 183 N.C. 165, 110 S.E. 865 (1922).

As to unauthorized cancellation of deed of trust, see Monteith v. Welch, 244 N.C. 415, 94 S.E.2d 345 (1956).

Removal of Deed of Trust as Cloud on Title. — Where a deed of trust was executed subsequent to the effective date of subdivision (5) of this section as it stood prior to the 1969 amendment (see now subsection (b), and the note thereby secured fell due more than 15 years prior to plaintiffs' purchase of the property, and no affidavit was filed nor was any marginal entry made on the record by the register of deeds as required by the statute, plaintiffs were entitled to have the deed of trust removed insofar as it constituted a cloud on their title. Thomas v. Myers, 229 N.C. 234, 49 S.E.2d 478 (1948), decided prior to the 1951 amendment.

Registration of Collateral Instrument Not Notice to Purchaser. — A purchaser is presumed to have examined each recorded deed or instrument in his line of title and to know its contents. He is not required to take notice of and examine recorded collateral instruments and documents which are not muniments of his title and are not referred to by the instruments in his chain of title. Vitiating facts must appear in deraigning title, on the face of deeds in the chain of title, and in one of the muniments of title. Morehead v. Harris, 4 N.C. App. 235, 166 S.E.2d 476 (1969).

Cited in Ownbey v. Parkway Properties, Inc., 222 N.C. 54, 21 S.E.2d 900 (1942); Moore v. Owens, 255 N.C. 336, 121 S.E.2d 540 (1961).

OPINIONS OF ATTORNEY GENERAL

An attorney is not required to present a written authorization or instrument agency in recordable form in order to acknowledge satisfaction of the provisions of a deed of trust. See opinion of Attorney General to Mr. R. Wendell Hutchins, Counsel to the Commissioners for the County of Washington, 54 N.C.A.G. 71 (1985).

§ 45-37.1. Validation of certain entries of cancellation made by beneficiary or assignee instead of trustee.

In all cases where, prior to January 1, 1930, it appears from the margin or face of the record in the office of the register of deeds of any county in this State that the original beneficiary named in any deed of trust, trust indenture, or other instrument intended to secure the payment of money and constituting a lien on real estate, or his assignee of record, shall have made an entry purporting to fully satisfy and discharge the lien of such instrument, and such entry has been signed by the original payee and beneficiary in said deed of trust, or other security instrument, or by his assignee of record, or by his or their properly constituted officer, agent, attorney, or legal representatives, and has been duly witnessed by the register of deeds or his deputy, all such entries of cancellation and satisfaction are hereby validated and made full, sufficient and complete to release, satisfy and discharge the lien of such instrument, and shall have the same effect as if such entry had been made and signed by the trustee named in said deed of trust, or other security instrument, or by his duly appointed successor or substitute. (1945, c. 986.)

§ 45-37.2. Recording satisfactions of security instruments.

(a) When a satisfaction document, affidavit of satisfaction, or trustee's satisfaction is recorded pursuant to G.S. 45-37(a)(7), the register of deeds shall record and index the instrument in accordance with G.S. 161-14.1. No fee shall be charged by the register of deeds for recording a satisfaction document, affidavit of satisfaction, or a trustee's satisfaction.

(b) When a security instrument is satisfied of record by a method other than by means of recording a satisfaction document, satisfaction affidavit, or trustee's satisfaction pursuant to G.S. 45-37(a)(7), the register of deeds shall record and index in accordance with G.S. 161.14.1 a record of satisfaction as provided for in this subsection. If the security instrument is being satisfied of record pursuant to G.S. 45-37(a)(2), the record of satisfaction may consist of either (i) all or a portion of the original security instrument rerecorded as described in subdivision (1) of this subsection or (ii) a separate instrument as described in subdivision (2) of this subsection. In all other cases, the record of satisfaction shall consist of a separate instrument as described in subdivision (2) of this subsection. No fee shall be charged by the register of deeds for recording a record of satisfaction.

(1) If the security instrument is being satisfied of record pursuant to G.S. 45-37(a)(2), all or a portion of the security instrument rerecorded is a sufficient record of satisfaction if it identifies the security instrument, the original parties to the security instrument, and the recording data for the security instrument as originally recorded. In addition, the rerecorded security instrument must contain either (i) an endorsement of payment and satisfaction made by a person authorized under G.S. 45-37(a)(2) to make such an endorsement, or (ii) an endorsement signed by the register of deeds that states substantially the following: "This security instrument is satisfied of record pursuant to G.S.

45-37(a)(2), the original security instrument and secured obligations having been presented to me with appropriate endorsement of payment and satisfaction appearing thereon as required by law."

(2) A separate instrument is a sufficient record of satisfaction if it complies with all of the following:
  a. Identifies the security instrument, the original parties to the security instrument, the recording data for the security instrument, and the office in which the security instrument is recorded.
  b. States the statutory authority pursuant to which the security instrument is being satisfied of record.
  c. Contains language terminating the effectiveness of the security instrument.
  d. Is signed by the register of deeds.

No particular phrasing is required for a record of satisfaction. The following form, when properly completed, is sufficient to satisfy the requirements of this subdivision:

"RECORD OF SATISFACTION
(G.S. 45-37.2)

This Record of Satisfaction applies to the following security instrument:

Type of Security Instrument: (Identify type of security instrument, such as deed of trust or mortgage)

Original Grantor(s): (Identify original grantor(s), trustor(s), or mortgagor(s))

Original Secured Party(ies): (Identify the original beneficiary(ies), mortgagee(s), or secured party(ies) in the security instrument)

Recording Data: The security instrument is recorded in Book ________ at Page ________ or as document number ________________ in the office of the Register of Deeds for ____________________ County, North Carolina.

This Record of Satisfaction terminates the effectiveness of the security instrument pursuant to the following statutory authority: (check applicable box)

☐ G.S. 45-37(a)(2), the original security instrument and secured obligations having been presented to me with appropriate endorsement of payment and satisfaction appearing thereon as required by law.

☐ G.S. 45-37(a)(3), the original security instrument and secured obligations having been presented to me, each such instrument being more than 10 years old as provided by law.

☐ G.S. 45-37(a)(4), the original security instrument and all negotiable instruments transferable by delivery secured thereby having been presented to me, each having been marked paid and satisfied in full by the bearer or holder thereof.

Other: (specify)

Date: ____________________________ ____________________________

(Signature of register of deeds)".

(1963, c. 1021, s. 1; 1967, c. 765, s. 6; 1987, c. 620, s. 2; 1991, c. 114, s. 2; 1993, c. 425, s. 3; 1995, c. 292, s. 6; 2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the

General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-38. Recording of foreclosure.

In case of foreclosure of any deed of trust, or mortgage, the trustee, mortgagee, or the trustee's or mortgagee's attorney shall record a notice of foreclosure that includes the date when, and the person to whom, a conveyance was made by reason of the foreclosure. In the event the entire obligation secured by a mortgage or deed of trust is satisfied by a sale of only a part of the property embraced within the terms of the mortgage or deed of trust, the trustee, mortgagee, or the trustee's or mortgagee's attorney shall indicate in the notice of foreclosure which property was sold.

A notice of foreclosure shall consist of a separate instrument, or that part of the original deed of trust or mortgage rerecorded, reciting the information required hereinabove, the names of the original parties to the original instrument foreclosed, and the recording data for the instrument foreclosed. A notice of foreclosure shall be indexed by the register of deeds in accordance with G.S. 161-14.1. (1923, c. 192, s. 2; C.S., s. 2594(a); 1949, c. 720, s. 2; 1963, c. 1021, s. 2; 1971, c. 985; 1991, c. 114, s. 3; 1993, c. 305, s. 24; 2005-123, s. 1; 2006-226, s. 13.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

Effect of Amendments. — Session Laws 2006-226, s. 13, effective August 10, 2006, substituted "foreclosure" for "forfeiture," and "G.S. 161-14.1" for "G.S. 161.14.1" in the last sentence of the second paragraph.

Legal Periodicals. — For brief comment on the 1949 amendment, see 27 N.C.L. Rev. 479 (1949).

CASE NOTES

Failure of Trustee to Comply Does Not Afford Constructive Notice of Fraud. — The purchaser of lands at a foreclosure sale made in conformity with a deed of trust upon lands is not afforded constructive notice of fraud by the omission of the trustee to comply with the provisions of this or the following section. Cheek v. Squires, 200 N.C. 661, 158 S.E. 198 (1931).

Cancellation Without Knowledge of Cestui. — Where the trustor paid the trustee the amount of the mortgage debt, and the trustee entered a cancellation of the deed of trust on the records under this section, without the knowledge of the cestui que trust, the cancellation was held valid. Parham v. Hinnant, 206 N.C. 200, 173 S.E. 26 (1934).

§ **45-39:** Repealed by Session Laws 1949, c. 720, s. 5.

§ **45-40:** Repealed by Session Laws 2005-123, s. 1, effective October 1, 2005.

§ 45-41. Recorded deed of release of mortgagee's representative.

The personal representative of any mortgagee or trustee in any mortgage or deed of trust which has heretofore or which may hereafter be registered in the manner required by the laws of this State may satisfy of record, discharge and release the same and all property thereby conveyed by deed of quitclaim, release or conveyance executed, acknowledged and recorded as is now prescribed by law for the execution, acknowledgment and registration of deeds and mortgages in this State. (1909, c. 283, s. 1; C.S., s. 2596; 2005-123, s. 1.)

Cross References. — For provisions regarding probate and registration of deeds and mortgages, etc., see G.S. 47-1 et seq.

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-42. Satisfaction of corporate mortgages by corporate officers.

All security instruments executed to a corporation may be satisfied and so marked of record as by law provided for the satisfaction of security instruments, by any officer of the corporation indicating the office held. For the purposes of recordation and satisfaction, such signature shall be deemed to be a certification by the signer that he is an officer and is authorized to execute the satisfaction on behalf of such corporation. Where security instruments were marked "satisfied" on the records before the twenty-third day of February, 1909, by any president, secretary, treasurer or cashier of any corporation by such officer writing his own name and affixing thereto the title of his office in such corporation, such satisfaction is validated, and is as effective to all intents and purposes as if a deed of release duly executed by such corporation had been made, acknowledged and recorded. (1909, c. 283, ss. 2, 3; C.S., s. 2597; 1935, c. 271; 1963, c. 193; 1991, c. 647, s. 6; 2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 45-42.1. Corporate cancellation of lost mortgages by register of deeds.

Upon affidavit of the secretary and treasurer of a corporation showing that the records of such corporation show that such corporation has fully paid and satisfied all of the notes secured by a security instrument executed by such corporation and such payment and satisfaction was made more than 25 years ago, and that such security instrument was made to a corporation which ceased to exist more than 25 years ago, and such affidavit shall further state that the records of such corporation show that no payments have been made on such secured obligation by the corporation executing such security instrument for 25 years, the register of deeds of the county in which such security instrument is recorded is authorized to record the affidavit. The register of deeds shall index the affidavit according to G.S. 161-22 using the names of parties stated in the affidavit and shall make reference to the recording data of the original security instrument as stated in the affidavit opposite the name of each party so indexed. Upon recording such affidavit, the said security instrument shall be deemed to be cancelled and satisfied of record: Provided, that this section shall not apply to any mortgagor corporation except those in which the State of North Carolina owns more than a majority of the capital stock and shall not apply to any security instrument in which the principal amount secured thereby exceeds the sum of fifteen thousand dollars ($15,000): Provided, such cancellation shall not bar any action to foreclose such security instrument instituted within 90 days after the same is cancelled. (1945, c. 1090; 1991, c. 114, s. 7; 2005-123, s. 1.)

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

Article 5.

Miscellaneous Provisions.

§ 45-43. Real estate mortgage loans; commissions.

Any individual or corporation authorized by law to do a real estate mortgage loan business may make or negotiate loans of money on notes secured by mortgages or deeds of trust on real estate bearing legal interest payable semiannually at maturity or otherwise, and in addition thereto, may charge, collect and receive such commission or fee as may be agreed upon for making or negotiation of any such loan, not exceeding, however, an amount equal to one and one-half percent (11/2%) of the principal amount of the loan for each year over which the repayment of the said loan is extended: Provided, however, the repayment of such loan shall be in annual installments extending over a period of not less than three nor more than 15 years, and that no annual installment, other than the last, shall exceed thirty-three and one-third percent (33⅓%) of the principal amount of loans which are payable in installments extending over a period of as much as three years and less than four years, twenty-five percent (25%) of the principal amount of loans which are payable in installments extending over a period of not less than four years nor more than five years, and fifteen percent (15%) of the principal amount of loans which are payable in installments extending over a period of more than five years and not more than 15 years. This section shall only apply to the counties of Ashe, Buncombe, Caldwell, Forsyth, Gaston, Henderson, McDowell, Madison, Rutherford, Watauga, and Yancey. (Ex. Sess. 1924, c. 35; 1925, cc. 28, 209; Pub. Loc. 1925, c. 592, modified by 1927, c. 5; Pub. Loc. 1927, c. 187.)

§§ 45-43.1 through 45-43.5: Repealed by Session Laws 1971, c. 1229, s. 1.

Cross References. — For provisions similar to the repealed sections, see G.S. 24-12 through 24-17.

§ 45-44. Mortgages held by insurance companies, banks, building and loan associations, or other lending institutions.

A mortgage or deed of trust held by an insurance company, bank, building and loan association, or other lending institution shall be deemed, for the purposes of any regulatory statute applicable to such institutions, to be a first lien on the property despite the existence of prior mortgages or other liens on the same property in all cases where sufficient funds for the discharge of such prior mortgages or other liens shall have been deposited with such lending institution in trust solely for such purpose. Such funds may be deposited either in cash or in obligations of the State of North Carolina or of the United States maturing in sufficient amount on or before the date or dates that the indebtedness secured by such prior mortgages or other liens is to be paid. (1957, c. 1350.)

§ 45-45. Spouse of mortgagor included among those having right to redeem real property.

Any married person has the right to redeem real property conveyed by his or her spouse's mortgages, deeds of trust and like security instruments and upon such redemption, to have an assignment of the security instrument and the uncancelled obligation secured thereby. (1959, c. 879, s. 13.)

CASE NOTES

Allegations of defendant that her husband conveyed property to a trustee without her joinder for the purpose of defeating her right to protect the property from a prior deed of trust, which contained her joinder, failed to state facts constituting a defense or counterclaim in an action in ejectment, since the husband's conveyance without her joinder did not prevent her from exercising her right to redemption from the prior deed of trust. Peoples Oil Co. v. Richardson, 271 N.C. 696, 157 S.E.2d 369 (1967).

§ 45-45.1. Release of mortgagor by dealings between mortgagee and assuming grantee.

Except where otherwise provided in the mortgage or deed of trust or in the note or other instrument secured thereby, or except where the mortgagor, or grantor of a deed of trust otherwise consents:

(1) Whenever real property which is encumbered by a mortgage or deed of trust is sold and the grantee assumes and agrees to pay such mortgage or deed of trust, and thereafter the mortgagee or secured creditor under the deed of trust gives the grantee a legally binding extension of time, or releases the grantee from liability on the obligation, the mortgagor or grantor of the deed of trust is released from any further liability on the obligation.

(2) Whenever real property which is encumbered by a mortgage or deed of trust is sold and the grantee assumes and agrees to pay such mortgage or deed of trust, and thereafter the mortgagee or secured creditor under the deed of trust or trustee acting in his behalf releases any of the real property included in the mortgage or deed of trust, the mortgagor or grantor of the deed of trust is released to the extent of the value of the property released, which shall be the value at the time of the release or at the time an action is commenced on the obligation secured by the mortgage or deed of trust, whichever value is the greater.

(3) Whenever real property which is encumbered by a mortgage or deed of trust is sold expressly subject to the mortgage or deed of trust, but the grantee does not assume the same, and thereafter the mortgagee or secured creditor under the deed of trust makes a binding extension of time of the mortgage or deed of trust, the mortgagor or grantor of the deed of trust is released to the extent of the value of the property at the time of the extension agreement.

(4) Whenever real property which is encumbered by a mortgage or deed of trust is sold expressly subject to the mortgage or deed of trust, but the grantee does not assume the same, and thereafter the mortgagee or secured creditor under the deed of trust, or trustee acting in his

behalf, releases any of the real property included in the mortgage or deed of trust, the mortgagor or grantor of the deed of trust is released to the extent of the value of the property released, which shall be the value at the time of the release or at the time an action is commenced on the obligation secured by the mortgage or deed of trust, whichever value is the greater. (1961, c. 356.)

Legal Periodicals. — For comment on application of statute of limitations to promise of grantee assuming mortgage or deed of trust, see 43 N.C.L. Rev. 966 (1965).

CASE NOTES

Subdivision (4) contemplates a sale or transfer of encumbered property to a grantee who does not assume the mortgage, and a release of the secured property by the mortgagee along with an attempt to hold the mortgagor personally liable on the note. Walker v. First Fed. Sav. & Loan Ass'n, 93 N.C. App. 528, 378 S.E.2d 583, cert. denied, 325 N.C. 230, 381 S.E.2d 791 (1989).

This section had no application to a transaction in which the mortgagor transferred encumbered property to the grantee and the mortgagee released the part of the tract which was encumbered from the note, and the trial court committed no error by refusing to reduce plaintiff's indebtedness under the note encumbering the remaining acres and by refusing to conclude that plaintiff's default on the note was cured by defendant's unilateral release of property. Walker v. First Fed. Sav. & Loan Ass'n, 93 N.C. App. 528, 378 S.E.2d 583, cert. denied, 325 N.C. 230, 381 S.E.2d 791 (1989).

Assignment of Deed Required for Collection. — An assignee of a note and deed of trust, who seeks to collect from the mortgagor, is required to assign the deed of trust to the mortgagor as a condition of collecting on the note. Investors Title Ins. Co. v. Montague, 142 N.C. App. 696, 543 S.E.2d 527, 2001 N.C. App. LEXIS 171 (2001), cert. denied, 353 N.C. 727, 550 S.E.2d 776 (2001).

Cited in Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977); Branch Banking & Trust Co. v. Kenyon Inv. Corp., 76 N.C. App. 1, 332 S.E.2d 186 (1985).

§ 45-45.2. Transfer taxes not applicable.

Notwithstanding any other provision of law, no excise tax on instruments conveying an interest in real property, except that levied by Article 8E of Chapter 105 of the General Statutes, shall apply to instruments conveying an interest in property as the result of foreclosure or in lieu of foreclosure to the holder of the security interest being foreclosed or subject to being foreclosed. (1987, c. 685, s. 1.)

ARTICLE 6.

Uniform Trust Receipts Act.

§§ 45-46 through 45-66: Repealed by Session Laws 1965, c. 700, s. 2.

ARTICLE 7.

Instruments to Secure Future Advances and Future Obligations.

§ 45-67. Definition.

As used in this Article, "security instrument" means a mortgage, deed of trust, or other instrument relating to real property securing an obligation or obligations to a person, firm, or corporation specifically named in such instrument for the payment of money. (1969, c. 736, s. 1; 1989, c. 496, s. 1.)

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

CASE NOTES

Cited in Miller v. Lemon Tree Inn of Wilmington, Inc., 39 N.C. App. 133, 249 S.E.2d 836 (1978); In re Mills, 39 Bankr. 564 (Bankr. E.D.N.C. 1984); Perry v. Carolina Bldrs. Corp., 128 N.C. App. 143, 493 S.E.2d 814 (1997).

§ 45-68. Requirements.

A security instrument, otherwise valid, shall secure future obligations which may from time to time be incurred thereunder so as to give priority thereto as provided in G.S. 45-70, if:

(1) Such security instrument shows:
  a. That it is given wholly or partly to secure future obligations which may be incurred thereunder;
  b. The amount of present obligations secured, and the maximum principal amount, including present and future obligations, which may be secured thereby at any one time;
  c. The period within which such future obligations may be incurred, which period shall not extend more than 15 years beyond the date of the security instrument; and

(2) At the time of incurring any such future obligations, each obligation is evidenced by a written instrument or notation, signed by the obligor and stipulating that such obligation is secured by such security instrument; provided, however, that this subsection shall apply only if the obligor and obligee have contracted in writing that each future obligation shall be evidenced by a written instrument or notation; and

(3) At any time a security instrument securing future advances is transferred or assigned by the owner thereof that the amount, date and due date of each note, bond, or other undertaking for the payment of money representing a future obligation secured by such security instrument be noted in writing thereon. (1969, c. 736, s. 1; 1985, c. 457; 1989, c. 496, s. 2.)

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

CASE NOTES

The purpose of the 1985 amendment to this section was to require the written instrument or notation for future obligations only when the parties agreed to require it. Yates Constr. Co. v. Greenleaf Corp., 99 N.C. App. 489, 393 S.E.2d 563 (1990), discretionary review denied, 328 N.C. 330, 402 S.E.2d 834 (1991).

Reference in Promissory Note to Security Agreement. — Unlike the situation where a deed of trust is involved, there is no requirement that a promissory note evidencing a future obligation contain any reference to the previously executed security agreement. The only requirement is that the obligation be covered by the security agreement. In re Mills, 39 Bankr. 564 (Bankr. E.D.N.C. 1984).

Effect of Agreement to Extend. — Where, under the explicit terms of savings and loan's deed of trust, the period within which owner's future obligations could be incurred expired on March 3, 1988, under the provisions of this section the only obligations incurred by the owner that related back to the recording date of the deed of trust were those incurred through March 3, 1988, and the obligations incurred after that date did not have seniority over plaintiff's intervening mechanic's lien. The agreement later made by owner and savings and loan to extend the term in which obligations could be incurred did not affect plaintiff's rights under the deed of trust as recorded. McNeary's Arborists, Inc. v. Carley Capital Group, 103 N.C. App. 650, 406 S.E.2d 644 (1991).

Future Advances Retaining Priority of Orignal Instrument. — Under G.S. 45-70, all advances made under a future advances deed of trust meeting the conditions provided in this section retain the priority of the original security instrument from the recording date thereof, and subsequent liens, even though recorded or filed prior to certain advances, are junior to all advances under the future advances deed of trust. Perry v. Carolina Bldrs. Corp., 128 N.C. App. 143, 493 S.E.2d 814 (1997).

Cited in Richardson Corp. v. Barclays Am./Mtg. Corp., 111 N.C. App. 432, 432 S.E.2d 409 (1993).

§ 45-69. Fluctuation of obligations within maximum amount.

Unless the security instrument provides to the contrary, if the maximum amount has not been advanced or if any obligation secured thereby is paid or is reduced by partial payment, further obligation may be incurred from time to time within the time limit fixed by the security instrument, provided the unpaid balance of principal outstanding shall never exceed the maximum amount authorized pursuant to G.S. 45-68(1)b. Such further obligations shall be secured to the same extent as original obligations thereunder, if the provisions of G.S. 45-68(2) and (3) are complied with. (1969, c. 736, s. 1.)

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

CASE NOTES

Applied in Richardson Corp. v. Barclays Am./Mtg. Corp., 111 N.C. App. 432, 432 S.E.2d 409 (1993).

§ 45-70. Priority of security instrument.

(a) Any security instrument which conforms to the requirements of this Article shall, from the time and date of registration thereof, have the same priority to the extent of all future advances secured by it, as if all the advances had been made at the time of the execution of the instrument.

(b) Repealed by Session Laws 1989, c. 496, s. 3.

(c) Payments made by the secured creditor for fire and extended coverage insurance, taxes, assessments, or other necessary expenditures for the preservation of the security shall be secured by the security instrument and shall have the same priority as if such payments had been made at the time of the execution of the instrument. The provisions of G.S. 45-68(2) and (3) shall not be applicable to such payments, nor shall such payments or accrued interest be considered in computing the maximum principal amount which may be secured by the instrument.

(d) Notwithstanding any other provision of this Article, any security instrument hereafter executed which secures an obligation or obligations of an electric or telephone membership corporation incorporated or domesticated in North Carolina to the United States of America or any of its agencies, or to any other financing institution, or of an electric or gas utility operating in North Carolina, shall from the time and date of registration of said security instrument have the same priority to the extent of all future advances secured by it as if all the advances had been made at the time of the execution of the instrument, regardless of whether the making of such advances is obligatory or whether the security instrument meets the requirements of G.S. 45-68. (1969, c. 736, s. 1; 1971, c. 565; 1979, c. 594; 1989, c. 496, s. 3.)

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

CASE NOTES

Future Advance Not Prioritized. — Because plaintiff corporate lender to farm partnership gave actual notice to additional lender that it had perfected a lien on farm property, the future advances made by additional lender to farm subsequent to the receipt of the notice and in excess of the cumulative amount initially stated in commitment letter was not obligatory and did "not take priority over" the plaintiff's loan. Richardson Corp. v. Barclays Am./Mtg. Corp., 111 N.C. App. 432, 432 S.E.2d 409, cert. denied, 335 N.C. 177, 438 S.E.2d 201 (1993).

Advance Retaining Priority of Security Instrument. — Under this section, all advances made under a future advances deed of trust meeting the conditions provided in G.S. 45-68 retain the priority of the original security instrument from the recording date thereof, and subsequent liens, even though recorded or filed prior to certain advances, are junior to all advances under the future advances deed of trust. Perry v. Carolina Bldrs. Corp., 128 N.C. App. 143, 493 S.E.2d 814 (1997).

Cited in State v. Brown, 9 N.C. App. 498, 176 S.E.2d 881 (1970); Yates Constr. Co. v. Greenleaf Corp., 99 N.C. App. 489, 393 S.E.2d 563 (1990).

§ 45-71. Satisfaction of the security instrument.

Upon payment of all the obligations secured by a security instrument which conforms to the requirements of this Article and upon termination of all obligation to make advances, and upon written demand made by the maker of the security instrument, his successor in interest, or anyone claiming under him, the holder of the security instrument is hereby authorized to and shall make a written entry upon the security instrument showing payment and satisfaction of the instrument, which entry he shall date and sign. When the security instrument secures notes, bonds, or other undertakings for the payment of money which have not already been entered on the security instrument as paid, the holder of the security instrument, unless payment was made to him, may require the exhibition of all such evidences of indebtedness secured by the instrument marked paid before making his entry showing payment and satisfaction. (1969, c. 736, s. 1.)

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-72. Termination of future optional advances.

(a) The holder of a security instrument conforming to the provisions of this Article shall, at the request of the maker of the security instrument or his successor in title promptly furnish to him a statement duly executed and acknowledged in such form as to meet the requirements for the execution and acknowledgment of deeds, setting forth in substance the following:

> "This is to certify that the total outstanding balance of all obligations, the payment of which is secured by that certain instrument executed by ____________, dated ____________, recorded in book ____________ at page ____ in the office of the Register of Deeds of ____________ County,

North Carolina, is $ _________, of which amount $_________ represents principal.

"No future advances will be made under the aforesaid instrument, except such expense as it may become necessary to advance to preserve the security now held.

This _______ day of ___________, _______.

____

(Signature and Acknowledgment)"

(b) Such statement, when duly executed and acknowledged, shall be entitled to probate and registration, and upon filing for registration shall be effective from the date of the statement. It shall have the effect of limiting the lien or encumbrance of the holder of the security instrument to the amount therein stated, plus any necessary advances made to preserve the security, and interest on the unpaid principal. It shall bar any further advances under the security instrument therein referred to except such as may be necessary to preserve the security then held as provided in G.S. 45-70(c). (1969, c. 736, s. 1; 1989, c. 496, s. 4; 1999 c. 456, s. 59; 1999-456, s. 59.)

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-73. Cancellation of record; presentation of notes described in security instrument sufficient.

The provisions of G.S. 45-37 apply to discharge of record of instruments executed under this Article except that in cases of cancellation by exhibition or presentation under G.S. 45-37(a)(2) or 45-37(a)(3), only notes or bonds described in the body of the instrument or noted in writing thereon as provided in G.S. 45-68(3) need be exhibited or presented. (1969, c. 736, s. 1.)

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

§ 45-74. Article not exclusive.

The provisions of this Article shall not be deemed exclusive, and no security instrument securing future advances or future obligations which is otherwise valid shall be invalidated by failure to comply with the provisions of this Article. (1969, c. 736, s. 1.)

Legal Periodicals. — For article, "Future Advances Lending in North Carolina," see 13 Wake Forest L. Rev. 297 (1977).

CASE NOTES

Applied in Miller v. Lemon Tree Inn of Wilmington, Inc., 39 N.C. App. 133, 249 S.E.2d 836 (1978).

§§ 45-75 through 45-79: Reserved for future codification purposes.

Article 8.

Instruments to Secure Certain Home Loans.

§ 45-80. Priority of security instruments securing certain home loans.

(a) Notwithstanding any other provision of law, a deed of trust or mortgage which secures a loan that complies with subsection (b) below shall have priority and continue to have priority from the time and date of registration thereof to the extent of all principal and interest secured by said deed of trust or mortgage notwithstanding that the loan may be renewed or extended one or more times and notwithstanding that the interest rate may be increased or decreased from time to time. Interest which accrues pursuant to changes in the interest rate made pursuant to a method agreed to as provided in subsection (b) below (whenever such changes are made) shall be secured and have priority from the registration of the deed of trust or mortgage and not from the time changes are made.

(b) With respect to a loan referred to in subsection (a) above:

(1) The parties must provide in a written instrument agreed to by the borrower at or before registration of the deed of trust or mortgage that the loan may be renewed or extended in accordance with stated terms and that the interest rate may be increased or decreased according to a stated method; and

(2) The loan must be a loan described in G.S. 24-1.1A(a)(1) or (2).

(c) The provisions of this section shall not be deemed exclusive and no deed of trust or mortgage or other security instrument which is otherwise valid shall be invalidated by failure to comply with the provisions of this section. (1979, 2nd Sess., c. 1182.)

Article 9.

Instruments to Secure Equity Lines of Credit.

§ 45-81. Definition.

(a) The term "equity line of credit" means an agreement in writing between a lender and a borrower for an extension of credit pursuant to which:

(1) At any time within a specified period not to exceed 30 years the borrower may request and the lender is obligated to provide, by honoring negotiable instruments drawn by the borrower or otherwise, advances up to an agreed aggregate limit;

(2) Any repayments of principal by the borrower within the specified period will reduce the amount of advances counted against the aggregate limit; and

(3) The borrower's obligation to the lender is secured by a mortgage or deed of trust relating to real property which mortgage or deed of trust shows on its face the maximum principal amount which may be secured at any one time and that it secures an equity line of credit governed by the provisions of this Article.

(b) As used in subdivision (a)(1) of this section, "lender is obligated" means that the lender is contractually bound to provide advances. The contract must set forth any events of default by the borrower, or other events not within the lender's control, which may relieve the lender from his obligation, and must state whether or not the lender has reserved the right to cancel or terminate the obligation.

(c) At any time when the balance of all outstanding sums secured by a mortgage or deed of trust pursuant to the provisions of this Article is zero, the lender shall, upon the request of the borrower, make written entry upon the security instrument showing payment and satisfaction of the instrument; provided, however, that such security instrument shall remain in full force and effect for the term set forth therein absent the borrower's request for such written entry. No prepayment penalty may be charged with respect to an equity line of credit loan. (1985, c. 207, s. 2; 1995, c. 237, s. 1.)

CASE NOTES

Subsequent Advancements Secured by Deed of Trust. — Subsequent advancements, made pursuant to an original agreement establishing a line of credit, must be treated as if made and identified on the date of execution of that original agreement, and until such time as the orignal security agreement is cancelled pursuant to subsection (c), later loans are also secured by the deed of trust even if all previous debts or obligations have been paid in full. Raintree Realty & Constr., Inc. v. Kasey, 116 N.C. App. 340, 447 S.E.2d 823 (1994), aff'd, 341 N.C. 195, 459 S.E.2d 273 (1995).

§ 45-82. Priority of security instrument.

A mortgage or deed of trust which shows on its face that it secures an equity line of credit governed by the provisions of this Article, shall, from the time of its registration, have the same priority to the extent of all advances secured by it as if the advances had been made at the time of the execution of the mortgage or deed of trust, notwithstanding the fact that from time to time during the term of the loan no balance is outstanding. Payments made by the lender for insurance, taxes, and assessments and other payments made by the lender pursuant to the deed of trust shall have the same priority as if made at the time of the execution of the mortgage or deed of trust, notwithstanding the maximum principal amount set forth in the mortgage or deed of trust. (1985, c. 207, s. 2.)

CASE NOTES

Subsequent Advancements Treated as If Made on Date of Original Agreement. — Subsequent advancements, made pursuant to an original agreement establishing a line of credit, must be treated as if made and identified on the date of execution of that original agreement, and until such time as the original security agreement is cancelled pursuant to G.S. 45-81(c), later loans are also secured by the deed of trust even if all previous debts or obligations have been paid in full. Raintree Realty & Constr., Inc. v. Kasey, 116 N.C. App. 340, 447 S.E.2d 823 (1994), aff'd, 341 N.C. 195, 459 S.E.2d 273 (1995).

§ 45-82.1. Extension of period for advances.

(a) The period for advances agreed to pursuant to G.S. 45- 81(a)(1) may be extended by written agreement of the lender and borrower executed prior to termination of the equity line of credit or the borrower's obligation to repay any outstanding indebtedness. Any extended period shall not exceed 30 years from the end of the preceding period for advances.

(b) A mortgage or deed of trust that secures an equity line of credit to which the lender and borrower have agreed to an extended period for advances shall have priority with respect to advances made after the preceding loan period from a date not later than the date of registration of the certificate described in subsection (c) of this section.

(c) The priority provided in subsection (b) of this section shall be accorded only if the grantor of the mortgage or the deed of trust securing the obligation, and other record owners of the real property therein conveyed, execute a certificate evidencing the extension and register the certificate in the office of the register of deeds where the mortgage or deed of trust is registered. The failure of any record owner to execute the certificate shall affect only that record owner's interest in the property, and executions by other owners shall have full effect to the extent of their interests in the property. For purposes of this section, the term "record owner" means any person owning a present or future interest of record in the real property which would be affected by the lien of the mortgage or deed of trust, but does not mean the trustee in a deed of trust or the owner or holder of a mortgage, deed of trust, mechanic's or materialman's lien, or any other lien or security interest in the real property.

(d) The certificate described in subsection (c) of this section may be in any form that fulfills the requirements of subsection (c) of this section, including the following:

"Certificate of Extension of Period for Advances Under
Home Equity Line of Credit

Please take notice that the borrower and lender under the home equity line of credit secured by the (deed of trust) (mortgage) recorded on ____________________ in Book __________, at Page __________, records of this County, have agreed to extend the period within which the borrower may request advances as set forth in G.S. 45-82.1. The borrower's obligations to repay advances and related undertakings are secured by the (deed of trust) (mortgage).

WITNESS the signatures and seals of the undersigned, this __________ day of __________, __________.

____ (SEAL)
(Grantor (s))
____ (SEAL)
Other record owner(s)
____ (SEAL)
(Mortgagee or Beneficiary)
(Acknowledgment as required by law)."
(1995, c. 237, s. 2.)

§ 45-83. Future advances statute shall not apply.

The provisions of Article 7 of this Chapter shall not apply to an equity line of credit or the instrument securing it, if the instrument shows on its face that it secures an equity line of credit governed by the provisions of this Article. (1985, c. 207, s. 2.)

§ 45-84. Article not exclusive.

Except as otherwise provided in G.S. 45-83, the provisions of this Article are not exclusive, and no mortgage or deed of trust which secures a line of credit or other obligation shall be invalidated by failure to comply with the provisions of this Article. (1985, c. 207, s. 2.)

§§ 45-85 through 45-89: Reserved for future codification purposes.

Article 10.

Mortgage Debt Collection and Servicing.

(Effective April 1, 2008)

§ 45-90. (Effective April 1, 2008) Definitions.

As used in this Article, the following definitions apply:

(1) Home loan. — A loan secured by real property located in this State used, or intended to be used, by an individual borrower or individual borrowers in this State as a dwelling, regardless of whether the loan is used to purchase the property or refinance the prior purchase of the property or whether the proceeds of the loan are used for personal, family, or business purposes.

(2) Servicer. — A "servicer" as defined in the Real Estate Settlement Procedures Act, 12 U.S.C. § 2605(i). A licensed attorney, who in the practice of law or performing as a trustee, accepts payments related to a loan closing, default, foreclosure, or settlement of a dispute or legal claim related to a loan, shall not be considered a servicer for the purposes of this Article. (2007-351, s. 5.)

Editor's Note. — The sections in Article 10 have been renumbered at the direction of the Revisor of Statutes, the section numbers in Session Laws 2007-351, s. 5, having been G.S. 45-85 to 45-90.

Session Laws 2007-351, s. 6, made this Article effective April 1, 2008.

§ 45-91. (Effective April 1, 2008) Assessment of fees; processing of payments; publication of statements.

A servicer must comply as to every home loan, regardless of whether the loan is considered in default or the borrower is in bankruptcy or the borrower has been in bankruptcy, with the following requirements:

(1) Any fee that is incurred by a servicer shall be both:

a. Assessed within 45 days of the date on which the fee was incurred. Provided, however, that attorney or trustee fees and costs incurred as a result of a foreclosure action shall be assessed within 45 days of the date they are charged by either the attorney or trustee to the servicer.

b. Explained clearly and conspicuously in a statement mailed to the borrower at the borrower's last known address at least 30 days after assessing the fee, provided the servicer shall not be required to take any action in violation of the provisions of the federal bankruptcy code.

(2) All amounts received by a servicer on a home loan at the address where the borrower has been instructed to make payments shall be accepted and credited, or treated as credited, within one business day of the date received, provided that the borrower has made the full contractual payment and has provided sufficient information to credit the account. If a servicer uses the scheduled method of accounting, any regularly scheduled payment made prior to the scheduled due date shall be credited no later than the due date. Provided, however, that if any payment is received and not credited, or treated as

credited, the borrower shall be notified within 10 business days by mail at the borrower's last known address of the disposition of the payment, the reason the payment was not credited, or treated as credited to the account, and any actions necessary by the borrower to make the loan current.

(3) Failure to charge the fee or provide the information within the allowable time and in the manner required under subdivision (1) of subsection (a) of this section constitutes a waiver of such fee.

(4) All fees charged by a servicer must be otherwise permitted under applicable law and the contracts between the parties. Nothing herein is intended to permit the application of payments or method of charging interest which is less protective of the borrower than the contracts between the parties and other applicable law. (2007-351, s. 5.)

Editor's Note. — The section as enacted by Session Laws 2007-351, s. 5, contained a subsection (a), but no subsection (b). The subsection (a) designation was deleted at the direction of the Revisor of Statutes.

§ 45-92. (Effective April 1, 2008) Obligation of servicer to handle escrow funds.

Any servicer that exercises the authority to collect escrow amounts on a home loan held or to be held for the borrower for insurance, taxes, and other charges with respect to the property shall collect and make all payments from the escrow account, so as to ensure that no late penalties are assessed or other negative consequences result. The provisions of this section shall apply regardless of whether the loan is delinquent or in default unless the servicer has a reasonable basis to believe that recovery of these funds will not be possible or the loan is more than 90 days in default. (2007-351, s. 5.)

§ 45-93. (Effective April 1, 2008) Borrower requests for information.

The servicer shall make reasonable attempts to comply with a borrower's request for information about the home loan account and to respond to any dispute initiated by the borrower about the loan account, as provided in this section. The servicer shall maintain, until the home loan is paid in full, otherwise satisfied, or sold, written or electronic records of each written request for information regarding a dispute or error involving the borrower's account. Specifically, the servicer is required to do all of the following:

(1) Provide a written statement to the borrower within 10 business days of receipt of a written request from the borrower that includes or otherwise enables the servicer to identify the name and account of the borrower and includes a statement that the account is or may be in error or otherwise provides sufficient detail to the servicer regarding information sought by the borrower. The borrower is entitled to one such statement in any six-month period free of charge, and additional statements shall be provided if the borrower pays the servicer a reasonable charge for preparing and furnishing the statement not to exceed twenty-five dollars ($25.00). The statement shall include the following information if requested:

a. Whether the account is current or, if the account is not current, an explanation of the default and the date the account went into default.

b. The current balance due on the loan, including the principal due, the amount of funds (if any) held in a suspense account, the amount of the escrow balance (if any) known to the servicer, and whether there are any escrow deficiencies or shortages known to the servicer.

c. The identity, address, and other relevant information about the current holder, owner, or assignee of the loan.

d. The telephone number and mailing address of a servicer representative with the information and authority to answer questions and resolve disputes.

(2) Provide the following information and/or documents within 25 business days of receipt of a written request from the borrower that includes or otherwise enables the servicer to identify the name and account of the borrower and includes a statement that the account is or may be in error or otherwise provides sufficient detail to the servicer regarding information sought by the borrower:

a. A copy of the original note, or if unavailable, an affidavit of lost note.

b. A statement that identifies and itemizes all fees and charges assessed under the loan transaction and provides a full payment history identifying in a clear and conspicuous manner all of the debits, credits, application of and disbursement of all payments received from or for the benefit of the borrower, and other activity on the home loan including escrow account activity and suspense account activity, if any. The period of the account history shall cover at a minimum the two-year period prior to the date of the receipt of the request for information. If the servicer has not serviced the home loan for the entire two-year time period the servicer shall provide the information going back to the date on which the servicer began servicing the home loan. For purposes of this subsection, the date of the request for the information shall be presumed to be no later than 30 days from the date of the receipt of the request. If the servicer claims that any delinquent or outstanding sums are owed on the home loan prior to the two-year period or the period during which the servicer has serviced the loan, the servicer shall provide an account history beginning with the month that the servicer claims any outstanding sums are owed on the loan up to the date of the request for the information. The borrower is entitled to one such statement in any six-month period free of charge. Additional statements shall be provided if the borrower pays the servicer a reasonable charge for preparing and furnishing the statement not to exceed fifty dollars ($50.00).

(3) Promptly correct errors relating to the allocation of payments, the statement of account, or the payoff balance identified in any notice from the borrower provided in accordance with subdivision (2) of this section, or discovered through the due diligence of the servicer or other means. (2007-351, s. 5.)

§ 45-94. (Effective April 1, 2008) Remedies.

In addition to any equitable remedies and any other remedies at law, any borrower injured by any violation of this Article may bring an action for recovery of actual damages, including reasonable attorneys' fees. The Commissioner of Banks, the Attorney General, or any party to a home loan may enforce the provisions of this section. With the exception of an action by the Commissioner of Banks or the Attorney General, at least 30 days before a borrower or a borrower's representative institutes a civil action for damages against a servicer for a violation of this Article, the borrower or a borrower's representative shall notify the servicer in writing of any claimed errors or disputes regarding the borrower's home loan that forms the basis of the civil action. The notice must be sent to the address as designated on any of the servicer's bills, statements, invoices, or other written communication, and must enable the servicer to identify the name and loan account of the borrower. For purposes of this section, notice shall not include a complaint or summons. Nothing in this section shall limit the rights of a borrower to enjoin a civil action, or make a counterclaim, cross-claim, or plead a defense in a civil action. A servicer will not be in violation of this Article if the servicer shows by a preponderance of evidence that:

(1) The violation was not intentional or the result of bad faith; and
(2) Within 30 days after discovering or being notified of an error, and prior to the institution of any legal action by the borrower against the servicer under this section, the servicer corrected the error and compensated the borrower for any fees or charges incurred by the borrower as a result of the violation. (2007-351, s. 5.)

§ 45-95. (Effective April 1, 2008) Severability.

The provisions of this Article shall be severable, and if any phrase, clause, sentence, or provision is declared to be invalid or is preempted by federal law or regulation, the validity of the remainder of this section shall not be affected thereby. If any provision of this Article is declared to be inapplicable to any specific category, type, or kind of points and fees, the provisions of this Article shall nonetheless continue to apply with respect to all other points and fees. (2007-351, s. 5.)

Chapter 45A.

Good Funds Settlement Act.

Sec.
45A-1. Short title.
45A-2. Applicability.
45A-3. Definitions.
45A-4. Duty of settlement agent.
Sec.
45A-5. Duty of lender, purchaser, or seller.
45A-6. Validity of loan documents.
45A-7. Penalty.

§ 45A-1. Short title.

This Chapter shall be known as the Good Funds Settlement Act. (1995 (Reg. Sess., 1996), c. 714, s. 1.)

§ 45A-2. Applicability.

This Chapter applies only to real estate transactions involving a one- to four-family residential dwelling or a lot restricted to residential use. (1995 (Reg. Sess., 1996), c. 714, s. 1.)

§ 45A-3. Definitions.

As used in this Chapter, unless the context otherwise requires:

(1) "Bank" means a financial institution, including but not limited to a national bank, state chartered bank, savings bank, or credit union that is insured by the Federal Deposit Insurance Corporation or a comparable agency of the federal or state government.

(2) "Borrower" means the maker of the promissory note evidencing the loan to be delivered at the closing.

(3) "Cashier's check" means a check that is drawn on a bank, is signed by an officer or employee of the bank on behalf of the bank as drawer, is a direct obligation of the bank, and is provided to a customer of the bank or acquired from the bank for remittance purposes.

(4) "Certified check" means a check with respect to which the drawee bank certifies by signature on the check of an officer or other authorized employee of the bank that (i) the signature of the drawer on the check is genuine and the bank has set aside funds that are equal to the amount of the check and will be used to pay the check or (ii) the bank will pay the check upon presentment.

(5) "Closing" means the time agreed upon by the purchaser, seller, and lender (if applicable), when the execution and delivery of the documents necessary to consummate the transaction contemplated by the parties to the contract occurs, and includes a loan closing.

(6) "Closing funds" means the gross or net proceeds of the real estate transaction, including any loan funds, to be disbursed by the settlement agent as part of the disbursement of settlement proceeds on behalf of the parties.

(7) "Collected funds" means funds deposited and irrevocably credited to a settlement agent's account used to fund the disbursement of settlement proceeds which account is a trust account, escrow account, or an account held by a company or its subsidiary which is licensed and supervised by the North Carolina Commissioner of Banks.

(8) "Disbursement of settlement proceeds" means the payment of all closing funds from the transaction by the settlement agent to the persons or entities entitled to that payment.

(9) "Lender" means any person or entity engaged in making or originating loans secured by mortgages or deeds of trust on real estate.

(10) "Loan closing" means the time agreed upon by the borrower and lender, as applicable, when the execution and delivery of loan documents by the borrower occurs.

(11) "Loan documents" means the note evidencing the debt due to the lender, the deed of trust or mortgage to secure that debt to the lender, and any other documents required by the lender to be executed by the borrower as part of the loan closing transaction.

(12) "Loan funds" means the gross or net proceeds of the loan to be disbursed by the settlement agent as part of the disbursement of settlement proceeds on behalf of the borrower and lender.

(13) "Party" or "parties" means the seller, purchaser, borrower, lender, and settlement agent, as applicable to the subject transaction.

(14) "Settlement" means the time when the settlement agent has received the duly executed deed, deed of trust or mortgage, and other loan documents and funds required to carry out the terms of the contracts between the parties.

(15) "Settlement agent" means the person or persons responsible for conducting the settlement and disbursement of the settlement proceeds, and includes any individual, corporation, partnership, or other entity conducting the settlement and disbursement of the closing funds.

(16) "Teller's check" means a check provided to a customer of a bank or acquired from a bank for remittance purposes, that is drawn by the bank, and drawn on another bank or payable through or at a bank. (1995 (Reg. Sess., 1996), c. 714, s. 1.)

§ 45A-4. Duty of settlement agent.

(a) The settlement agent shall cause recordation of the deed, if any, the deed of trust or mortgage, or other loan documents required to be recorded at settlement. The settlement agent shall not disburse any of the closing funds prior to the recordation of any deeds or loan documents required to be filed by the lender, if applicable, and verification that the closing funds used to fund disbursement are deposited in the settlement agent's trust or escrow account in one or more forms prescribed by this Chapter. Unless otherwise provided in this Chapter, a settlement agent shall not cause a disbursement of settlement proceeds unless those settlement proceeds are collected funds. Notwithstanding that a deposit made by a settlement agent to its trust or escrow account does not constitute collected funds, the settlement agent may cause a disbursement of settlement proceeds from its trust or escrow account in reliance on that deposit if the deposit is in one or more of the following forms:

(1) A certified check;

(2) A check issued by the State, the United States, a political subdivision of the State, or an agency or instrumentality of the United States, including an agricultural credit association;

(3) A cashier's check, teller's check, or official bank check drawn on or issued by a financial institution insured by the Federal Deposit Insurance Corporation or a comparable agency of the federal or state government;

(4) A check drawn on the trust account of an attorney licensed to practice in the State of North Carolina;

(5) A check or checks drawn on the trust or escrow account of a real estate broker licensed under Chapter 93A of the General Statutes;

(6) A personal or commercial check or checks in an aggregate amount not exceeding five thousand dollars ($5,000) per closing if the settlement

agent making the deposit has reasonable and prudent grounds to believe that the deposit will be irrevocably credited to the settlement agent's trust or escrow account;

(7) A check drawn on the account of or issued by a mortgage banker licensed under Article 19A of Chapter 53 of the General Statutes that has posted with the Commissioner of Banks a surety bond in the amount of at least three hundred thousand dollars ($300,000). The surety bond shall be in a form satisfactory to the Commissioner and shall run to the State for the benefit of any settlement agent with a claim against the licensee for a dishonored check.

(b) **(For applicability date, see note)** If the settlement agent receives information from the lender as provided in G.S. 45A-5(b) or otherwise has actual knowledge that a mortgage broker or other person acted as a mortgage broker in the origination of the loan, the settlement agent shall place an entry on page 1 of the deed of trust showing the name of the mortgage broker or other person who acted as a mortgage broker in the origination of the loan. Information pertaining to the identity of the mortgage broker or other person who acted as a mortgage broker in the origination of the loan shall not be considered confidential information. The terms "mortgage broker" and "act as a mortgage broker" shall have the same meaning as provided in G.S. 53-243.01. (1995 (Reg. Sess., 1996), c. 714, s. 1; 2001-420, ss. 1, 2; 2007-176, s. 1.)

Effect of Amendments. — Session Laws 2007-176, s. 1, effective July 5, 2007, and applicable to deeds of trust registered on or after April 1, 2008, inserted the subsection (a) designation and added subsection (b).

§ 45A-5. Duty of lender, purchaser, or seller.

(a) The lender, purchaser, or seller shall, at or before closing, deliver closing funds, including the gross or net loan funds, if applicable, to the settlement agent either in the form of collected funds or in the form of a negotiable instrument described in G.S. 45A-4(a)(1) through (7), provided that the lender, purchaser, or seller, as applicable, shall cause that negotiable instrument to be honored upon presentment for payment to the bank or other depository institution upon which the instrument is drawn. However, in the case of a refinancing, or any other loan where a right of rescission applies, the lender shall, no later than the business day after the expiration of the rescission period required under the federal Truth-in-Lending Act, 15 U.S.C. § 1601, et seq., cause disbursement of loan funds to the settlement agent in one or more of the forms prescribed by provisions in this Chapter.

(b) **(For applicability date, see note)** The lender shall include in the loan closing instructions to the settlement agent the name of the mortgage broker or other person, if any, who acted as a mortgage broker in the origination of the loan. (1995 (Reg. Sess., 1996), c. 714, s. 1; 2007-176, s. 2.)

Effect of Amendments. — Session Laws 2007-176, s. 2, effective July 5, 2007, and applicable to deeds of trust registered on or after April 1, 2008, inserted the subsection (a) designation and substituted "G.S. 45A-4(a)(1) through (7)" for "G.S. 45A-4(1) through (7)" in the first sentence; and added subsection (b).

§ 45A-6. Validity of loan documents.

Failure to comply with the provisions of this Chapter shall not govern the validity or enforceability of any document, including a deed or any loan document, executed and delivered at any settlement occurring after October 1, 1996. (1995 (Reg. Sess., 1996), c. 714, s. 1.)

§ 45A-7. Penalty.

Any party violating this Chapter is liable to any other party suffering a loss due to that violation for that other party's actual damages plus reasonable attorneys' fees. In addition, any party violating this Chapter shall pay to the party or parties suffering a loss an amount equal to one thousand dollars ($1,000) or double the amount of interest payable on any loan for the first 60 days after the loan closing, whichever amount is greater. (1995 (Reg. Sess., 1996), c. 714, s. 1.)

OPINIONS OF ATTORNEY GENERAL

Agricultural Credit Association as Political Subdivision of United States. — Section 45A-7 is ambiguous as to whether an agricultural credit association is a political subdivision of the United States within the meaning of subdivision (2). See opinion of Attorney General to The Honorable Frank Mitchell, Member of the North Carolina House of Representatives, and The Honorable Charles W. Albertson, Member of the North Carolina Senate, 2001 N.C. AG LEXIS 31 (7/5/01).

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

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46-42. Personal property may be partitioned; commissioners appointed.
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46-45, 46-46. [Repealed.]

Article 1.

Partition of Real Property.

§ 46-1. Partition is a special proceeding.

Partition under this Chapter shall be by special proceeding, and the procedure shall be the same in all respects as prescribed by law in special proceedings, except as modified herein. (1868-9, c. 122, s. 33; Code, s. 1923; Rev., s. 2485; C.S., s. 3213.)

Cross References. — As to special proceedings generally, see G.S. 1-393 et seq.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Partition Regulated by Statute. — Since 1868, the partition of land between tenants in common has been regulated by statute. Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962).

Proceedings Are Equitable in Nature. — Partition proceedings have been consistently held to be equitable in nature. Allen v. Allen, 263 N.C. 496, 139 S.E.2d 585 (1965); Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

In this State partition proceedings have been consistently held to be equitable in nature, and the statutes are not a strict limitation upon the authority of the court. Dunn v. Dunn, 37 N.C. App. 159, 245 S.E.2d 580 (1978); Gray v. Crotts, 58 N.C. App. 365, 293 S.E.2d 626 (1982).

Procedure Prescribed for Special Proceedings Applies. — A proceeding for partition of real or personal property is a special proceeding under procedure in all respects the same as that prescribed by law in special proceedings except as modified by this chapter. Dubose v. Harpe, 239 N.C. 672, 80 S.E.2d 454 (1954).

Jurisdiction. — Where the parties invoked the jurisdiction of the district court to equitably distribute their marital property in an action for absolute divorce and equitable distribution of their marital property, the district court did not lose jurisdiction to equitably distribute the marital property because of its failure to enter a judgment in the equitable distribution case before the special proceeding seeking partition of the marital property was filed in the office of the clerk of superior court. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Taking Rendered Partition Suit Moot. — Taking which was proper under this section rendered earlier suit for partition of property moot; State did not have to wait until partition proceedings had been completed to condemn petitioner's interest. Coastland Corp. v. North Carolina Wildlife Resources Comm'n, 134 N.C. App. 343, 517 S.E.2d 661 (1999).

Sovereign immunity does not bar a suit for partition against the State, in its initial stage where petitioner merely seeks, through a "special proceeding," to have what already belongs to him and makes no demands on the State's property or ownership. Coastland Corp. v. North Carolina Wildlife Resources Comm'n, 134 N.C. App. 343, 517 S.E.2d 661 (1999).

A tenancy in common is the foundation upon which partition is based. Smith v. Smith, 248 N.C. 194, 102 S.E.2d 868 (1958).

Under this Chapter, a tenant in common is entitled to partition as a matter of right. McDowell v. McDowell, 61 N.C. App. 700, 301 S.E.2d 729 (1983).

This right may be waived, however, for a reasonable time, by either an express or implied contract. McDowell v. McDowell, 61 N.C. App. 700, 301 S.E.2d 729 (1983).

A cotenants' right to partition can be contracted away in a deed of separation entered into while the property is still owned by the parties as tenants by the entirety. McDowell v. McDowell, 61 N.C. App. 700, 301 S.E.2d 729 (1983).

To estop a cotenant from partitioning a piece of property, there must be an express or implied contract or agreement waiving the right to partition. Roberson v. Roberson, 65 N.C. App. 404, 309 S.E.2d 520 (1983), cert. denied, 310 N.C. 626, 315 S.E.2d 691 (1984).

Chapter Does Not Apply to Partition by Agreement. — This Chapter applies to compulsory or judicial partition. It does not apply to partition by agreement. Keener v. Den, 73 N.C. 132 (1875).

As to authority of court in partition by agreement, and procedure therein, see Outlaw v. Outlaw, 184 N.C. 255, 114 S.E. 4 (1922). See also, Newsome v. Harrell, 168 N.C. 295, 84 S.E. 337 (1915).

Superior court had no authority to partition marital property pursuant to the provisions of this section where the jurisdiction of the district court had been properly invoked to equitably distribute such marital property. Garrison v. Garrison, 90 N.C. App. 670, 369 S.E.2d 628 (1988).

Dismissal of Appeal Held Error. — Where petitioners excepted to the commissioners' report under G.S. 46-19, the trial court did not have the authority to dismiss the appeal due to petitioners failure to state specific grounds why the commissioners' report should not be confirmed. Jenkins v. Fox, 98 N.C. App. 224, 390 S.E.2d 683 (1990).

Partition Not Proper Remedy for Ouster. — Where a tenant in common has been actually ousted by his cotenant, his remedy is by ejectment, and not partition. Thomas v. Garvan, 15 N.C. 223, 25 Am. Dec. 708 (1833).

Applied in Haddock v. Stocks, 167 N.C. 70, 83 S.E. 9 (1914); Gibbs v. Higgins, 215 N.C. 201, 1 S.E.2d 554 (1939); Davis v. Griffin, 249 N.C. 26, 105 S.E.2d 119 (1958); Pearson v. McKenney, 5 N.C. App. 544, 169 S.E.2d 46 (1969); Couch v. Couch, 18 N.C. App. 108, 196 S.E.2d 64 (1973).

Cited in Skinner v. Carter, 108 N.C. 106, 12 S.E. 908 (1891); King v. Neese, 233 N.C. 132, 63 S.E.2d 123 (1951); Murphy v. Smith, 235 N.C. 455, 70 S.E.2d 697 (1952); Nunn v. Gibbons, 249 N.C. 362, 106 S.E.2d 499 (1959); McDonald v. Medford, 111 N.C. App. 643, 433 S.E.2d 231 (1993).

§ 46-2. Venue in partition.

The proceeding for partition, actual or by sale, must be instituted in the county where the land or some part thereof lies. If the land to be partitioned consists of one tract lying in more than one county, or consists of several tracts lying in different counties, proceedings may be instituted in either of the counties in which a part of the land is situated, and the court of such county wherein the proceedings for partition are first brought shall have jurisdiction to proceed to a final disposition of said proceedings, to the same extent as if all of said land was situate in the county where the proceedings were instituted. (1868-9, c. 122, s. 7; Code, s. 1898; Rev., s. 2486; C.S., s. 3214; Ex. Sess. 1924, c. 62, s. 1.)

CASE NOTES

Waiver of Venue. — Construing G.S. 1-82, 1-83 and this section in pari materia, venue cannot be jurisdictional, and it may always be waived. Pleading to the merits waives defective venue. Venue is a matter not to be determined by the common law, but by legislative regulation. Clark v. Carolina Homes, 189 N.C. 703, 128 S.E. 20 (1925).

§ 46-3. Petition by cotenant or personal representative of cotenant.

One or more persons claiming real estate as joint tenants or tenants in common or the personal representative of a decedent joint tenant, or tenant in common, when sale of such decedent's real property to make assets is alleged and shown as required by G.S. 28A-17-3, may have partition by petition to the superior court. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C.S., s. 3215; 1963, c. 291, s. 2; 1985, c. 689, s. 16.)

Cross References. — As to procedure for sale or mortgage of property where there is a vested interest and a contingent remainder to uncertain persons, see G.S. 41-11. As to unknown parties, see G.S. 46-6. As to partition sales, see G.S. 46-22 et seq.

CASE NOTES

I. In General.
II. Parties.
III. Plea of Sole Seizin.

I. IN GENERAL.

Jurisdiction of Superior Court. — The superior court acquires jurisdiction over proceedings to partition lands upon their being transferred by the clerk thereto, in terms, and may proceed therewith and fully determine all matters in controversy. In such case it is immaterial whether it was properly instituted before the clerk. Baggett v. Jackson, 160 N.C. 26, 76 S.E. 86 (1912).

Where petitioner tried but failed to invoke the jurisdiction of the district court for equitable distribution of the parties' marital property the superior court had subject matter jurisdiction to hear the proceeding for the partition of the subject property. Diggs v. Diggs, 116 N.C. App. 95, 446 S.E.2d 873, cert. denied, 338 N.C. 515, 452 S.E.2d 809 (1994).

Tenancy in Common Is Necessary Basis for Partition. — Tenancy in common in land is the necessary basis for maintenance of a special proceeding for partition by petition to the superior court. Murphy v. Smith, 235 N.C. 455, 70 S.E.2d 697 (1952); Gray v. Crotts, 58 N.C. App. 365, 293 S.E.2d 626 (1982).

A tenancy in common is the foundation upon which partition is based. Smith v. Smith, 248 N.C. 194, 102 S.E.2d 868 (1958); Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

Tenant in Common Is Entitled to Partition as Matter of Right. — A tenant in common is entitled as a matter of right to partition of real estate held in common, to the end that he may have and enjoy his share therein in severalty. Davis v. Griffin, 249 N.C. 26, 105 S.E.2d 119 (1958); Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965).

Ordinarily a tenant in common in realty or personalty is entitled to partition of the property. Chadwick v. Blades, 210 N.C. 609, 188 S.E. 198 (1936).

Tenant Must Have Right of Possession. — A tenant in common is entitled to a compulsory partition, and to enable said tenant to maintain a proceeding for such partition he must have an estate in possession or the right of possession. The possession need not be actual. Moore v. Baker, 222 N.C. 736, 24 S.E.2d 749 (1943). See Wood v. Sugg, 91 N.C. 93, 48 Am. R. 639 (1884); Osborne v. Mull, 91 N.C. 203 (1884); Alexander v. Gibbon, 118 N.C. 796, 24 S.E. 748, 54 Am. St. R. 757 (1896); Spring Green Church v. Thornton, 158 N.C. 119, 73 S.E. 810 (1912).

Waiver of Right to Partition. — While it is the general rule that a tenant in common may have partition as a matter of right, it is equally well established that a cotenant, either by an express or implied contract, may waive his right to partition for a reasonable time. When he does, partition will be denied him or his successors who take with notice. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

A person can validly contract away his right to partition in a deed of separation. Hepler v. Burnham, 24 N.C. App. 362, 210 S.E.2d 509 (1975).

Tenants in common may make a valid agreement whereby the right to partition is modified or limited, provided the waiver of the right to partition is not for an unreasonable length of time. Chadwick v. Blades, 210 N.C. 609, 188 S.E. 198 (1936). See 15 N.C.L. Rev. 279.

Statutes declaring that joint tenants or tenants in common shall have a right to partition were never intended to interfere with a contract between such tenants modifying or limiting this otherwise incidental right, or to render it incompetent for parties to make such contracts, either at the time of the creation of the tenancy or afterwards. Hepler v. Burnham, 24 N.C. App. 362, 210 S.E.2d 509 (1975).

In this State partition proceedings have been consistently held to be equitable in nature, and the court has jurisdiction to adjust all equities in respect to the property. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

And Petitioner Must Do Equity. — Partition is always subject to the principle that he who seeks it by coming into equity for relief must do equity. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966); Gray v. Crotts, 58 N.C. App. 365, 293 S.E.2d 626 (1982).

Thus equity will not award partition at the suit of one in violation of his own agreement or in violation of a condition or restriction imposed on the estate by one through whom he claims. The objection to partition in such cases is in the nature of an estoppel. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

The refusal of partition to one who has brought suit therefor in violation of his contract appears to bear a close analogy to the grant of specific performance of a contract. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

What Petition Should Allege. — A petition under this section is in the ordinary form of a complaint in a civil action, and should allege that the plaintiffs and defendants are tenants in common of the land, should describe the land; should state the interest of each party; and should indicate that the plaintiffs desire to hold their interests in severalty and that they are entitled to partition for that purpose. Pearson v. McKenney, 5 N.C. App. 544, 169 S.E.2d 46 (1969).

Failure to Allege Right to Possession. — If the petition alleges that the petitioners are tenants in common in fee, it will not be dismissed for failure to allege that they are entitled to immediate possession. Epley v. Epley, 111 N.C. 505, 16 S.E. 321 (1892); Alexander v. Gibbon, 118 N.C. 796, 24 S.E. 748, 54 Am. St. R. 757 (1896).

Where tenants in common allege that they are the owners of land and seized of the fee simple title thereto, the law presumes possession. Moore v. Baker, 222 N.C. 736, 24 S.E.2d 749 (1943).

Omission of Term of Court. — A petition in special proceedings for partition was not demurrable because it did not give the term of court or any court in the caption. Hartsfield v. Bryan, 177 N.C. 166, 98 S.E. 379 (1919).

Leave to Amend Petition. — On petition before the clerk for partition, permission to amend the petition is purely within the discretion of the clerk. Simmons v. Jones, 118 N.C. 472, 24 S.E. 114 (1896).

As to nonsuit (now dismissal) of proceedings, see Haddock v. Stocks, 167 N.C. 70, 83 S.E. 9 (1914); Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Partition in Kind Is Favored. — Partition in kind is favored and will be ordered, even though there may be some slight disadvantages in pursuing such method. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965).

But Right of Actual Partition May Not Be Used to Injure Another. — Partition of land in kind is a matter of right, but this right of actual partition may not be so used as to injure another. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965).

Prima facie, a tenant in common is entitled, as a matter of right, to a partition of the lands so that he may enjoy his share in severalty. If, however, an actual partition cannot be made without injury to some or all of the parties interested, he is equally entitled to a partition by sale. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

There should be a partition in kind unless such partition will cause material and substantial injury to some or all of the parties interested. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965).

Determination of Whether Land Should Be Partitioned or Sold. — Whether or not, in a proceeding instituted under this section for partition of land held by two or more persons as tenants in common, there shall be an actual partition or a sale for partition, as authorized by statute, involves a question of fact to be determined by the court. Talley v. Murchison, 212 N.C. 205, 193 S.E. 148 (1937).

Whether land should be divided in kind or sold for partition is a question of fact for decision of the clerk of superior court, subject to review by the judge on appeal; it is not an issue of fact for a jury. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965).

Test Is Whether Value of Share Would Be Materially Less on Partition Than on Sale. — The test of whether a partition in kind would result in great prejudice to the cotenant owners is whether the value of the share of each in case of a partition would be materially less than the share of each in the money equivalent that could probably be obtained for the whole. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965).

Determinative Circumstances. — On the question of partition or sale, the determinative circumstances usually relate to the land itself and its location, physical condition, quantity, and the like. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965).

The physical difficulty of division is only a circumstance for the consideration of the court. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965).

The burden is on him who seeks a sale in lieu of actual partition to allege and prove the facts upon which the order of sale must rest. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Ownership of Adjacent Land by Tenant in Common. — While it is true that courts may consider whether one of the tenants in common owns other land adjoining the land to be partitioned, that does not, ipso facto, mean that a tenant in common's share of the property being partitioned must be laid off next to his homeplace. Gray v. Crotts, 58 N.C. App. 365, 293 S.E.2d 626 (1982).

Drawing of Lots to Assign Shares. — When there is no question that parcels have been equally divided in terms of value, the drawing of lots as a method of assigning the shares to tenants in common is specifically approved, even though this article makes no provision for partitioning by lot or chance. Gray v. Crotts, 58 N.C. App. 365, 293 S.E.2d 626 (1982).

Partition of Part of Land. — The petitioners are not entitled as a matter of right to have a part only of the lands divided, and the defendants may have other land held in common included. Luther v. Luther, 157 N.C. 499, 73 S.E. 102 (1911); Horne v. Horne, 261 N.C. 688, 136 S.E.2d 87 (1964); Coats v. Williams, 261 N.C. 692, 136 S.E.2d 113 (1964). But see § 46-16 and the note thereto as to partial partition.

Effect of Adjudication When Title Is Put in Issue. — While proceedings for the partition of lands do not ordinarily place the title at issue, such may be done by the tenants in common, and the judgment thereunder will estop them. Buchanan v. Harrington, 152 N.C. 333, 67 S.E. 747, 136 Am. St. R. 838 (1910); Baugham v. Trust Co., 181 N.C. 406, 107 S.E. 431 (1921).

Applied in Gibbs v. Higgins, 215 N.C. 201, 1 S.E.2d 554 (1939); Moore v. Baker, 224 N.C. 133, 29 S.E.2d 452 (1944).

Cited in Brittain v. Mull, 91 N.C. 498 (1884); Pearson v. McKenney, 5 N.C. App. 544, 169 S.E.2d 46 (1969); Bridgers v. Bridgers, 56 N.C. App. 617, 289 S.E.2d 921 (1982); Beck v. Beck, 125 N.C. App. 402, 481 S.E.2d 317 (1997); Whatley v. Whatley, 126 N.C. App. 193, 484 S.E.2d 420 (1997).

II. PARTIES.

The life tenant of a one-half interest in realty may maintain a partition proceeding against the fee simple owner of the other one-half interest in the property. First-Citizens Bank & Trust Co. v. Carr, 279 N.C. 539, 184 S.E.2d 268 (1971).

Sale or Partition of Reversions, Remainders and Executory Interests. — This section is no authority for partition as between the life tenant and remaindermen, except where the proceeding is brought by the remaindermen and the life tenant is joined. Burton v. Cahill, 192 N.C. 505, 135 S.E. 332 (1926).

Prior to the enactment of G.S. 46-23,

cotenants in remainder or reversion had no right to enforce a compulsory partition of land in which they had such estate. Moore v. Baker, 222 N.C. 736, 24 S.E.2d 749 (1943).

Right as Against Persons Having Contingent Remainders in Undivided Interests in Land. — Petitioners, owning an undivided interest in fee in several tracts of land and also owning life estates in the balance of the undivided interests in the same tracts of land with contingent limitations over to persons not presently determinable, had the right, as against the contingent remaindermen, to partition the several tracts so that petitioners might hold some of the tracts in fee and in common, and thus know the boundaries of the real estate owned by them in fee distinct from the boundaries of that in which they owned life estates with contingent remainder over. Davis v. Griffin, 249 N.C. 26, 105 S.E.2d 119 (1958).

Right of Divorced Couple to Partition. — When marriage is dissolved by divorce, the husband and wife become tenants in common of property formerly held by the entirety, and are entitled to partition. McKinnon, Currie & Co. v. Caulk, 167 N.C. 411, 83 S.E. 559 (1914).

Churches belonging to an association controlling a school are not entitled to partition. Spring Green Church v. Thornton, 158 N.C. 119, 73 S.E. 810 (1912).

Partition by Minor and Another. — Where partition was brought by a minor and another, the latter was bound by the judgment, although it was not approved by the judge of the court. Lindsay v. Beaman, 128 N.C. 189, 38 S.E. 811 (1901).

Persons Bound by Proceedings. — Persons who are not parties are not bound. Henderson v. Wallace, 72 N.C. 451 (1875).

Bringing in Defendants. — Parties claiming to hold in common may be brought in as defendants. McKeel v. Holloman, 163 N.C. 132, 79 S.E. 445 (1913).

In an action by heirs at law for partition of intestate's lands, the administrator could not be made a party defendant because he opposed the partition and wished in the same action to make application to sell the land for debts of the estate. Garrison v. Cox, 99 N.C. 478, 6 S.E. 124 (1888).

Additional Party Seeking to Set Aside Sale. — An application to be made a party defendant in partition proceedings after confirmation of sale was properly denied, where it was based on deeds from persons who never had claimed any title and was accompanied by a motion to set aside the sale to permit principals to make a bid. Thompson v. Rospigliosi, 162 N.C. 145, 77 S.E. 113 (1913).

Persons named as parties must be served with process. Patillo v. Lytle, 158 N.C. 92, 73 S.E. 200 (1911).

Intervention by Claimant of Paramount Title. — In an action for partition of lands, it is proper to allow another party claiming paramount title to the land to intervene and assert his rights. Roughton v. Duncan, 178 N.C. 5, 100 S.E. 78 (1919).

Claimant of paramount title who seeks to intervene in partition proceedings may be estopped by his laches. Thomas v. Garvan, 15 N.C. 223, 25 Am. Dec. 708 (1833).

As to intervention by a judgment debtor, see Edmonds v. Wood, 222 N.C. 118, 22 S.E.2d 237 (1942).

Judgment Creditors and Mortgagees. — In proceedings for partition, judgment creditors of the individual tenants, and their mortgagees, are proper parties to the proceedings; and where such lienors have been made parties thereto, it is error for the trial judge to dismiss the action as to them. Holley v. White, 172 N.C. 77, 89 S.E. 1061 (1916).

The mortgagee of one tenant in common is not a necessary party to special proceedings to partition the land. Rostan v. Huggins, 216 N.C. 386, 5 S.E.2d 162, 126 A.L.R. 410 (1939).

The presence of an unnecessary party, in proceedings for partition of lands, will be regarded as immaterial, except as affecting costs. Baggett v. Jackson, 160 N.C. 26, 76 S.E. 86 (1912).

III. PLEA OF SOLE SEIZIN.

Effect of Plea. — Where the plea of sole seizin is set up, the effect is practically to convert the procedure into an action of ejectment. When it is not set up, the parties are taken to be tenants in common, and the only inquiry is as to the interests owned. Graves v. Barrett, 126 N.C. 267, 35 S.E. 539 (1900); Haddock v. Stocks, 167 N.C. 70, 83 S.E. 9 (1914).

Where the plea of sole seizin is set up, the proper course is for the court to try title to the land. Purvis v. Wilson, 50 N.C. 22, 69 Am. Dec. 773 (1857).

Waiver of Plea. — Where, in partition, a plea of sole seizin is not put in before the order of partition is made, it will be considered as waived. Wright v. McCormick, 69 N.C. 14 (1873).

Burden of Proof. — Where the defendants plead sole seizin in proceedings to partition lands, the burden of proof was with the plaintiff, which would devolve upon the defendant to establish adverse possession, when relied upon for title, after a prima facie case of tenancy in common was made out. Lester v. Harvard, 173 N.C. 83, 91 S.E. 698 (1917).

Where defendants in partition deny cotenancy and plead sole seizin, the burden is upon plaintiffs to show title in the parties by tenancy in common. Johnson v. Johnson, 229 N.C. 541, 50 S.E.2d 569 (1948).

§ 46-3.1. Court's authority to make orders pending final determination of proceeding.

Pending final determination of the proceeding, on application of any of the parties in a proceeding to partition land, the court may make such orders as it considers to be in the best interest of the parties, including but not limited to orders relating to possession, payment of secured debt or other liens on the property, occupancy and payment of rents, and to include the appointment of receivers pursuant to G.S. 1-502(6). (1981, c. 584, s. 1.)

§ 46-4. Surface and minerals in separate owners; partitions distinct.

When the title to the mineral interests in any land has become separated from the surface in ownership, the tenants in common or joint tenants of such mineral interests may have partition of the same, distinct from the surface, and without joining as parties the owner or owners of the surface; and the tenants in common or joint tenants of the surface may have partition of the same, in manner provided by law, distinct from the mineral interest and without joining as parties the owner or owners of the mineral interest. In all instances where the mineral interests and surface interest have thus become separated in ownership, the owner or owners of the mineral interests shall not be compelled to join in a partition of the surface interests, nor shall the owner or owners of the surface interest be compelled to join in a partition of the mineral interest, nor shall the rights of either owner be prejudiced by a partition of the other interests. (1905, c. 90; Rev., s. 2488; C.S., s. 3216.)

CASE NOTES

Applied in Buffaloe v. Barnes, 226 N.C. 313, 38 S.E.2d 222 (1946).

§ 46-5. Petition by judgment creditor of cotenant; assignment of homestead.

When any person owns a judgment duly docketed in the superior court of a county wherein the judgment debtor owns an undivided interest in fee in land as a tenant in common, or joint tenant, and the judgment creditor desires to lay off the homestead of the judgment debtor in the land and sell the excess, if any, to satisfy his judgment, the judgment creditor may institute before the clerk of the court of the county wherein the land lies a special proceeding for partition of the land between the tenants in common, making the judgment debtor, the other tenants in common and all other interested persons parties to the proceeding by summons. The proceeding shall then be in all other respects conducted as other special proceedings for the partition of land between tenants in common. Upon the actual partition of the land the judgment creditor may sue out execution on his judgment, as allowed by law, and have the homestead of the judgment debtor allotted to him and sell the excess, as in other cases where the homestead is allotted under execution. The remedy provided for in this section shall not deprive the judgment creditor of any other remedy in law or in equity which he may have for the enforcement of his judgment lien. (1905, c. 429; Rev., s. 2489; C.S., s. 3217.)

Cross References. — As to execution, see G.S. 1-302 et seq. As to exempt property, see now G.S. 1C-1601 et seq.

CASE NOTES

As to intervention in partition proceedings, see Edmonds v. Wood, 222 N.C. 118, 22 S.E.2d 237 (1942).

§ 46-6. Unknown parties; summons and representation.

If, upon the filing of a petition for partition, it be made to appear to the court by affidavit or otherwise that there are any persons interested in the premises whose names are unknown to and cannot after due diligence be ascertained by the petitioner, the court shall order notices to be given to all such persons by a publication of the petition, or of the substance thereof, with the order of the court thereon, in one or more newspapers to be designated in the order. If after such general notice by publication any person interested in the premises and entitled to notice fails to appear, the court shall in its discretion appoint some disinterested person to represent the owner of any shares in the property to be divided, the ownership of which is unknown and unrepresented. (1887, c. 284; Rev., s. 2490; C.S., s. 3218.)

CASE NOTES

Discretion in Appointing Representative. — It is discretionary with the trial judge, by the express terms of the statute, as to whether he will appoint some disinterested person to represent the interest of unknown persons, etc., and this discretion is not reviewable. Lawrence v. Hardy, 151 N.C. 123, 65 S.E. 766 (1909).

Purchaser Acquires Good Title. — When the service of summons has been made by publication on parties unknown, as required by this section, the proceedings being regular upon their face, and the court having jurisdiction of the subject matter, a purchaser for full value without notice acquires title, free from claim or demand of such heir upon whom summons has been thus served. Lawrence v. Hardy, 151 N.C. 123, 65 S.E. 766 (1909).

Purchaser Cannot Resist Payment of Purchase Price. — Where the method prescribed by this section is followed, a purchaser may not successfully resist payment of the purchase price of the land on the ground of a defect in title in that the commissioner's deed would not preclude the claim of the missing heir. Bynum v. Bynum, 179 N.C. 14, 101 S.E. 527 (1919).

§ 46-7. Commissioners appointed.

The superior court shall appoint three disinterested commissioners to divide and apportion such real estate, or so much thereof as the court may deem best, among the several tenants in common, or joint tenants. Provided, in cases where the land to be partitioned lies in more than one county, then the court may appoint such additional commissioners as it may deem necessary from counties where the land lies other than the county where the proceedings are instituted. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C.S., s. 3219; Ex. Sess. 1924, c. 62, s. 2.)

CASE NOTES

Drawing by Two Commissioners to Determine Allotment. — Where the court in a partitioning proceeding ordered that "the commissioners" conduct a lottery before the clerk to determine the allotment of the separate parcels, the absence of one of the three commissioners because of illness when the drawing before the clerk was held did not invalidate the drawing. Dunn v. Dunn, 37 N.C. App. 159, 245 S.E.2d 580 (1978).

Approval of Report Based on Findings of Two Appraisers. — Where testator's children selected three appraisers in accordance with the will, but prior to final report one of the appraisers died, whereupon the court ordered the two surviving appraisers to complete the appraisal and file a report, which report was later approved by the court, it was held that under the terms of the will and under this section, it was necessary that three appraisers act in the matter, although two of them could file the report, pursuant to G.S. 46-17, and the court should have appointed a third appraiser, so that the approval of the report based upon the findings of only two appraisers was reversible error. Sharpe v. Sharpe, 210 N.C. 92, 185 S.E. 634 (1936).

Assignment by Coin Flip. — Where commissioners properly divided property into two sections that were nearly equal, assigning the property by flipping a coin was not improper. Robertson v. Robertson, 126 N.C. App. 298, 484 S.E.2d 831 (1997).

Applied in Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962).

Cited in Pearson v. McKenney, 5 N.C. App. 544, 169 S.E.2d 46 (1969); Powers v. Fales, 61 N.C. App. 516, 301 S.E.2d 123 (1983); Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

§ 46-7.1. Compensation of commissioners.

The clerk of the superior court shall fix the compensation of commissioners for the partition or division of lands according to the provisions of G.S. 1-408. (1949, c. 975; 1953, c. 48.)

Local Modification. — Guilford: 1951, c. 977, s. 1; Harnett: 1951, c. 1170; Stokes: 1959, c. 531.

§ 46-8. Oath of commissioners.

The commissioners shall be sworn by a magistrate, the sheriff or any deputy sheriff of the county, or any other person authorized to administer oaths, to do justice among the tenants in common in respect to such partition, according to their best skill and ability. (1868-9, c. 122, s. 2; Code, s. 1893; Rev., s. 2492; C.S., s. 3220; 1945, c. 472; 1971, c. 1185, s. 8.)

Cross References. — As to form of oath, see G.S. 11-11.

§ 46-9. Delay or neglect of commissioner penalized.

If, after accepting the trust, any of the commissioners unreasonably delay or neglect to execute the same, every such delinquent commissioner shall be liable for contempt and may be removed, and shall be further liable to a penalty of fifty dollars ($50.00), to be recovered by the petitioner. (1868-9, c. 122, s. 10; Code, s. 1901; Rev., s. 2498; C.S., s. 3221.)

§ 46-10. Commissioners to meet and make partition; equalizing shares.

The commissioners, who shall be summoned by the sheriff, must meet on the premises and partition the same among the tenants in common, or joint tenants, according to their respective rights and interests therein, by dividing the land into equal shares in point of value as nearly as possible, and for this purpose they are empowered to subdivide the more valuable tracts as they may deem best, and to charge the more valuable dividends with such sums of money as they may think necessary, to be paid to the dividends of inferior value, in order to make an equitable partition. (1868-9, c. 122, s. 3; Code, s. 1894; 1887, c. 284, s. 2; Rev., s. 2491; C.S., s. 3222; 1995, c. 379, s. 14(b).)

CASE NOTES

Section Applies Only to Compulsory Partition. — Where partition is not compulsory but is under an agreement between cotenants, this section is not applicable. Newsome v. Harrell, 168 N.C. 295, 84 S.E. 337 (1915); Outlaw v. Outlaw, 184 N.C. 255, 114 S.E. 4 (1922).

Actual partition must be on the basis of the division made by the commissioners and not otherwise. Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962).

Authority of Commissioners and Effect of Partition. — In partition proceedings, the duty of the commissioners is to make actual partition among the tenants in common and to make a full report thereof; they have no other function. The allotment of the respective shares in partition proceedings creates no new estate and conveys no title, the sole effect thereof being to sever the unity of possession and to fix the physical boundaries of the tracts. Therefore, no title vests in the commissioners, and after confirmation of their report they have no further authority, and purported deeds executed by them to the several tenants convey nothing. McLamb v. Weaver, 244 N.C. 432, 94 S.E.2d 331 (1956).

Validity of Action of Two Commissioners. — Where three commissioners are appointed to partition land the action of any two of them is valid. Thompson v. Shemwell, 93 N.C. 222 (1885).

Two commissioners may fill the vacancy caused by the absence of the third commissioner, when done in the presence of the interested parties and without their objection. Simmons v. Foscue, 81 N.C. 86 (1879).

The court's approval of a report based upon the findings of only two appraisers or commissioners was held reversible error in Sharpe v. Sharpe, 210 N.C. 92, 185 S.E. 634 (1936).

By the very terms of G.S. 46-17, the signature of two of the commissioners to their report is sufficient. Thompson v. Shemwell, 93 N.C. 222 (1885); Sharpe v. Sharpe, 210 N.C. 92, 185 S.E. 634 (1936).

Existing Easements. — It would seem that existing easements are not destroyed by a division in partition. See Jones v. Swindell, 176 N.C. 34, 96 S.E. 663 (1918).

Improvements. — A tenant in common is entitled to recover against a cotenant for betterments he has placed on the land. Daniel v. Dixon, 163 N.C. 137, 79 S.E. 425 (1913).

Where no appeal is taken from the order allowing for improvements, it precludes the plaintiff from having the good faith of the defendant in making the improvements inquired into. Fisher v. Toxaway Co., 171 N.C. 547, 88 S.E. 887 (1916).

Where in a partition an excessive portion is allotted to one individual, but is reduced on a reallotment, that individual cannot be allowed for improvements made on the excess, as it was his own folly to make them before obtaining a final decree and his deed. Carland v. Jones, 55 N.C. 506 (1856).

Basis of Owelty. — The right to owelty on an unequal partition is based on the implied warranty attaching to each share from all the others. Nixon v. Lindsay, 55 N.C. 230 (1855); Cheatham v. Crews, 88 N.C. 38 (1883).

Equality in value must be afforded by the assessment of an owelty charge. Moore v. Baker, 224 N.C. 498, 31 S.E.2d 526 (1944).

Owelty Is Not a Mere Lien Debt. — The charge in partition upon the more valuable shares is not a mere debt secured by lien. The debtor is a tenant in common with the holder of the share in whose favor the decree is entered to the extent of the charge, until the same shall be satisfied. In re Walker, 107 N.C. 340, 12 S.E. 136 (1890).

But Is a Charge upon the Land. — The sums charged upon "the more valuable dividends" in partitions of lands are charges, not upon the persons of the owners of such dividends, but upon the land alone. Young v. Trustees of Davidson College, 62 N.C. 261 (1867).

Owelty Follows Land. — Charges upon land for equality of partition follow the land into the hands of all persons to whom it may come; and they are held to be affected by constructive notice. Dobbin v. Rex, 106 N.C. 444, 11 S.E. 260 (1890); Powell v. Weatherington, 124 N.C. 40, 32 S.E. 380 (1899). As to the docketing of owelty charges, see § 46-21.

When Land Charged with Payment of Several Shares. — Payment under execution of the charge in favor of one share does not discharge the land in the hands of the purchaser from the payment of a charge in favor of another share. Meyers v. Rice, 107 N.C. 24, 12 S.E. 66 (1890).

A discharge in bankruptcy does not cancel the charge of owelty of partition against the land of the bankrupt. In re Walker, 107 N.C. 340, 12 S.E. 136 (1890).

Charges for equality of partition should be enforced by proceedings in rem against the more valuable shares of the land divided, and not by personal judgments against the owners thereof. Young v. Trustees of Davidson College, 62 N.C. 261 (1867); Waring v. Wadsworth, 80 N.C. 345 (1879); Meyers v. Rice, 107 N.C. 24, 12 S.E. 66 (1890).

A motion in the cause for execution is the proper proceeding to subject land charged with owelty of partition to the payment thereof. Meyers v. Rice, 107 N.C. 24, 12 S.E. 66 (1890).

Parties to Action to Recover Owelty. — The widow of the party upon whose land a charge was placed was not a necessary party to an action brought to recover the sum charged. Ruffin v. Cox, 71 N.C. 253 (1874).

Counterclaim. — A cotenant who is charged in partition proceedings with owelty may set up by way of counterclaim damages sustained by his eviction from part of the land awarded to him. Huntley v. Cline, 93 N.C. 458 (1885).

Division of Costs. — The costs in proceedings for partition, including the expenses of the partition, are charges upon the several shares in proportion to their respective values. Hinnant v. Wilder, 122 N.C. 149, 29 S.E. 221 (1898).

Costs Precede Homestead Exemption. — Where, in an ex parte proceeding for the partition of lands, partition was duly made and one part was assigned in severalty to A, and A failed to pay the costs adjudged against her and the share allotted to her was sold on execution issued on the judgment, and no homestead was allotted to A, who had no other land, and her interest was not worth $1,000.00, in an action by the heirs of A against the purchaser at the execution sale, the sale was held to be valid. Hinnant v. Wilder, 122 N.C. 149, 29 S.E. 221 (1898).

Confirmation Necessary to Execution. — No execution can issue to satisfy a charge against land in partition proceedings until the commissioners' report has been confirmed. In re Ausborn, 122 N.C. 42, 29 S.E. 56 (1898).

Assignment by Coin Flip. — Where commissioners properly divided property into two sections that were nearly equal, assigning the property by flipping a coin was not improper. Robertson v. Robertson, 126 N.C. App. 298, 484 S.E.2d 831 (1997).

Separately Owned Property. — When partitioning property, such factors as separately owned property may in the discretion of the commissioners be considered; however, such consideration is not required. Robertson v. Robertson, 126 N.C. App. 298, 484 S.E.2d 831 (1997).

Applied in Pearson v. McKenney, 5 N.C. App. 544, 169 S.E.2d 46 (1969).

Cited in Capps v. Capps, 85 N.C. 408 (1881); Thompson v. Thompson, 235 N.C. 416, 70 S.E.2d 495 (1952); Macon v. Edinger, 49 N.C. App. 624, 272 S.E.2d 411 (1980); Ferrell v. DOT, 334 N.C. 650, 435 S.E.2d 309 (1993).

§ 46-11. Owelty to bear interest.

The sums of money due from the more valuable dividends shall bear interest until paid. (1868-9, c. 122, s. 8; Code, s. 1899; Rev., s. 2496; C.S., s. 3223.)

§ 46-12. Owelty from infant's share due at majority.

When a minor to whom a more valuable dividend shall fall is charged with the payment of any sum, the money shall not be payable until such minor arrives at the age of 18 years, but the general guardian, if there be one, must pay such sum whenever assets shall come into his hands, and in case the general guardian has assets which he did not so apply, he shall pay out of his own proper estate any interest that may have accrued in consequence of such failure. (1868-9, c. 122, s. 9; Code, s. 1900; Rev., s. 2497; C.S., s. 3224; 1971, c. 1231, s. 1.)

CASE NOTES

Owelty may be enforced against land inherited by infants from an adult who owned the land when the owelty was made a charge against it, though as to land partitioned to an infant cotenant owelty is not payable until he reaches his majority. Powell v. Weatherington, 124 N.C. 40, 32 S.E. 380 (1899).

§ 46-13. Partition where shareowners unknown or title disputed; allotment of shares in common.

If there are any of the tenants in common, or joint tenants, whose names are not known or whose title is in dispute, the share or shares of such persons shall be set off together as one parcel. If, in any partition proceeding, two or more appear as defendants claiming the same share of the premises to be divided, or if any part of the share claimed by the petitioner is disputed by any defendant or defendants, it shall not be necessary to decide on their respective claims before the court shall order the partition or sale to be made, but the partition or sale shall be made, and the controversy between the contesting parties may be afterwards decided either in the same or an independent proceeding. If two or more tenants in common, or joint tenants, by petition or answer, request it, the commissioners may, by order of the court, allot their several shares to them in common, as one parcel, provided such division shall not be injurious or detrimental to any cotenant or joint tenant. (1868-9, c. 122, s. 3; Code, s. 1894; 1887, c. 284, ss. 2, 4; Rev., ss. 2491, 2511; C.S., s. 3225; 1937, c. 98.)

§ 46-14. Judgments in partition of remainders binding on parties thereto.

Where land is conveyed by deed, or devised by will, upon contingent remainder, executory devise, or other limitation, any judgment of partition rendered in an action or special proceeding in the superior court authorizing a division or partition of said lands, and to which the life tenant or tenants, and all other persons then in being, or not in being, take such land as if the contingency had then happened, are parties, and those unborn being duly represented by guardian ad litem, such judgment of partition authorizing division or partition of said lands among the respective tenants and remaindermen or executory devisees, will be valid and binding upon all parties thereto and upon all other persons not then in being. (1933, c. 215, s. 1; 1959, c. 1274, s. 1.)

CASE NOTES

Cited in Barnes v. Dortch, 245 N.C. 369, 95 S.E.2d 872 (1957).

§ 46-15: Repealed by Session Laws 1959, c. 879, s. 14.

Cross References. — As to intestate succession, see G.S. 29-1 et seq. As to abolition of dower and curtesy, see G.S. 29-4.

§ 46-16. Partial partition; balance sold or left in common.

In all proceedings under this Chapter actual partition may be made of a part of the land sought to be partitioned and a sale of the remainder; or a part only of any land held by tenants in common, or joint tenants, may be partitioned and the remainder held in cotenancy. (1887, c. 214, s. 1; Rev., s. 2506; C.S., s. 3227.)

CASE NOTES

This section does not authorize a partition or sale of the undivided interest of some of the cotenants in an entire tract of land, leaving the undivided interest of other cotenants unaffected. Brooks v. Austin, 95 N.C. 474 (1886); Patillo v. Lytle, 158 N.C. 92, 73 S.E. 200 (1911).

Section Inapplicable Where Parties Agree to Partition of Entire Tract. — Where all parties agree that the entire tract can be partitioned without injury to any of the parties in interest, the provisions of this section and G.S. 46-22 are not appliable to the proceeding. Horne v. Horne, 261 N.C. 688, 136 S.E.2d 87 (1964).

§ 46-17. Report of commissioners; contents; filing.

The commissioners, within a reasonable time, not exceeding 60 days after the notification of their appointment, shall make a full and ample report of their proceedings, under the hands of any two of them, specifying therein the manner of executing their trust and describing particularly the land or parcels of land divided, and the share allotted to each tenant in severalty, with the sum or sums charged on the more valuable dividends to be paid to those of inferior value. The report shall be filed in the office of the superior court clerk: Provided, that the clerk of the superior court may, in his discretion, for good cause shown, extend the time for the filing of the report of said commissioners for an additional period not exceeding 60 days. This proviso shall be applicable to proceedings now pending for the partition of real property. (1868-9, c. 122, s. 5; Code, s. 1896; Rev., s. 2494; C.S., s. 3228; 1949, c. 16.)

CASE NOTES

Alteration of Registered Report Not Authorized. — The report of commissioners in partition proceedings, dividing land, when filed, approved, confirmed, recorded and registered, becomes a muniment of title, and the commissioners, without the order and approval of the court, have no right to alter or change the same. Clinard v. Brummell, 130 N.C. 547, 41 S.E. 675 (1902).

Findings as to Value Not Reviewable. — The findings of commissioners on value are not subject to review in the appellate court. Fisher v. Toxaway Co., 171 N.C. 547, 88 S.E. 887 (1916).

Two commissioners can make the report, under the express terms of this section. Thompson v. Shemwell, 93 N.C. 222 (1885); Sharpe v. Sharpe, 210 N.C. 92, 185 S.E. 634 (1936).

The mere fact that the commissioners did not file their report within the statutory period of 60 days after notification did not vitiate the report or preclude confirmation. Thompson v. Thompson, 235 N.C. 416, 70 S.E.2d 495 (1952).

Commissioners Not Required to Hear Tenants in Common. — There is no statutory requirement that commissioners appointed to partition land shall hear and consider evidence offered by the tenants in common or their contentions prior to or at the time of making partition. Allen v. Allen, 263 N.C. 496, 139 S.E.2d 585 (1965).

Cited in Dunn v. Dunn, 37 N.C. App. 159, 245 S.E.2d 580 (1978).

§ 46-17.1. Dedication of streets.

Upon motion of any party or the commissioners appointed to make division, the clerk may authorize the commissioners to propose and report the dedication of such portions of the land as are necessary as a means of access to any share, or is otherwise advisable for public or private highways, streets or alleys, and such proposal shall be acted upon by the clerk as a part of the report and, if approved, shall constitute a dedication. No interest of a minor or other person under disability shall be affected thereby until such dedication is approved by a judge of the superior court. (1969, c. 45.)

CASE NOTES

Cited in Wright v. Town of Matthews, 177 N.C. App. 1, 627 S.E.2d 650, 2006 N.C. App. LEXIS 702 (2006).

§ 46-18. Map embodying survey to accompany report.

The commissioners are authorized to employ the county surveyor or, in his absence or if he be connected with the parties, some other surveyor, who shall make out a map of the premises showing the quantity, courses and distances of each share, which map shall accompany and form a part of the report of the commissioners. (1868-9, c. 122, s. 4; Code, s. 1895; Rev., s. 2493; C.S., s. 3229.)

CASE NOTES

Cited in Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962); Pearson v. McKenney, 5 N.C. App. 544, 169 S.E.2d 46 (1969).

§ 46-19. Confirmation and impeachment of report.

(a) If no exception to the report of the commissioners is filed within 10 days, the same shall be confirmed. Any party after confirmation may impeach the proceedings and decrees for mistake, fraud or collusion by petition in the cause: Provided, innocent purchasers for full value and without notice shall not be affected thereby.

(b) If an exception to the report of commissioners is filed, the clerk shall do one of the following:

(1) Confirm the report;
(2) Recommit the report for correction or further consideration;
(3) Vacate the report and direct a reappraisal by the same commissioners; or
(4) Vacate the report, discharge the commissioners, and appoint new commissioners to view the premises and make a partition of them.

(c) Appeal from the clerk to superior court of an order of confirmation of the report of commissioners is governed by G.S. 1-301.2 except that the judge may take only the actions specified in subsection (b) of this section and may not adjudge a partition of the land different from that made by the commissioners. (1868-9, c. 122, s. 5; Code, s. 1896; Rev., s. 2494; C.S., s. 3230; 1947, c. 484, s. 2; 1999-216, s. 11.)

CASE NOTES

"Mistake, Fraud or Collusion". — Since an opportunity for correcting ordinary error or irregularities is provided to a party by the filing of exceptions under this section and by appeal from the decree of confirmation in G.S. 1-272 [see now G.S. 1-301.1 et seq.], it should be clear that the legislature did not intend the word "mistake" in this section to apply to ordinary error and irregularities by the commissioner or the clerk; rather, the words "mistake, fraud or collusion" in this section, construed in pari materia, are applicable to substantial defects or omissions in the proceedings which probably would not be discovered in time to assert rights within the 10-day limit for filing exceptions to the report of the commissioners or to appeal from the confirmation order, and which would likely result in the denial of a substantial right if not corrected. Macon v. Edinger, 49 N.C. App. 624, 272 S.E.2d 411 (1980), rev'd on other grounds, 303 N.C. 374, 278 S.E.2d 256 (1981).

This section essentially governs two situations. First of all, in partition proceedings where there is no mistake, fraud, or collusion alleged, a party has 10 days from the filing of the commissioner's report to file an exception to the proposed partition. If no exception is filed, the report is confirmed. The second part of this section covers situations where a party is claiming that mistake, fraud, or collusion has occurred. In this instance, a party, even after confirmation, may impeach the proceedings. Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983), cert. denied, 310 N.C. 476, 312 S.E.2d 882 (1984).

Proceedings Interlocutory until Confirmation. — Until the decree of confirmation by the judge, the proceedings for the partition of lands are not final, but interlocutory, and rest in his discretion. Tayloe v. Carrow, 156 N.C. 6, 72 S.E. 76 (1911).

All orders of the clerk or judge are interlocutory except a final judgment or decree confirming the report of the commissioners. Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962).

Time for Filing Exceptions. — Exceptions to the report of the commissioners appointed to make partition of land must be filed within 20 (now 10) days after the report is filed. Floyd v. Rock, 128 N.C. 10, 38 S.E. 33 (1901).

Filing of Exceptions Not Untimely. — Where, within the required time after filing the report, defendant notified the clerk that he desired to file exceptions, whereupon the clerk made a memorandum that defendant had objected to the report, and later amended exceptions, setting out various grounds why the report should not be confirmed, were filed with the clerk without objection, it was held error to confirm the report on the ground that no exception had been filed within the statutory time. McDevitt v. McDevitt, 150 N.C. 644, 64 S.E. 761 (1909).

Effect of Failure to Object. — Where no exceptions were filed and no objections made, plaintiff was entitled to a decree of confirmation as a matter of law. Roberts v. Roberts, 143 N.C. 309, 55 S.E. 721 (1906); Macon v. Edinger, 49 N.C. App. 624, 272 S.E.2d 411 (1980), rev'd on other grounds, 303 N.C. 374, 278 S.E.2d 256 (1981).

Determination of Whether to Confirm. — If exceptions are filed in apt time, whether the report of the commissioners should be confirmed is for determination by the clerk and, upon appeal from his order, by the judge. Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962).

Clerk Has Jurisdiction Initially to Pass upon Exceptions. — Clearly, the clerk has authority and jurisdiction, initially, to pass upon exceptions to the report of the commissioners in a special proceeding for partition. Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962).

Powers of Clerk in Hearing on Exceptions. — In a hearing on exceptions to the report of the commissioners, the clerk may (1) recommit the report for correction or further consideration, or (2) vacate the report and direct a reappraisal by the same commissioners, or (3) vacate the report, discharge the commissioners, and appoint new commissioners to view the premises and make partition thereof. Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962).

The clerk is without authority to alter the report that is filed, either by changing the division lines or by enlarging or decreasing the owelty charge assessed by the commissioners. Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962).

Right of Clerk to Set Aside Former Order. — Where it appeared of record that the clerk of the court in proceedings to partition lands had rendered a judgment in the plaintiff's favor, and had set it aside on the defendant's motion made before him 17 months thereafter upon allegation of fraud in its procurement, and that the plaintiff had fraudulently prevented the defendant from appearing and defending, to which the plaintiff did not except, the plaintiff's motion in the superior court, in the cause transferred, for judgment in his favor upon the whole record, could not be allowed. The clerk was within the provisions of this section in setting aside his former order in plaintiff's favor, on defendant's motion, at the time it was made before him. Turner v. Davis, 163 N.C. 38, 79 S.E. 257 (1913).

Judge May Confirm Report or Vacate It and Enter Appropriate Interlocutory Orders. — In a de novo hearing before the judge, where the question is whether the report of the commissioners should be confirmed, the judge may confirm or he may vacate and enter appropriate interlocutory orders. Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962).

Where the clerk had confirmed the report of the commissioners, the question before the judge was whether the division made by the commissioners was fair and equitable. If so, a final judgment or decree confirming the report of the commissioners should have been entered. If not, the report of the commissioners should have been set aside; and, if set aside, the court by interlocutory order, should have ordered a new division by commissioners or, if the facts justified, a partition sale. Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962).

But May Not Order Partition Different from That Made by Commissioners. — The judge may not, based on his findings as to what would constitute an equitable division, adjudge a partition of the land different from that made by the commissioners. Allen v. Allen, 258 N.C. 305, 128 S.E.2d 385 (1962).

Effect of Findings of Judge. — Where an actual partition of lands has been ordered, whether the division made by the commissioners was fair and equitable or unequal in value is a question of fact to be determined by the judge of the superior court upon an appeal from a judgment of the clerk affirming the report of commissioners, and the findings of the judge are conclusive and binding if there is any evidence in the record to support them. West v. West, 257 N.C. 760, 127 S.E.2d 531 (1962).

Petitioners Not Required to State Specific Grounds. — Where petitioners excepted to the commissioners' report under this section, the trial court did not have the authority to dismiss the appeal due to petitioners' failure to state specific grounds why the commissioners' report should not be confirmed. Jenkins v. Fox, 98 N.C. App. 224, 390 S.E.2d 683 (1990).

Appeals May Be to Different Judges. — Where appeals from the clerk in proceedings for partition are made successively to different judges, a judge before whom a later appeal comes may set aside or modify a former interlocutory order, it not being required for that purpose that the same judge should have passed upon the former appeals. Tayloe v. Carrow, 156 N.C. 6, 72 S.E. 76 (1911).

Jurisdiction of Judge in Chambers. — A judge in chambers has jurisdiction of appeals from the report of commissioners appointed in special proceedings to partition land. McMillan v. McMillan, 123 N.C. 577, 31 S.E. 729 (1898).

Confirmation Is Error Where Commissioners Fail to Carry Out Orders. — Where commissioners fail to carry out the orders of the court in some material respect, it is error to confirm their report, especially if it appears that a party or parties have probably suffered injury by reason of such failure. Allen v. Allen, 263 N.C. 496, 139 S.E.2d 585 (1965).

Resale After Confirmation. — After confirmation a resale may be ordered for sufficient cause shown; but this should be upon petition or notice to the purchaser who has acquired equitable rights under the first confirmation. Ex parte White, 82 N.C. 377 (1880).

Statute of Limitations. — Where the commissioners to divide lands held by tenants in common award owelty to one of them to equalize his share with the other, the 10-year statute of limitations began to run from the confirmation of the report by the clerk, approved by the judge, and the fact that the clerk had not docketed the judgment in the 7 years after confirmation, as between the parties having at least constructive notice of the proceedings, did not alone repel the bar of the statute. Cochran v. Colson, 192 N.C. 663, 135 S.E. 794 (1926).

Applied in Hewett v. Hewett, 38 N.C. App. 37, 247 S.E.2d 23 (1978).

Cited in Macon v. Edinger, 303 N.C. 274, 278 S.E.2d 256 (1981); Estate of Heffner, 61 N.C. App. 646, 301 S.E.2d 720 (1983).

§ 46-20. Report and confirmation enrolled and registered; effect; probate.

Such report, when confirmed, together with the decree of confirmation, shall be enrolled and certified to the register of deeds and registered in the office of the county where such real estate is situated, and shall be binding among and between the claimants, their heirs and assigns. It shall not be necessary for the clerk of court to probate the certified papers required to be registered by this section. (1868-9, c. 122, s. 6; Code, s. 1897; Rev., s. 2495; C.S., s. 3231; 1965, c. 804.)

CASE NOTES

Effect of Adjudication Before Clerk. — In proceedings to partition lands among tenants in common, the adjudication before the clerk operates as an estoppel as to them and those in privity with them, when no appeal has been taken. Southern State Bank v. Leverette, 187 N.C. 743, 123 S.E. 68 (1924).

Matters not in issue and claims for different rights are not concluded by partition proceedings before the clerk. Gillans v. Edmonson, 153 N.C. 602, 69 S.E. 9 (1910).

Color of Title. — The record of partition proceedings constitutes color of title. Lindsay v. Beaman, 128 N.C. 189, 38 S.E. 811 (1901).

Admissibility of Record in Evidence. — The record of the proceedings is admissible in evidence even if it is not recorded as required by this section. Lindsay v. Beaman, 128 N.C. 189, 38 S.E. 811 (1901).

Cited in Cochran v. Colson, 192 N.C. 663, 135 S.E. 794 (1926).

§ 46-21. Clerk to docket owelty charges; no release of land and no lien.

In case owelty of partition is charged in favor of certain parts of said land and against certain other parts, the clerk shall enter on the judgment docket the said owelty charges in like manner as judgments are entered on said docket, persons to whom parts are allotted in favor of which owelty is charged being marked plaintiffs on the judgment docket, and persons to whom parts are allotted against which owelty is charged being marked defendants on said docket; said entry on said docket shall contain the title of the special proceeding in which the land was partitioned, and shall refer to the book and page in which the said special proceeding is recorded; when said owelty charges are paid said entry upon the judgment docket shall be marked satisfied in like manner as judgments are cancelled and marked satisfied; and the clerk shall be entitled to the same fees for entering such judgment of owelty as he is entitled to for docketing other judgments: Provided, that the docketing of said owelty charges as hereinbefore set out shall not have the effect of releasing the land from the owelty charged in said special proceeding: Provided, any judgment docketed under this section shall not be a lien on any property whatever, except that upon which said owelty is made a specific charge. (1911, c. 9, s. 1; C.S., s. 3232.)

CASE NOTES

Effect of Failure to Docket. — Failure of the clerk to docket the owelty of partition upon his judgment docket within 7 years after confirmation of the report did not affect the right of plaintiff to enforce payment of the owelty by execution. Cochran v. Colson, 192 N.C. 663, 135 S.E. 794 (1926).

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

(a) The court shall order a sale of the property described in the petition, or of any part, only if it finds, by a preponderance of the evidence, that an actual partition of the lands cannot be made without substantial injury to any of the interested parties.

(b) "Substantial injury" means the fair market value of each share in an in-kind partition would be materially less than the share of each cotenant in the money equivalent that would be obtained from the sale of the whole, and if an in-kind division would result in material impairment of the cotenant's rights.

(c) The court shall specifically find the facts supporting an order of sale of the property.

(d) The party seeking a sale of the property shall have the burden of proving substantial injury under the provisions of this section. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3233; 1985, c. 626, s. 1.)

Cross References. — As to power of court to enter judgment for money due on judicial sales, see G.S. 1-243.

Legal Periodicals. — For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Section Is Inapplicable Where Parties Agree to Partition. — Where all parties agree that the entire tract can be partitioned without injury to any of the parties in interest, the provisions of G.S. 46-16 and this section are not applicable to the proceeding. Horne v. Horne, 261 N.C. 688, 136 S.E.2d 87 (1964).

Tenants in common are entitled to actual partition, if it can be made without injury to any of the co-owners. Tayloe v. Carrow, 156 N.C. 6, 72 S.E. 76 (1911); Horne v. Horne, 261 N.C. 688, 136 S.E.2d 87 (1964). See Gillespie v. Allison, 115 N.C. 542, 20 S.E. 627 (1894); Seawell v. Seawell, 233 N.C. 735, 65 S.E.2d 369 (1951); Batts v. Gaylord, 253 N.C. 181, 116 S.E.2d 424 (1960); Coats v. Williams, 261 N.C. 692, 136 S.E.2d 113 (1964).

Prima facie, a tenant in common is entitled, as a matter of right, to partition of the lands so that he may enjoy his share in severalty. If, however, an actual partition cannot be made without injury to some or all of the parties interested, he is equally entitled to a partition by sale. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

And Partition in Kind Is Favored over Sale. — A tenant in common is entitled, as a matter of right, to a partition in kind if it can be accomplished equitably. That is to say, partition in kind is favored over sale of the land for division. Phillips v. Phillips, 37 N.C. App. 388, 246 S.E.2d 41, cert. denied, 295 N.C. 647, 248 S.E.2d 252 (1978).

The burden is on the party seeking sale for partition to show the necessity therefor, and where sale for partition is decreed by the court without hearing evidence or finding facts to show the right to sell, the cause will be remanded. Wolfe v. Galloway, 211 N.C. 361, 190 S.E. 213 (1937); Seawell v. Seawell, 233 N.C. 735, 65 S.E.2d 369 (1951).

The burden is upon those alleging the necessity and desirability of a sale to establish the necessary requisites. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965).

The burden is on him who seeks a sale in lieu of actual partition to allege and prove the facts upon which the order of sale must rest. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

The burden is upon those opposing a partition in kind to establish the necessity of a sale. Phillips v. Phillips, 37 N.C. App. 388, 246 S.E.2d 41, cert. denied, 295 N.C. 647, 248 S.E.2d 252 (1978).

The party seeking a partition by sale must show substantial injustice or material impairment of his rights or position such that the value of his share of the real property would be materially less on actual partition than if the land were sold and the tenants were paid according to their respective shares. Whatley v. Whatley, 126 N.C. App. 193, 484 S.E.2d 420 (1997).

Fact that a tenant in common is entitled to a homestead against the judgment cannot prevent a sale for partition. Holley v. White, 172 N.C. 77, 89 S.E. 1061 (1916).

A sale will not be ordered merely for the convenience of one of the cotenants. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965).

Proof of Injury to Cotenant Must Be Shown. — The court has no authority to order a sale of land for partition without satisfactory proof of facts showing that an actual partition will cause injury to some or all of the cotenants. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965).

In the absence of any allegation, proof or finding that an actual partition cannot be had without injury to some or all of the parties, the court has no jurisdiction to order a sale. Seawell v. Seawell, 233 N.C. 735, 65 S.E.2d 369 (1951).

By "injury" to a cotenant is meant substantial injustice or material impairment of his rights or position, such that it would be unconscionable to require him to submit to actual partition. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965); Phillips v. Phillips, 37 N.C. App. 388, 246 S.E.2d 41, cert. denied, 295 N.C. 647, 248 S.E.2d 252 (1978).

Test Is Whether Value of Share Would Be Materially Less on Partition Than on Sale. — The test of whether a partition in kind would result in great prejudice to the cotenant owners is whether the value of the share of each in case of a partition would be materially less than the share of each in the money equivalent that could probably be obtained for the whole. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965); Phillips v. Phillips, 37 N.C. App. 388, 246 S.E.2d 41, cert. denied, 295 N.C. 647, 248 S.E.2d 252 (1978).

Determinative Circumstances. — On the question of partition or sale, the determinative circumstances usually relate to the land itself, and its location, physical condition, quantity, and the like. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965).

Impairment of Rights of Cotenants Held Insubstantial. — A $2,100.00 diminution in value, or $1,050.00 per cotenant, was not a substantial or material impairment of the rights of the cotenants in property worth $280,000.00, such that an actual partition would be unconscionable. Phillips v. Phillips, 37 N.C. App. 388, 246 S.E.2d 41, cert. denied, 295 N.C. 647, 248 S.E.2d 252 (1978).

Effect of Interests of Others. — The owner of an undivided one-half interest in land cannot be denied his rights to have a partition or sale in lieu of partition because of interests which defendants, other than his cotenants, claiming under him, have acquired in and to his undivided interest. Barber v. Barber, 195 N.C. 711, 143 S.E. 469 (1928).

Effect of Trust Created by Another Cotenant. — The right of a tenant in common to have the lands sold for a division, under this section, cannot be defeated by a trust creating an interest in the lands by another of the tenants. Barber v. Barber, 195 N.C. 711, 143 S.E. 469 (1928).

Life Estate Does Not Bar Sale of Reversion or Remainder. — The existence of a life estate is not, per se, a bar to a sale for partition of the remainder or reversion thereof, since, for the purpose of the partition, tenants in common are deemed seized and possessed as if no life estate existed. The actual possession of the life tenant, however, cannot be disturbed so long as it exists. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Whether land should be divided in kind or sold for partition is a question of fact for decision of the clerk of superior court, subject to review by the judge on appeal; it is not an issue of fact for a jury. Brown v. Boger, 263 N.C. 248, 139 S.E.2d 577 (1965).

The controverted fact arising on the pleadings as to the advisability of a sale for partition or an actual division was not an issue of fact but a question of fact for the decision of the clerk, subject to review by the judge on appeal. Ledbetter v. Piner, 120 N.C. 455, 27 S.E. 123 (1897); Vanderbilt v. Roberts, 162 N.C. 273, 78 S.E. 156 (1913).

Whether or not, in a proceeding instituted under G.S. 46-3 for partition of the land of tenants in common, there shall be an actual partition or sale for partition involves a question of fact to be determined by the court. In such proceedings, an allegation that the land is incapable of actual division without injury to some or all of the tenants in common raises a question of fact for the trial judge, and not an issue of fact for the jury, and the judge has the power to order a sale for partition. Barber v. Barber, 195 N.C. 711, 143 S.E.2d 469 (1928).

The court must find the facts required by this section in order to support a decree of sale for partition. Priddy & Co. v. Sanderford, 221 N.C. 422, 20 S.E.2d 341 (1942).

Failure of Court to Make Required Findings. — Where the trial court failed to make the findings of fact required by this section for partition by sale, that actual partition would result in one cotenant's share having less value than the share he would receive were the property partitioned by sale, and that actual partition would materially impair a cotenant's rights, since there was also no evidence in the record which would support such findings, the trial court's order of partition by sale was reversed. Partin v. Dalton Property Assocs., 112 N.C. App. 807, 436 S.E.2d 903 (1993).

Conclusive Effect of Findings of Trial Judge. — The findings of the trial judge with regard to whether there should be a partition in kind or sale are conclusive and binding if supported by competent evidence; the judge has discretion in making the determination, and his decision will not be disturbed absent some error of law. Phillips v. Phillips, 37 N.C. App. 388, 246 S.E.2d 41, cert. denied, 295 N.C. 647, 248 S.E.2d 252 (1978).

Holders of Judgment Liens Not Necessary Parties. — The holders of judgment liens on land sought to be partitioned or on undivided interests in such land are not necessary parties to the proceeding to partition the land by sale. Washburn v. Washburn, 234 N.C. 370, 67 S.E.2d 264 (1951).

The trustee and beneficiaries under a trust created in lands by a tenant in common are proper parties to the proceedings for a sale for division. Barber v. Barber, 195 N.C. 711, 143 S.E. 469 (1928).

Right of Wife of Cotenant to Resist Partition. — The wife of a tenant in common has an interest in his portion of the lands or the proceeds of the sale thereof, for division, contingent upon her surviving him, and is a proper party to the proceedings for partition, under this section or G.S. 46-3, with the right to be heard when the lands are sold for division, in order to protect her contingent interests in the proceeds of the sale. But she cannot resist the plaintiff's right to a partition nor challenge the power of the court to order sale for partition. Barber v. Barber, 195 N.C. 711, 143 S.E. 469 (1928).

A wife having a dower interest in property held by her husband as tenant in common could not defeat a sale for partition. Citizens Bank & Trust Co. v. Watkins, 215 N.C. 292, 1 S.E.2d 853 (1939).

Purchase of Land by Tenant in Common. — A tenant in common suing to partition the premises controlled by him as agent for the cotenants cannot, on being appointed commissioner to sell the premises, purchase them at the sale or procure anyone to do it for him, and he cannot speculate for his own benefit or do any act detrimental to the interest of his cotenants. Tuttle v. Tuttle, 146 N.C. 484, 59 S.E. 1008 (1907). See also, Credle v. Baugham, 152 N.C. 18, 67 S.E. 46 (1910).

Interest of Trust Beneficiaries Attaches to Proceeds. — The interest of the beneficiaries under a deed of trust upon the interest of a tenant in common in land will, upon its sale under this section, attach to the proceeds and be fully protected in the final judgment or order in the proceedings. Barber v. Barber, 195 N.C. 711, 143 S.E. 469 (1928).

Determination of Claims Before Distribution. — A defendant who asserted his claims before an order of distribution was made was entitled as a matter of right to have his claims determined before an order of distribution of the proceeds of the sale was entered. Roberts v. Barlowe, 260 N.C. 239, 132 S.E.2d 483 (1963).

Appellate Review. — Since a tenant in common has the right to actual partition unless it is made to appear by satisfactory proof that actual partition cannot be made without injury to some or all of the parties interested, an order for sale for partition affects a substantial right, and an appeal will lie to the Supreme Court from such order entered by the judge on appeal from the clerk. Hyman v. Edwards, 217 N.C. 342, 7 S.E.2d 700 (1940).

The action of a judge of the superior court in setting aside the report of partition commissioners advising actual partition and ordering a sale is not reviewable, unless an error of law was committed. Albemarle Steam Nav. Co. v. Wovell, 133 N.C. 93, 45 S.E. 466 (1903); Tayloe v. Carrow, 156 N.C. 6, 72 S.E. 76 (1911).

Applied in Talley v. Murchison, 212 N.C. 205, 193 S.E. 148 (1937); Clapp v. Clapp, 241 N.C. 281, 85 S.E.2d 153 (1954); Meachem v. Boyce, 35 N.C. App. 506, 241 S.E.2d 880 (1978); Harris v. Harris, 51 N.C. App. 103, 275 S.E.2d 273 (1981); Duke v. Hill, 68 N.C. App. 261, 314 S.E.2d 586 (1984).

Cited in Wachovia Bank & Trust Co. v. United States, 234 F. Supp. 897 (M.D.N.C. 1964); Shankle v. Shankle, 289 N.C. 473, 223 S.E.2d 380 (1976); Bridgers v. Bridgers, 56 N.C. App. 617, 289 S.E.2d 921 (1982); Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984).

§ 46-23. Remainder or reversion sold for partition; outstanding life estate.

The existence of a life estate in any land shall not be a bar to a sale for partition of the remainder or reversion thereof, and for the purposes of partition the tenants in common or joint tenants shall be deemed seized and possessed as if no life estate existed. But this shall not interfere with the possession of the life tenant during the existence of his estate. (1887, c. 214, s. 2; Rev., s. 2508; C.S., s. 3234.)

Cross References. — As to sale, lease or mortgage in case of remainders, see G.S. 41-11.

CASE NOTES

Rule Before Section Was Adopted. — Before the passage of this section, cotenants in remainder or reversion had no right to enforce a compulsory partition of land in which they had such estate. Gillespie v. Allison, 115 N.C. 542, 20 S.E. 627 (1894); Moore v. Baker, 222 N.C. 736, 24 S.E.2d 749 (1943).

Prior to passage of this section, partition was permitted between the holder of the life estate and the owner in fee. McEachern v. Gilchrist, 75 N.C. 196 (1876).

Rule under this Section. — The existence of a life estate is not, per se, a bar to a sale for partition of the remainder or reversion thereof, since, for the purpose of partition, tenants in common are deemed seized and possessed as if no life estate existed. The actual possession of the life tenant, however, cannot be disturbed so long as it exists. Kayann Properties, Inc. v. Cox, 268 N.C. 14, 149 S.E.2d 553 (1966).

Section Not Applicable to Life Estate with Power of Sale. — When lands are devised to wife for life, giving her control thereof with power to sell, pay debts, etc., this section does not apply, for if applied it would defeat the very purpose as to powers given the wife. Makely v. Makely, 175 N.C. 121, 95 S.E. 51 (1918).

A power of sale granted to a life tenant by implication creates an exception to the right of partition set out in this section. Keener v. Korn, 46 N.C. App. 214, 264 S.E.2d 829 (1980).

This Section Enlarges Vested Rights. — A statute giving to remaindermen the right to have partition of lands in remainder vested before the passage of such statute is remedial and, instead of impairing, enlarges vested rights. Gillespie v. Allison, 115 N.C. 542, 20 S.E. 627 (1894).

And Its Application Is Not Limited to Sales. — By the wording of this section, that is, "a sale for partition," followed by the words "purposes of partition," it is apparent that the legislature did not intend to limit the application of the section to sales, and it is to be construed to include actual partition by the remaindermen, as well as for a sale for division by them. Baggett v. Jackson, 160 N.C. 26, 76 S.E. 86 (1912).

The existence of a life estate, even though it be in favor of one of the tenants in common, does not preclude partition of the remainder among the tenants in common. Smith v. Smith, 248 N.C. 194, 102 S.E.2d 868 (1958).

Vested Remaindermen Are Entitled to Partition or Sale. — Since the enactment of this section, the owner of a fee or vested remainder in real estate as a joint tenant or tenant in common is entitled to a partition of the land or sale for partition of the remainder or reversion thereof. But such partition or sale of a vested remainder in real estate shall not interfere with the possession of the life tenant during the existence of his estate. Bunting v. Cobb, 234 N.C. 132, 66 S.E.2d 661 (1951).

Remainderman petitioner was entitled to partition as a matter of right, unless actual partition could not be made without injury to some or all of the parties interested. In that case, he would be entitled to sale or partition. Richardson v. Barnes, 238 N.C. 398, 77 S.E.2d 925 (1953).

But proceedings for partition cannot be maintained when plaintiff holds only a contingent interest in the lands, determinable on the death of the life tenant, who is still living at the time. Vinson v. Wise, 159 N.C. 653, 75 S.E. 732 (1912).

Possession Need Not Be Actual. — A tenant in common is entitled to a compulsory partition, and to enable said tenant to maintain a proceeding for such partition he must have an estate in possession, or the right of possession. The possession need not be actual. The actual possession may be in a life tenant. Moore v. Baker, 222 N.C. 736, 24 S.E.2d 749 (1943). See also, Priddy & Co. v. Sanderford, 221 N.C. 422, 20 S.E.2d 341 (1942).

All Parties Interested Must Unite. — A sale for partition will not be decreed when there are contingent remainders or other conditional interests therein unless all the persons who may be by any possibility interested unite in asking such a decree. Aydlett v. Pendleton, 111 N.C. 28, 16 S.E. 8 (1892); Pendleton v. Williams, 175 N.C. 248, 95 S.E. 500 (1918).

If contingent interests are to be affected by the partition, they must be represented. Overman v. Tate, 114 N.C. 571, 19 S.E. 706 (1894).

Applied in Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365 (1941); Davis v. Griffin, 249 N.C. 26, 105 S.E.2d 119 (1958); Miller v. McLean, 252 N.C. 171, 113 S.E.2d 359 (1960); Horne v. Horne, 261 N.C. 688, 136 S.E.2d 87 (1964).

§ 46-24. Life tenant as party; valuation of life estate.

In all proceedings for partition of land whereon there is a life estate, the life tenant may join in the proceeding and on a sale the interest on the value of the share of the life tenant shall be received and paid to such life tenant annually; or in lieu of such annual interest, the value of such share during the probable life of such life tenant shall be ascertained and paid out of the proceeds to such life tenant absolutely. (1887, c. 214, s. 3; Rev., s. 2509; C.S., s. 3235.)

Cross References. — For mortuary tables and tables applicable to annuities, see G.S. 8-46 and 8-47.

CASE NOTES

Life Estate May Not Be Sold Without Consent of Life Tenant. — While the life tenant during the existence of her estate may waive her rights and consent to the sale of her estate, under this section, this may not be done, against her will, in a partition proceeding. Priddy & Co. v. Sanderford, 221 N.C. 422, 20 S.E.2d 341 (1942).

Waiver of Rights by Life Tenants. — Under a will providing that the "home place shall remain a home for all the single members of the family as long as they shall live, if they choose to do so, and then be divided between the next of kin," single members of the family were entitled to partition of the home place among remaindermen as directed by will, where they showed the court that they no longer desired to retain it as a home, since the life tenants could waive the right if they desired to enjoy their share in severalty. Sides v. Sides, 178 N.C. 554, 101 S.E. 100 (1919).

Life Tenants May Not Maintain Partition Proceedings Against Remaindermen. — Life tenants are not tenants in common with remaindermen, and may not maintain partition proceedings against the tenants in common in the remainder. Richardson v. Barnes, 238 N.C. 398, 77 S.E.2d 925 (1953).

While under this section and G.S. 46-23 there is authority for a sale for partition of the reversion at the instance of the remaindermen, or by their joining the life tenants, or between tenants in common or joint tenants, there is no statute which authorizes the sale on the application of the life tenant as against the remaindermen. Ray v. Poole, 187 N.C. 749, 123 S.E. 5 (1924).

As to propriety of partition proceedings between life tenant of one-half interest and owner of other one-half interest, allotting life estate in severalty, see First-Citizens Bank & Trust Co. v. Carr, 279 N.C. 539, 184 S.E.2d 268 (1971).

Estate During Widowhood. — This section did not apply to an estate durante viduitate, as there was no practicable rule by which the present value of such an estate could be determined; hence, where land to which an estate durante viduitate attached was sold for partition and the proceeds were in custody of the court below, they could not be divided among the widow and the remaindermen, against the will of the remaindermen, but would remain real estate until partition could be made at the termination of the estate durante viduitate by the widow's remarriage or death. Gillespie v. Allison, 117 N.C. 512, 23 S.E. 438 (1895).

Applied in Davis v. Griffin, 249 N.C. 26, 105 S.E.2d 119 (1958); Wachovia Bank & Trust Co. v. United States, 234 F. Supp. 897 (M.D.N.C. 1964).

Cited in Pendleton v. Williams, 175 N.C. 248, 95 S.E. 500 (1918); Piland v. Piland, 24 N.C. App. 653, 211 S.E.2d 844 (1975); Piland v. Piland, 286 N.C. 723, 213 S.E.2d 723 (1975).

§ 46-25. Sale of standing timber on partition; valuation of life estate.

When two or more persons own, as tenants in common, joint tenants or copartners, a tract of land, either in possession, or in remainder or reversion, subject to a life estate, or where one or more persons own a remainder or reversionary interest in a tract of land, subject to a life estate, then in any such case in which there is standing timber upon any such land, a sale of said timber trees, separate from the land, may be had upon the petition of one or more of said owners, or the life tenant, for partition among the owners thereof, including the life tenant, upon such terms as the court may order, and under like proceedings as are now prescribed by law for the sale of land for partition: Provided, that when the land is subject to a life estate, the life tenant shall be made a party to the proceedings, and shall be entitled to receive his or her portion of the net proceeds of sales, to be ascertained under the mortality tables established by law: Provided further, that prior to a judgment allowing a life tenant to sell the timber there must be a finding that the cutting is in keeping with good husbandry and that no substantial injury will be done to the remainder interest. (1895, c. 187; Rev., s. 2510; C.S., s. 3236; 1949, c. 34; 1975, c. 476, s. 1; 1997-133, s. 3.)

Cross References. — As to mortality tables and present worth of annuities, see G.S. 8-46 and 8-47.

Editor's Note. — Session Laws 1975, c. 476, which added the second proviso at the end of the section, provides in s. 2 that the act shall apply only to property acquired by deed, inheritance or will after its effective date, Oct. 1, 1975.

Legal Periodicals. — For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

CASE NOTES

This section changes the common law and permits a sale of timber for profit, by a life tenant, with the remaindermen receiving their share of the proceeds. At common law the life tenant was not permitted to sell standing timber, nor to receive benefit from it except for ordinary purposes in using the land. Piland v. Piland, 24 N.C. App. 653, 211 S.E.2d 844, cert. denied, 286 N.C. 723, 213 S.E.2d 723 (1975); Bridgers v. Bridgers, 56 N.C. App. 617, 289 S.E.2d 921 (1982).

It gives the life tenant an advantage in timber that he does not enjoy in land. Life tenants may not maintain partition proceedings against tenants in common in the remainder. Piland v. Piland, 24 N.C. App. 653, 211 S.E.2d 844, cert. denied, 286 N.C. 723, 213 S.E.2d 723 (1975).

This Section Is Permissive. — The statute authorizing partition sale of standing timber is permissive rather than mandatory. Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528 (1948).

The use of the word "may" obviously makes this section permissive. Piland v. Piland, 24 N.C. App. 653, 211 S.E.2d 844, cert. denied, 286 N.C. 723, 213 S.E.2d 723 (1975).

Applicability. — This section is not limited in application to only those tracts of land in which interests are subject to a life estate. When this section speaks of tenants in common "either in possession, or in remainder or reversion, subject to a life estate," the phrase "subject to a life estate" modifies only the words "remainder" and "reversion." Tenants in common who presently possess a tract of land may also petition for a sale of timber. Bridgers v. Bridgers, 56 N.C. App. 617, 289 S.E.2d 921 (1982).

Cotenants Need Not Have Same Type of Interest. — This section does not require all cotenants to have the same type of interest in the land. A cotenant in remainder may petition for a sale of standing timber from land in which the other cotenant has a present possessory interest. Bridgers v. Bridgers, 56 N.C. App. 617, 289 S.E.2d 921 (1982).

Showing of Impossibility of Land Partition Is Not Necessary. — Tenants in remainder are not required to show under this section that an equitable partition of land tracts is not possible before the court may authorize a sale of the timber apart from the realty. Bridgers v. Bridgers, 56 N.C. App. 617, 289 S.E.2d 921 (1982).

Discretion of Court. — Under this section, the court has the power in its discretion to order a sale of timber upon the life tenant's petition. Piland v. Piland, 24 N.C. App. 653, 211

S.E.2d 844, cert. denied, 286 N.C. 723, 213 S.E.2d 723 (1975).

Prior to the 1975 amendment, this section did not require findings as to necessity and advisability of a sale. Piland v. Piland, 24 N.C. App. 653, 211 S.E.2d 844, cert. denied, 286 N.C. 723, 213 S.E.2d 723 (1975).

Provision in Judgment Requiring Actual Partition of Timber. — Where a tenant in common, without the knowledge or authorization of his cotenants, contracted to sell the timber on the entire tract, and thereafter he joined his cotenants in a timber deed to another person, in an action brought by the grantee in the deed against the vendee in the contract to sell, a provision in the judgment that if the vendee elected to purchase the timber covered by the contract, there should be actual partition of the timber between the vendee and the grantee, would be upheld. Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528 (1948).

Applied in Bridgers v. Bridgers, 62 N.C. App. 583, 303 S.E.2d 342 (1983).

§ 46-26. Sale of mineral interests on partition.

In case of the partition of mineral interests, in all instances where it is made to appear to the court that it would be for the best interests of the tenants in common, or joint tenants, of such interests to have the same sold, or if actual partition of the same cannot be had without injury to some or all of such tenants (in common), then it is lawful for and the duty of the court to order a sale of such mineral interests and a division of the proceeds as the interests of the parties may appear. (1905, c. 90, s. 2; Rev., s. 2507; C.S., s. 3237.)

Legal Periodicals. — For survey of 1982 law on property, see 61 N.C.L. Rev. 1171 (1983).

CASE NOTES

The mere conclusion of the court that the mineral interest is incapable of actual division, unsupported by allegation, proof, or finding, will not support a decree of sale for partition. Carolina Mineral Co. v. Young, 220 N.C. 287, 17 S.E.2d 119 (1941).

Cited in Bridgers v. Bridgers, 56 N.C. App. 617, 289 S.E.2d 921 (1982).

§ 46-27. Sale of land required for public use on cotenant's petition.

When the lands of joint tenants or tenants in common are required for public purposes, one or more of such tenants, or their guardian for them, may file a petition verified by oath, in the superior court of the county where the lands or any part of them lie, setting forth therein that the lands are required for public purposes, and that their interests would be promoted by a sale thereof. Whereupon the court, all proper parties being before it, and the facts alleged in the petition being ascertained to be true, shall order a sale of such lands, or so much thereof as may be necessary. The expenses, fees and costs of this proceeding shall be paid in the discretion of the court. Mediator fees and costs of mediation shall be assessed in accordance with G.S. 7A-38.3B. (1868-9, c. 122, s. 16; Code, s. 1907; Rev., s. 2518; C.S., s. 3238; 1949, c. 719, s. 2; 2005-67, s. 4.)

Editor's Note. — This section, as amended by Session Laws 2005-67, s. 4, effective May 26, 2005, is applicable to all matters pending before a clerk or superior court on, or filed with the clerk after, the date the Supreme Court adopts rules implementing Session Laws 2005-67.

§ 46-28. Sale procedure.

(a) The procedure for a partition sale shall be the same as is provided in Article 29A of Chapter 1 of the General Statutes.

(b) The commissioners shall certify to the court that at least 20 days prior to sale a copy of the notice of sale was sent by first class mail to the last known address of all petitioners and respondents who previously were served by personal delivery or by registered or certified mail. The commissioners shall also certify to the court that at least ten days prior to any resale pursuant to G.S. 46-28.1(e) a copy of the notice of resale was sent by first class mail to the last known address of all parties to the partition proceeding who have filed a written request with the court that they be given notice of any resale. An affidavit from the commissioners that copies of the notice of sale and resale were mailed to all parties entitled to notice in accordance with this section shall satisfy the certification requirement and shall also be deemed prima facie true. If after hearing it is proven that a party seeking to revoke the order of confirmation of a sale or subsequent resale was mailed notice as required by this section prior to the date of the sale or subsequent resale, then that party shall not prevail under the provisions of G.S. 46-28.1(a)(2)a. and b. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3239; 1949, c. 719, s. 2; 1985, c. 626, s. 2; 1987, c. 282, s. 7.)

CASE NOTES

Applied in Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983);

§ 46-28.1. Petition for revocation of confirmation order.

(a) Notwithstanding G.S. 46-28 or any other provision of law, an order confirming the partition sale of real property shall not become final and effective until 15 days after entered. At any time before the confirmation order becomes final and effective, any party to the partition proceeding or the purchaser may petition the court to revoke its order of confirmation and to order the withdrawal of the purchaser's offer to purchase the property upon the following grounds:

(1) In the case of a purchaser, a lien remains unsatisfied on the property to be conveyed.

(2) In the case of any party to the partition proceeding:

  a. Notice of the partition was not served on the petitioner for revocation as required by Rule 4 of the Rules of Civil Procedure; or

  b. Notice of the sale was not mailed to the petitioner for revocation as required by G.S. 46-28(b); or

  c. The amount bid or price offered is inadequate and inequitable and will result in irreparable damage to the owners of the real property.

In no event shall the confirmation order become final or effective during the pendency of a petition under this section. No upset bid shall be permitted after the entry of the confirmation order.

(b) The party petitioning for revocation shall deliver a copy of the petition to all parties required to be served under Rule 5 of G.S. 1A-1, and the officer or person designated to make such sale in the manner provided for service of process in Rule 4(j) of G.S. 1A-1. The court shall schedule a hearing on the petition within a reasonable time and shall cause a notice of the hearing to be served on the petitioner, the officer or person designated to make such a sale and all parties required to be served under Rule 5 of G.S. 1A-1.

(c) In the case of a petition brought under this section by a purchaser claiming the existence of an unsatisfied lien on the property to be conveyed, if the purchaser proves by a preponderance of the evidence that:

(1) A lien remains unsatisfied on the property to be conveyed; and
(2) The purchaser has not agreed in writing to assume the lien; and
(3) The lien will not be satisfied out of the proceeds of the sale; and
(4) The existence of the lien was not disclosed in the notice of sale of the property, the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

The order of the court in revoking an order of confirmation under this section may not be introduced in any other proceeding to establish or deny the existence of a lien.

(d) In the case of a petition brought pursuant to this section by a party to the partition proceeding, if the court finds by a preponderance of the evidence that petitioner has proven a case pursuant to a., b., or c. of subsection (a)(2), the court may revoke the order confirming the sale, order the withdrawal of the purchaser's offer, and order the return of any money or security to the purchaser tendered pursuant to the offer.

(e) If the court revokes its order of confirmation under this section, the court shall order a resale. The procedure for a resale is the same as is provided for an original public sale under Article 29A of Chapter 1 of the General Statutes. (1977, c. 833, s. 1; 1985, c. 626, ss. 3-7; 2001-271, s. 19.)

§ 46-28.2. When bidder may purchase.

After the order of confirmation becomes final and effective, the successful bidder may immediately purchase the property. (1977, c. 833, s. 3; 1985, c. 626, s. 8.)

§ 46-29: Repealed by Session Laws 1949, c. 719, s. 2.

§ 46-30. Deed to purchaser; effect of deed.

The deed of the officer or person designated to make such sale shall convey to the purchaser such title and estate in the property as the tenants in common, or joint tenants, and all other parties to the proceeding had therein. (1868-9, c. 122, ss. 13, 31; Code, ss. 1904, 1921; Rev., s. 2512; C.S., s. 3241; 1949, c. 719, s. 2.)

CASE NOTES

Subjection of Purchased Property to Liens. — The purchaser at a judicial sale takes the property subject to whatever liens and encumbrances exist thereon, and cannot have the proceeds of sale applied to discharge such liens. Jordan v. Faulkner, 168 N.C. 466, 84 S.E. 764 (1915).

Where judgment creditors of a tenant in common are not made parties to a partition proceeding, the purchaser buys subject to their liens. Holley v. White, 172 N.C. 77, 89 S.E. 1061 (1916). See also, Washburn v. Washburn, 234 N.C. 370, 67 S.E.2d 264 (1951).

OPINIONS OF ATTORNEY GENERAL

Power of Superior Court Clerk to Authorize Commissioners to Impose Restrictive Covenants. — Clerk of superior court may not authorize commissioners in proceeding to partition land among tenants in common to impose legally binding restrictive covenants when there are no restrictions prior to partition and some of the cotenants do not consent to the imposition of such covenants. See opinion of Attorney General to Honorable M.L. Huggins, 42 N.C.A.G. 1 (1972).

§ 46-31. Clerk not to appoint self, assistant or deputy to sell real property.

No clerk of the superior court shall appoint himself or his assistant or deputy to make sale of any property in any proceeding before him. (1868-9, c. 122, s. 15; Code, s. 1906; 1899, c. 161; Rev., s. 2513; C.S., s. 3242; 1949, c. 719, s. 2.)

CASE NOTES

For condemnation of the practice of clerks appointing themselves to make partition sales, prior to enactment of this section, see Evans v. Cullens, 122 N.C. 55, 28 S.E. 961 (1898).

§ 46-32: Repealed by Session Laws 1949, c. 719, s. 2.

§ 46-33. Shares in proceeds to cotenants secured.

At the time that the order of confirmation becomes final, the court shall secure to each tenant in common, or joint tenant, his ratable share in severalty of the proceeds of sale. (1868-9, c. 122, s. 31; Code, s. 1921; Rev., s. 2513; C.S., s. 3244; 1977, c. 833, s. 2.)

CASE NOTES

Application by Judgment Creditors for Share of Proceeds. — Since they are not affected by the partition sale, judgment creditors, who are not parties to the partition proceeding, have no right to apply to the court after final decree to have their debtor's share of the proceeds paid to them. Moreover, they cannot be permitted to intervene for such purpose after the officer or person making the partition sale has put an end to the proceeding by disposing of the proceeds of sale in conformity with the final decree. Washburn v. Washburn, 234 N.C. 370, 67 S.E.2d 264 (1951).

§ 46-34. Shares to persons unknown or not sui juris secured.

When a sale is made under this Chapter, and any party to the proceedings be an infant, non compos mentis, imprisoned, or beyond the limits of the State, or when the name of any tenant in common is not known, it is the duty of the court to decree the share of such party, in the proceeds of sale, to be so invested or settled that the same may be secured to such party or his real representative. (1868-9, c. 122, s. 17; Code, s. 1908; 1887, c. 284, s. 3; Rev., s. 2516; C.S., s. 3245.)

CASE NOTES

This section does not interfere with the power to free the title and make a valid conveyance of the same. Bynum v. Bynum, 179 N.C. 14, 101 S.E. 527 (1919).

And Title of Purchaser Without Notice Is Not Affected by Court's Failure to Invest. — A purchaser for full value, without notice, of lands at a sale for partition thereof by the heirs at law acquires a title which is not affected by the failure of the court to retain and invest funds sufficient to protect the rights of such unknown persons, served with summons by publication, who may afterwards appear and establish an interest in the lands. Lawrence v. Hardy, 151 N.C. 123, 65 S.E. 766 (1909).

Consent of Court Necessary to Agreement. — Parties cannot stipulate as to distribution of the proceeds of a judicial sale without the full knowledge and consent of the court, especially where there are infants in the case whose rights may be seriously prejudiced by such an agreement. Lyman v. Southern Coal Co., 183 N.C. 581, 112 S.E. 242 (1922).

Infant's Share of Proceeds Remains Re-

alty. — The proceeds of land, sold for partition, to which an infant is entitled, remain real estate until such infant comes of age and elects to take them as money. Bateman v. Latham, 56 N.C. 35 (1856).

Payment to Guardian. — A payment made by a purchaser of lands, under a decree for sale and partition which directed the proceeds to be paid over to the parties according to law, to the guardian of one of the tenants in common is proper and in pursuance of the statute. Howerton v. Sexton, 104 N.C. 75, 10 S.E. 148 (1889).

Cited in McCormick v. Patterson, 194 N.C. 216, 139 S.E. 225 (1927); Estate of Nixon, 2 N.C. App. 422, 163 S.E.2d 274 (1968).

Article 3.

Partition of Lands in Two States.

§§ 46-35 through 46-41: Repealed by Session Laws 1943, c. 543.

Article 4.

Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.

When any persons entitled as tenants in common, or joint tenants, of personal property desire to have a division of the same, they, or either of them, may file a petition in the superior court for that purpose; and the court, if it think the petitioners entitled to relief, shall appoint three disinterested commissioners, who, being first duly sworn, shall proceed within 20 days after notice of their appointment to divide such property as nearly equally as possible among the tenants in common, or joint tenants. (1868-9, c. 122, s. 27; Code, s. 1917; Rev., s. 2504; C.S., s. 3253.)

Legal Periodicals. — For article on joint ownership of corporate securities in North Carolina, see 44 N.C.L. Rev. 290 (1966).

CASE NOTES

The appropriate procedure for a tenant in common seeking a division of personal property is to file a petition in the superior court for that purpose pursuant to this section. Parslow v. Parslow, 47 N.C. App. 84, 266 S.E.2d 746 (1980).

Exclusiveness of Remedy. — A petition for the partition of personal property is the only remedy one tenant in common has against another for withholding possession. Powell v. Hill, 64 N.C. 169 (1870); Grim v. Wicker, 80 N.C. 343 (1879).

One tenant in common or joint owner of personal property cannot maintain an action against the other tenant or owner to recover the exclusive possession of the property when the defendant forcibly took it from the plaintiff's possession; the plaintiff's only remedy is to have the property partitioned. Thompson v. Silverthorne, 142 N.C. 12, 54 S.E. 782 (1906).

Injunction or Receiver. — Where, pending a suit for partition of personal property, the defendant threatens the destruction or removal of the property, the court, on the plaintiff's application, may grant an injunction or appoint a receiver. Thompson v. Silverthorne, 142 N.C. 12, 54 S.E. 782 (1906).

Title to Personalty. — In petitions for the partition of personal property owned in common, where the defendant sets up title in severalty in himself, the title to the property may be tried on the petition. Edwards v. Bennett, 32 N.C. 361 (1849).

Venue. — A proceeding for the partition of personal property is the sole remedy of a tenant in common to obtain possession as against a cotenant, and therefore it is governed by the provisions of G.S. 1-76(4), making the venue the county in which the property sought to be partitioned is located, and not the county of the residence of the petitioner or respondent. Dubose v. Harpe, 239 N.C. 672, 80 S.E.2d 454 (1954).

Notes. — The owners of notes, as tenants in common, are entitled to partition. Central Bank & Trust Co. v. Board of Comm'rs, 195 N.C. 678, 143 S.E. 252 (1928).

Applied in Chapman v. Vande Bunte, 604 F. Supp. 714 (E.D.N.C. 1985).

Cited in Chadwick v. Blades, 210 N.C. 609, 188 S.E. 198 (1936).

§ 46-43. Report of commissioners.

The commissioners shall report their proceedings under the hands of any two of them, and shall file their report in the office of the clerk of the superior court within five days after the partition was made. (1868-9, c. 122, s. 28; Code, s. 1918; Rev., s. 2505; C.S., s. 3254.)

CASE NOTES

Cited in Clement v. Ireland, 129 N.C. 220, 39 S.E. 838 (1901).

§ 46-43.1. Confirmation; impeachment.

If no exception to the report of the commissioners making partition is filed within 10 days the report shall be confirmed. Any party, after confirmation, shall be allowed to impeach the proceeding for mistake, fraud or collusion, by petition in the cause, but innocent purchasers for full value and without notice shall not be affected thereby. (1953, c. 24.)

Legal Periodicals. — For brief comment on this section, see 31 N.C.L. Rev. 428 (1953).

§ 46-44. Sale of personal property on partition.

If a division of personal property owned by any persons as tenants in common, or joint tenants, cannot be had without injury to some of the parties interested, and a sale thereof is deemed necessary, the court shall order a sale to be made as provided in Article 29A of Chapter 1 of the General Statutes. (1868-9, c. 122, s. 29; Code, s. 1919; Rev., s. 2519; C.S., s. 3255; 1949, c. 719, s. 2.)

CASE NOTES

Cited in Chadwick v. Blades, 210 N.C. 609, 188 S.E. 198 (1936); Bullman v. Edney, 232 N.C. 465, 61 S.E.2d 338 (1950).

§§ 46-45, 46-46: Repealed by Session Laws 1949, c. 719, s. 2.

Chapter 47.

Probate and Registration.

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ARTICLE 1.

Probate.

§ 47-1. Officials of State authorized to take probate.

The execution of all deeds of conveyance, contracts to buy, sell or convey lands, mortgages, deeds of trust, instruments modifying or extending the terms of mortgages or deeds of trust, assignments, powers of attorney, covenants to stand seized to the use of another, leases for more than three years, releases, affidavits concerning land titles or family history, any instruments pertaining to real property, and any and all instruments and writings of whatever nature and kind which are required or allowed by law to be registered in the office of the register of deeds or which may hereafter be required or allowed by law to be so registered, may be proved or acknowledged before any one of the following officials of this State: The justices, judges, magistrates, clerks, assistant clerks, and deputy clerks of the General Court of Justice, and notaries public. (Code, s. 1246; 1895, c. 161, ss. 1, 3; 1897, c. 87; 1899, c. 235; Rev., s. 989; C.S., s. 3293; 1951, c. 772; 1969, c. 44, s. 52; 1971, c. 1185, s. 9.)

Cross References. — As to probate where clerk is a party, see G.S. 47-7.

Legal Periodicals. — For article, "Toward Greater Marketability of Land Titles — Remedying the Defective Acknowledgment Syndrome," see 46 N.C.L. Rev. 56 (1967).

CASE NOTES

Taking Acknowledgment as Judicial Act. — Taking of an acknowledgment of the execution of a deed by a notary public is a judicial or quasi-judicial act by a public official for which he may not be held liable absent a showing that his act was corrupt. Nelson v. Comer, 21 N.C. App. 636, 205 S.E.2d 537 (1974).

A woman is qualified to act as a notary public in North Carolina. Preston v. Roberts, 183 N.C. 62, 110 S.E. 586 (1922).

Effect of Disqualification. — If the disqualification of either the probating or acknowledging officer appears upon the face of the record, the registration is a nullity as to subsequent purchasers and encumbrancers. Quinnerly v. Quinnerly, 114 N.C. 145, 19 S.E. 99 (1894).

When the incapacity of the acknowledging or probating officer is latent, i.e., does not appear upon the record, one who takes under the grantee in such instrument gets a good title, unless the party claiming the benefit of the defected acknowledgment or probate is cognizant of the fact. Richmond Guano Co. v. Walston, 187 N.C. 667, 122 S.E. 663 (1924); County Sav. Bank v. Tolbert, 192 N.C. 126, 133 S.E. 558 (1926).

Registration of improperly acknowledged or defectively probated deed imports no constructive notice and the deed will be treated as if unregistered. New Home Bldg. Supply Co. v. Nations, 259 N.C. 681, 131 S.E.2d 425 (1963).

A timber deed in regular form, having a valid assignment of the timber rights by the grantee in the deed endorsed on its back, was duly registered, and the endorsement was transcribed on the records with the deed. It was held that even though the endorsement was sufficient as a conveyance of the timber rights, the endorsement was not acknowledged, and therefore there was no registration of the endorsement so as to defeat the rights of the creditors of the grantee in the deed. New Home Bldg. Supply Co. v. Nations, 259 N.C. 681, 131 S.E.2d 425 (1963).

A contract to sell and convey timber, in order to be enforceable against creditors and purchasers for value, must be probated and registered as provided by this Chapter. Winston v. Williams & McKeithan Lumber Co., 227 N.C. 339, 42 S.E.2d 218 (1947).

Applied in Clark v. Butts, 240 N.C. 709, 83 S.E.2d 885 (1954); Baker v. Murphrey, 254 N.C. 506, 119 S.E.2d 398 (1961).

Cited in McClure v. Crow, 196 N.C. 657, 146 S.E. 713 (1929); Beck v. Voncannon, 237 N.C. 707, 75 S.E.2d 895 (1953); Phillips v. Gilbert, 248 N.C. 183, 102 S.E.2d 771 (1958); Baker v. Murphrey, 250 N.C. 346, 108 S.E.2d 644 (1959).

§ 47-2. Officials of the United States, foreign countries, and sister states.

The execution of all such instruments and writings as are permitted or required by law to be registered may be proved or acknowledged before any one of the following officials of the United States, of the District of Columbia, of the several states and territories of the United States, of countries under the dominion of the United States and of foreign countries: Any judge of a court of record, any clerk of a court of record, any notary public, any commissioner of deeds, any commissioner of oaths, any mayor or chief magistrate of an incorporated town or city, any ambassador, minister, consul, vice-consul, consul general, vice-consul general, associate consul, or any other person authorized by federal law to acknowledge documents as consular officers, or commercial agent of the United States, any justice of the peace of any state or territory of the United States, any officer of the army or air force of the United States or United States marine corps having the rank of warrant officer or higher, any officer of the United States navy or coast guard having the rank of warrant officer, or higher, or any officer of the United States merchant marine having the rank of warrant officer, or higher. No official seal shall be required of said military, naval or merchant marine official, but he shall sign his name, designate his rank, and give the name of his ship or military organization and the date, and for the purpose of certifying said acknowledgment, he shall use a form in substance as follows:

On this the ______ day of ______, ______, before me ______, the undersigned officer, personally appeared ______________, known to me (or satisfactorily proven) to be accompanying or serving in or with the armed forces of the United States (or to be the spouse of a person accompanying or serving in or with the armed forces of the United States) and to be the person whose name is subscribed to the within instruments and acknowledged that ______ he ______ executed the same for the purposes therein contained. And the undersigned does further certify that he is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States.

____
Signature of Officer

____
Rank of Officer and command to which attached.

If the proof or acknowledgment of the execution of an instrument is had before a justice of the peace of any state of the United States other than this State or of any territory of the United States, the certificate of such justice of the peace shall be accompanied by a certificate of the clerk of some court of record of the county in which such justice of the peace resides, which certificate of the clerk shall be under his hand and official seal, to the effect that such justice of the peace was at the time the certificate of such justice bears date an acting justice of the peace of such county and state or territory and that the genuine signature of such justice of the peace is set to such certificate. (1899, c. 235, s. 5; 1905, c. 451; Rev., s. 990; 1913, c. 39, s. 1; Ex. Sess. 1913, c. 72, s. 1; C.S., s. 3294; 1943, c. 159, s. 1; c. 471, s. 1; 1945, c. 6, s. 1; 1955, c. 658, s. 1; 1957, c. 1084, s. 1; 1967, c. 949; 1999-456, s. 59; 2004-199, s. 16.)

Cross References. — As to power of notaries public, see G.S. 10A-9. As to form of certificate required upon acknowledgment by nonresident official, see G.S. 47-44 and 47-45.

Editor's Note. — Session Laws 1955, c. 658, s. 2, validated any instrument or writing required by law to be proved or acknowledged which, prior to April 21, 1955, was proved or acknowledged before an officer of the United States Army, United States Air Force or United States Marine Corps having the rank of warrant officer or higher, or any officer of the United States Navy, United States Coast Guard, or United States Merchant Marine, having the rank of warrant officer or higher.

Session Laws 1957, c. 1084, s. 2, validated any instrument or writing required by law to be proved or acknowledged which, prior to June 5, 1957, was proved or acknowledged before an officer of the Air Force of the United States.

Legal Periodicals. — For comment on the 1943 amendments, see 21 N.C.L. Rev. 323 (1943).

CASE NOTES

Compliance Essential. — This section, prescribing how deeds may be proved and acknowledgments taken in other states as well as in foreign countries, must be followed, or they and the registration thereon will be declared void. New Hanover Shingle Mills v. Roper Lumber Co., 171 N.C. 410, 88 S.E. 633 (1916).

Commissioner of Deeds of Another State. — Prior to the 1913 amendment, a probate before a commissioner of deeds of another state was held ineffectual in this State. Wood v. Lewey, 153 N.C. 401, 69 S.E. 268 (1910); New Hanover Shingle Mills v. Roper Lumber Co., 171 N.C. 410, 88 S.E. 633 (1916).

Notary Public of Another State — Proof in That State. — A deed regularly proved before a notary public in South Carolina by authority of this section is effectual to pass title as against creditors. County Sav. Bank v. Tolbert, 192 N.C. 126, 133 S.E. 558 (1926).

Same — Proof in This State. — The probate of an instrument taken in this State by a notary public of another state is defective. County Sav. Bank v. Tolbert, 192 N.C. 126, 133 S.E. 558 (1926).

Rights of Purchaser Where Record Is Clear. — While a probate of a mortgage taken in this State by a notary public of another state is defective, the purchaser at the mortgage sale will acquire the title by his deed as against a subsequent judgment creditor, when the probate appears of record, in the office of the register of deeds in the county wherein the land is situate here, to have been regularly taken in such other state, and there is no evidence that such purchaser had knowledge of the defect at or before the time he acquired his deed. County Sav. Bank v. Tolbert, 192 N.C. 126, 133 S.E. 558 (1926).

Assumption that Notary Was Rightfully Appointed. — Where it appears from the probate of a deed that it was probated before a woman notary public in another state, it would be assumed that the notary was rightfully appointed and her act would be recognized as valid here. Nicholson v. Eureka Lumber Co., 160 N.C. 33, 75 S.E. 730 (1912).

Cited in DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980).

§ 47-2.1. Validation of instruments proved before officers of certain ranks.

Any instrument or writing, required by law to be proved or acknowledged before an officer, which prior to the ratification of this section was proved or acknowledged before an officer of the United States army or United States marine corps having the rank of second lieutenant or higher, or any officer of the United States navy, United States coast guard, or United States merchant marine, having the rank of ensign or higher, is hereby validated and declared sufficient for all purposes. (1945, c. 6, s. 2.)

§ 47-2.2. Notary public of sister state; lack of seal or stamp or expiration date of commission.

If the proof or acknowledgment of any instrument is had before a notary public of any state other than North Carolina and the instrument does not show the seal or stamp of the notary public and the expiration date of the commission of the notary public, the certificate of proof or acknowledgment made by such notary public shall be accompanied by the certificate of the county official before whom the notary qualifies for office, stating that such notary public was at the time his certificate bears date an acting notary public of such state, and that such notary's genuine signature is set to his certificate. The certificate of the official herein provided for shall be under his hand and official seal. (1973, c. 1016.)

§ **47-3:** Repealed by Session Laws 1987, c. 620, s. 3.

§ **47-4:** Repealed by Session Laws 1971, c. 1185, s. 10.

§ 47-5. When seal of officer necessary to probate.

When proof or acknowledgment of the execution of any instrument by any maker of such instrument, whether a person or corporation, is had before any official authorized by law to take such proof and acknowledgment, and such official has an official seal, he shall set his official seal to his certificate. If the official before whom the instrument is proved or acknowledged has no official seal he shall certify under his hand, and his private seal shall not be essential. When the instrument is proved or acknowledged before the register of deeds of the county in which the instrument is to be registered, the official seal shall not be necessary. (1899, c. 235, s. 8; Rev., s. 993; C.S., s. 3297; 1969, c. 664, s. 3; 1977, c. 375, s. 12.)

Cross References. — As to attestation of official acts of notaries public, see G.S. 10A-9(b). As to validation of certain acknowledgments of deeds, etc., before a notary public where seal was omitted, see G.S. 47-52, 47-53.1 and 47-102. As to validation of certain acknowledgments before officers with seal where seal does not appear of record, see G.S. 47-53.

CASE NOTES

Name of Notary on Notarial Seal. — The statute does not require that the notary's name or any name should be used on the notarial seal, though customarily the name of the notary does appear thereon. The seal appended by the notary to his certificate is presumably his, in the absence of evidence to the contrary. This is not rebutted by the mere fact that the notary signs his name "Geo. Theo. Sommer" and the seal has on it the name of "Theo. Sommer," when the fact of the execution of the deed is adjudged to have been proved by such seal and certificate of the notary. Deans v. Pate, 114 N.C. 194, 19 S.E. 146 (1894).

Effect of Omission of Seal. — The failure of a justice of the peace to attach his seal to a certificate of the proof of execution of a deed and privy examination of the wife did not invalidate his action, otherwise regular. Lineberger v. Tidwell, 104 N.C. 506, 10 S.E. 758 (1889).

Presumption as to Seal. — When a copy of the certificate of the commissioner of affidavits concludes, "Given under my hand and seal," the presumption is that the seal was affixed to the original, though not appearing in the copy. Johnson v. Eversole Lumber Co., 147 N.C. 249, 60 S.E. 1129 (1908).

The certificate of probate to a deed need not have a seal if not required by statute at the date of the execution. Westfelt v. Adams, 131 N.C. 379, 42 S.E. 823 (1902).

§ 47-6. Officials may act although land or maker's residence elsewhere.

The execution of all instruments required or permitted by law to be registered may be proved or acknowledged before any of the officials authorized by law to take probates, regardless of the county in this State in which the subject matter of the instrument may be situated and regardless of the domicile, residence or citizenship of the person who executes such instrument, or of the domicile, residence or citizenship of the person to whom or for whose benefit such instrument may be made. (1899, c. 235, s. 13; Rev., s. 994; C.S., s. 3298.)

§ 47-7: Repealed by Session Laws 1987, c. 620, s. 3.

§ 47-8: Repealed by Session Laws 1991, c. 543, s. 1.

§ 47-8.1. Certain documents verified by attorneys validated.

Final judgments otherwise proper, entered in actions or proceedings in which the complaints or any other documents were verified in violation of G.S. 47-8 prior to its repeal shall not be void or voidable. (1991, c. 543, s. 2.)

Editor's Note. — Section 47-8 referred to in this section, was repealed by Session Laws 1991, c. 543, s. 1, effective July 4, 1991.

§ 47-9. Probates before stockholders in building and loan associations.

No acknowledgment or proof of execution of any mortgage or deed of trust executed to secure the payment of any indebtedness to any building and loan association shall hereafter be held invalid by reason of the fact that the officer taking such acknowledgment or proof is a stockholder in said building and loan association. This section does not authorize any officer or director of a building and loan association to take acknowledgments or proofs. The provisions of this section shall apply to federal savings and loan associations having their principal offices in this State. Acknowledgments and proofs of execution, including private examinations of any married woman taken before March 20, 1939, by an officer who is or was a stockholder in any federal savings and loan association, are hereby validated. (1913, c. 110, ss. 1, 3; C.S., s. 3301; 1939, c. 136; 1977, c. 375, s. 12.)

§ 47-10. Probate before stockholders or directors in banking corporations.

No acknowledgment or proof of execution, including privy examination of married women, of any mortgage, or deed of trust executed to secure the payment of any indebtedness to any banking corporation, taken prior to the first day of January, 1929, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination, was a stockholder or director in such banking corporation. (1929, c. 302, s. 1.)

CASE NOTES

Acknowledgment Before Bank Official. — Where a mortgage is executed on the equity in lands in order to secure endorsers on a note against loss, and the note is discounted at a bank, the contract to secure the endorsers against loss is a collateral agreement between the makers and endorsers to which the bank is not a party, and the acknowledgment to the mortgage taken by an official of the bank is valid. Watkins v. Simonds, 202 N.C. 746, 164 S.E. 363 (1932).

§ 47-11. Subpoenas to maker and subscribing witnesses.

The grantee or other party to an instrument required or allowed by law to be registered may at his own expense obtain from the clerk of the superior court of the county in which the instrument is required to be registered a subpoena for any or all of the makers of or subscribing witnesses to such instrument, commanding such maker or subscribing witness to appear before such clerk at his office at a certain time to give evidence concerning the execution of the instrument. The subpoena shall be directed to the sheriff of the county in which the person upon whom it is to be served resides. If any person refuses to obey such subpoena he is liable to a fine of forty dollars ($40.00) or to be attached for contempt by the clerk, upon its being made to appear to the satisfaction of the clerk that such disobedience was intentional, under the same rules of law as are prescribed in the cases of other defaulting witnesses. (Code, s. 1268; 1897, c. 28; 1899, c. 235, s. 16; Rev., s. 996; C.S., s. 3302.)

§ 47-12. Proof of attested instrument by subscribing witness.

Except as provided by G.S. 47-12.2, the execution of any instrument required or permitted by law to be registered, which has been witnessed by one or more subscribing witnesses, may be proved for registration before any official authorized by law to take proof of such an instrument, by a statement under oath of any such subscribing witness that the maker either signed the instrument in his presence or acknowledged to him the execution thereof. Nothing in this section in anywise affects any of the requirements set out in G.S. 52-10 or 52-10.1. (1899, c. 235, s. 12; Rev., s. 997; C.S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; 1951, c. 379, s. 1; 1953, c. 1078, s. 1; 1977, c. 375, s. 12.)

Legal Periodicals. — As to early amendatory acts, see 15 N.C.L. Rev. 337 (1937) and 25 N.C.L. Rev. 406 (1947).

For brief comment on the 1951 amendment, see 29 N.C.L. Rev. 411 (1951).

CASE NOTES

Registration of improperly acknowledged or defectively probated deed imports no constructive notice, and the deed will be treated as if unregistered. New Home Bldg. Supply Co. v. Nations, 259 N.C. 681, 131 S.E.2d 425 (1963).

Applied in Clark v. Butts, 240 N.C. 709, 83 S.E.2d 885 (1954); Nelson v. Comer, 21 N.C. App. 636, 205 S.E.2d 537 (1974).

§ 47-12.1. Proof of attested instrument by proof of handwriting.

(a) If all subscribing witnesses have died or have left the State or have become of unsound mind or otherwise incompetent or unavailable, the execution of such instrument, except as provided by G.S. 47-12.2, may be proved for registration, before any official authorized by law to take proof of such an instrument, by a statement under oath that the affiant knows the handwriting of the maker and that the purported signature of the maker is in the handwriting of the maker, or by a statement under oath that the affiant knows the handwriting of a particular subscribing witness and that the purported signature of such subscribing witness is in the handwriting of such subscribing witness.

(b) Nothing in this section in anywise affects any of the requirements set out in G.S. 52-10 or 52-10.1. (1899, c. 235, s. 12; Rev., s. 997; C.S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; 1951, c. 379, s. 1; 1977, c. 375, s. 12.)

§ 47-12.2. Subscribing witness incompetent when grantee or beneficiary.

The execution of an instrument may not be proved for registration by a subscribing witness who is the grantee or beneficiary therein nor by proof of his signature as such subscribing witness. Nothing in this section invalidates the registration of any instrument registered prior to April 9, 1935. (1899, c. 235, s. 12; Rev., s. 997; C.S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; 1951, c. 379, s. 1.)

§ 47-13. Proof of unattested writing.

If an instrument required or permitted by law to be registered has no subscribing witness, the execution of the same may be proven before any official authorized to take the proof and acknowledgment of such instrument by proof of the handwriting of the maker and this shall likewise apply to proof of execution of instruments by married persons. (1899, c. 235, s. 11; Rev., s. 998; C.S., s. 3304; 1945, c. 73, s. 12; 1977, c. 375, s. 12.)

CASE NOTES

Admission to Probate by Proof of Handwriting. — A deed having no subscribing witness may be admitted to probate and registration upon proof of the handwriting of the maker, or, if the subscribing witness is dead, upon proof of his handwriting. Black v. Justice, 86 N.C. 504 (1882).

Proof of Writing of Nonresident by Resident Party. — Where the parties to an instrument requiring registration are nonresidents, except one, the instrument may be probated by proving the handwriting of the nonresident by the resident party. LeRoy v. Jacobosky, 136 N.C. 443, 48 S.E. 796 (1904).

Registration of improperly acknowledged or defectively probated deed imports no constructive notice and the deed will be treated as if unregistered. New Home Bldg. Supply Co. v. Nations, 259 N.C. 681, 131 S.E.2d 425 (1963).

§ 47-13.1. Certificate of officer taking proof of instrument.

The person taking proof of an instrument pursuant to G.S. 47-12, 47-12.1 or 47-13 shall execute a certificate on or attached to the instrument being proved, certifying to the fact of proof substantially as provided in the certificate forms set out in G.S. 47-43.2, 47-43.3 and 47-43.4, and such certificate shall be prima facie evidence of the facts therein certified. (1951, c. 379, s. 2; 1953, c. 1078, s. 2.)

§ 47-14. Register of deeds to verify the presence of proof or acknowledgement and register instruments; order by judge; instruments to which register of deeds is a party.

(a) The register of deeds shall not accept for registration any instrument that requires proof or acknowledgement unless the execution of the instrument by one or more signers appears to have been proved or acknowledged before an officer with the apparent authority to take proofs or acknowledgements, and the said proof or acknowledgement includes the officer's signature, commission expiration date, and official seal, if required. The register of deeds shall accept an instrument for registration that does not require proof or acknowledgement if the instrument otherwise satisfies the requirements of G.S. 161-14. Any document previously recorded or any certified copy of any document previously recorded may be rerecorded, regardless of whether it has been changed or altered, or it is being rerecorded pursuant to G.S. 47-36.1. The register of deeds shall not be required to verify or make inquiry concerning (i) the legal sufficiency of any proof or acknowledgement, (ii) the authority of any officer who took a proof or acknowledgement, (iii) the legal sufficiency of any document presented for registration, or (iv) upon presentation of the original document for re-recording, whether the original document has been changed or altered.

(b) If a register of deeds denies registration pursuant to subsection (a), the person offering the instrument for registration may present the instrument to a judge, as provided in subsection (c), and the judge shall determine that if the instrument requires proof or acknowledgement and if the signature of one or more signers has been proved or acknowledged before an officer authorized to take proofs and acknowledgements, and if said proof or acknowledgement includes the officer's signature and commission expiration date and official seal, if required, the judge shall so adjudge, and shall order the instrument to be registered, together with the certificates, and the register of deeds shall register them accordingly.

(c) Application for an order for registration pursuant to subsection (b) of this section shall be made to any judge of the district court in the district including the county in which the instrument is to be registered.

(d) Registration of an instrument pursuant to this section is not effective with regard to parties who have not executed the instrument or whose execution thereof has not been duly proved or acknowledged.

(e) Any instrument required or permitted by law to be registered in which the register of deeds of the county of registration is a party may be proved or acknowledged before any magistrate or any notary public. Any such instrument presented for registration shall be examined by the clerk of superior court of the county of registration and if it appears that the execution and acknowledgment are in due form he shall so certify and the instrument shall then be recorded in the office of the register of deeds.

(f) The acceptance of a record for registration by the register of deeds shall give rise to a presumption that, at the time the record was presented for registration, a clear and legible image of the notary's official seal was affixed or embossed on the record near the notary's official signature. This presumption shall apply regardless of whether the image is legible or photographically reproduced in the records maintained by the register of deeds. A register of deeds may not refuse to accept a record for registration because a notarial seal does not satisfy the requirements of G.S. 10B-37. (1899, c. 235, s. 7; 1905, c. 414; Rev., s. 999; C.S., s. 3305; 1921, c. 91; 1939, c. 210, s. 2; 1967, c. 639, s. 1; 1969, c. 664, s. 2; 1973, c. 60; 2005-123, s. 2; 2006-59, s. 26; 2006-259, s. 52(a)-(b); 2006-264, s. 40(c).)

Cross References. — As to form of adjudication and order of registration, see G.S. 47-37.

Editor's Note. — Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

Effect of Amendments. — Session Laws 2006-59, s. 26, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, added subsection (f).

Session Laws 2006-264, s. 40(c), as amended by Session Laws 2006-259, s. 52(a), effective October 1, 2005, in subsection (a), inserted "it has been changed or altered, or" in the third sentence and added item (iv) at the end.

Legal Periodicals. — For article, "North Carolina's Real Estate Recording Laws: The Ghost of 1885," see 28 N.C. Cent. L.J. 199 (2006).

CASE NOTES

Elements of Adjudication. — If the certificate is not found in due form, the instrument is rejected. If the certificate is adjudged in due form, then the clerk (now the register of deeds) admits to probate, i.e., probates it, passes upon the certificate as furnishing proof of execution, and adjudges as to the genuineness of the certificate, the authority of the officer, and whether the justice or officer certifying is such, and the sufficiency of proof as certified. White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890).

Adjudication Is Mandatory — Generally. — The requirement of this section that the clerk or deputy clerk (now the register of deeds) shall pass upon the sufficiency of the probate of a deed is mandatory and not directory. Woodlief v. Woodlief, 192 N.C. 634, 135 S.E. 612 (1926).

Failure to adjudicate upon the probate to a deed for lands situated here will invalidate the conveyance as against the rights of purchasers and creditors. Champion Fibre Co. v. Cozad, 183 N.C. 600, 112 S.E. 810 (1922), distinguishing two lines of decisions, one holding this section directory, the other holding it mandatory.

Same — Qualification of the Rule. — While it is held that such act of adjudication and order of registration are directory upon the clerk of the superior court (now the register of deeds) of the county wherein the land is situated, it is so only where the fiat or order of registration has been properly made by the clerk (now the register of deeds) of another county upon which such power has been conferred by the statute, and in the absence of any proper fiat or order for registration, the conveyance will be ineffectual against the rights of purchasers and creditors of the grantor. Champion Fibre Co. v. Cozad, 183 N.C. 600, 112 S.E. 810 (1922).

Same — Lines of Cases Distinguished. — For line of cases holding that where the clerk of the court of any county in this State took the acknowledgment of a deed and ordered it to registration, it was not absolutely necessary that the certificate of this clerk be passed upon by the clerk of the court of the county in which the land was situated, see Holmes v. Marshall, 72 N.C. 37 (1875); Young v. Jackson, 92 N.C. 144 (1885); Darden v. Neuse & Trent River Steamboat Co., 107 N.C. 437, 12 S.E. 46 (1890); and Heath v. Lane, 176 N.C. 119, 96 S.E. 889 (1918), distinguished in Champion Fibre Co. v. Cozad, 183 N.C. 600, 112 S.E. 810 (1922).

For line of cases holding this section to be mandatory, in which probate was taken before some officer other than the clerk of court, judges of the superior court, or justices of the Supreme Court, see Simmons v. Gholson, 50 N.C. 401 (1858); Evans v. Etheridge, 99 N.C. 43, 5 S.E. 386 (1888); White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890); and Cozad v. McAden, 148 N.C. 10, 61 S.E. 633 (1908), rev'd on rehearing, 150 N.C. 206, 63 S.E. 944 (1909), distinguished in Champion Fibre Co. v. Cozad, 183 N.C. 600, 112 S.E. 810 (1922).

For case which apparently limited the doctrine that the statute was directory to cases in which deeds had been acknowledged before other clerks, judges, or justices of the Supreme Court, see Darden v. Neuse & Trent River Steamboat Co., 107 N.C. 437, 12 S.E. 46 (1890).

Same — Where Probate Taken by Foreign Commissioner of Deeds. — The probate to a mortgage of lands situated in North Carolina, taken by the commissioner of deeds in another state, registered without the fiat or order for registration by a clerk of the superior court (now the register of deeds) within the State, and clothed with authority to do so by statute, is ineffectual as against purchasers or creditors to pass title to the purchaser at the foreclosure sale, or those claiming under him. Champion Fibre Co. v. Cozad, 183 N.C. 600, 112 S.E. 810 (1922).

Substantial Compliance Sufficient. — A substantial compliance with this section and G.S. 47-37 is all that is necessary to be observed by the clerk of the superior court (now the register of deeds) of the county wherein the land lay, in passing upon the certificate to a deed thereto made and executed in another state; and when objection to the validity of registration is made on that ground, and it appears of record on appeal that the certificate made in such other state is in fact sufficient, the validity of the registration will be declared and upheld by the Supreme Court. Kleybolte & Co. v. Black Mt. Timber Co., 151 N.C. 635, 66 S.E. 663 (1910).

Use of Words "In Due Form" Not Essential to Adjudication. — The adjudication by the clerk of the superior court (now the register of deeds) that "the foregoing instrument has been duly proved, as appears from the foregoing seal and certificate," does not follow the very words of the statute in that it does not adjudge that said probate is "in due form." But it is intelligible and means substantially the same thing and will be upheld without regard to mere form. Devereux v. McMahon, 102 N.C. 284, 9 S.E. 635 (1889).

Where the acknowledgment was before an officer authorized to take it and the probate was in fact in due form, the omission of the clerk (now the register of deeds) to adjudge in just so many words that the probate was "in due form," when in substance he did so adjudge, did not constitute sufficient grounds to exclude the deed. Deans v. Pate, 114 N.C. 194, 19 S.E. 146 (1894).

Registration No Evidence of Adjudication Without Signed Certificate of Clerk. — Where the acknowledgment of the grantor and his wife to a deed to lands has been properly taken and the clerk of the court (now the register of deeds) has failed or omitted to sign his name to the certificate for registration, the registration of the instrument is no evidence of compliance with the provisions of this section. The curative statutes, G.S. 47-49, 47-86, 47-87, 47-88, and 47-89, have no application. Woodlief v. Woodlief, 192 N.C. 634, 135 S.E. 612 (1926).

Parol Evidence. — The statutes of this State require, as the method of authentication and warrant to the register to record a deed, that a certificate complying substantially with the terms of the statute shall be attached to or endorsed upon the deed, even though probate is had before the clerk of the superior court (now the register of deeds), and where no sufficient certificate was attached to or endorsed upon an instrument, it could not be shown by parol that proper proof was made before the clerk. National Bank v. Hill, 226 F. 102 (E.D.N.C. 1915).

To What Clerk Must Certify. — It is only required for a valid probate that the clerk (now the register of deeds) should certify to the proof of a deed taken before him. It is only when he passes upon a probate taken before some other officer that he is required to certify to the correctness of the probate and certificate. Table Rock Lumber Co. v. Branch, 158 N.C. 251, 73 S.E. 164 (1911).

Adjudication of Instrument Probated in Another State. — When a deed in trust made and executed beyond the borders of this State conveying lands herein has been there acknowledged and probated before a notary public, and (unnecessarily) the clerk of the Supreme Court, in compliance with a statute there, has certified the official character of the notary and his authority as such, it is a sufficient compliance with this section and G.S. 47-37 for the clerk of the superior court (now the register of deeds) of the county wherein the land lay to certify that "the foregoing and annexed certificate of (naming the clerk), a clerk of the Supreme Court, etc., duly authenticated by his official seal, is adjudged to be correct, in due form and according to law, and the foregoing and annexed deed of trust is adjudged to be duly proved, etc." Kleybolte & Co. v. Black Mt. Timber Co., 151 N.C. 635, 66 S.E. 663 (1910).

Certificate Not Required for Registration of Grant by State. — The certificate of the clerk of the court (now the register of deeds), required as a prerequisite to the registration of instruments named therein, is not essential to the validity of the registration of a grant, the great seal of the State being sufficient authority for such registration. Ray v. Stewart, 105 N.C. 472, 11 S.E. 182 (1890).

Presumption of Regularity from Certificate. — Where it appears that the clerk (now the register of deeds) appended his certificate to a lease offered for registration, it would be presumed, nothing to the contrary appearing, that it was in due form. Darden v. Neuse & Trent River Steamboat Co., 107 N.C. 437, 12 S.E. 46 (1890).

Defective Corporate Deed of Trust Invalid Notwithstanding Adjudication. — A corporate deed of trust was executed by the trustee, as well as the corporation, and bore a notary's certificate of proof of the trustee's execution, and a certificate as required by this section that the instrument had been duly proved, "as appears from the foregoing seals and certificate, which are adjudged to be in due form and according to law," but no certificate as to the proof of execution by the corporation was attached. It was held, under this section, that the certificate was invalid, and did not entitle the deed to registration. National Bank v. Hill, 226 F. 102 (E.D.N.C. 1915).

Ancient Document Rule. — Plaintiffs claimed the locus in quo under 7 years adverse possession under color and under 20 years adverse possession. Defendants objected to certain deeds in plaintiffs' chain of color of title on the ground that they were improperly registered and did not comply with this section and G.S. 47-17. It was held that the deeds, having been on record for some 30 years, were competent under the ancient document rule to be submitted to the jury on the claim of adverse possession for 20 years, and error, if any, in admitting the deeds as color of title was not prejudicial under the facts. Owens v. Blackwood Lumber Co., 212 N.C. 133, 193 S.E. 219 (1937).

Adjudication as Exercise of Judicial Function. — When the clerk of the superior court (now the register of deeds), upon the certificate of the acknowledgment of a grantor in a conveyance or of proof of its execution before him, adjudges such certificate to be in due form, admits the instrument to probate, and orders its registration, this is the exercise of a judicial function. White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890).

Cited in Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

OPINIONS OF ATTORNEY GENERAL

Fee. — The register of deeds should charge only one fee of 50¢ (now $1.00) under G.S. 161-10 for probate of the instrument to be registered, regardless of the number of notary acknowledgments appearing thereon. See opinion of Attorney General to Miss Frances H. Burwell, Stokes County Register of Deeds, 40 N.C.A.G. 611 (1969).

To Be Probated, Instrument's Notarization Must Show Expiration Date of Notary's Commission. — See opinion of Attorney General to Mr. Alex T. Wood, Register of Deeds, Franklin County, 41 N.C.A.G. 225 (1971).

§ 47-14.1. Repeal of laws requiring private examination of married women.

All deeds, contracts, conveyances, leaseholds or other instruments executed from and after February 7, 1945, shall be valid for all purposes without the separate, privy, or private examination of married woman where she is a party to or a grantor in such deed, contract, conveyance, leasehold or other instrument, and it shall not be necessary nor required that the separate or privy examination of such married woman be taken by the certifying officer. From and after February 7, 1945, all laws and clauses of laws contained in any section of the General Statutes requiring the privy or private examination of a married woman are hereby repealed. (1945, c. 73, s. 21; 1951, c. 893, s. 1.)

Legal Periodicals. — For comment on the constitutionality of the privy examination under former G.S. 52-6(a) and its relation to this section, see 12 Wake Forest L. Rev. 1007 (1977).

CASE NOTES

This Section Did Not Repeal Former § 52-6. — This section, which formerly appeared as G.S. 47-116, did not repeal former G.S. 52-6. Honeycutt v. Citizens Nat'l Bank, 242 N.C. 734, 89 S.E.2d 598 (1955).

Cited in North Carolina Baptist Hosps. v. Harris, 319 N.C. 347, 354 S.E.2d 471 (1987).

§ 47-15: Repealed by Session Laws 1985, c. 589, s. 26.

§ 47-16. Probate of corporate deeds, where corporation has ceased to exist.

It is competent for the clerk of the superior court in any county in this State, on proof before him upon the oath and examination of the subscribing witness to any contract or instrument required to be registered under the laws of this State, to adjudge and order that such contract or instrument be registered as by law provided, when such contract or instrument is signed by any corporation in its corporate name by its president, and when such corporation has been out of existence for more than 10 years when the said contract or instrument is offered for probate and registration, and when the grantee and those claiming under any such grantee have been in the uninterrupted possession of the property described in said contract or instrument since the date of its execution; and said contract or instrument so probated and registered shall be as effective to all intents and purposes as if signed, sealed, and acknowledged, or proven, as provided under the existing laws of this State. (1911, c. 44, s. 1; C.S., s. 3307.)

Cross References. — As to forms of probate for deeds and other conveyances by corporations, see G.S. 47-41.

ARTICLE 1A.

Uniform Real Property Electronic Recording Act.

§ 47-16.1. Short title.

This Article may be cited as the Uniform Real Property Electronic Recording Act. (2005-391, s. 1.)

OFFICIAL COMMENT

This act applies to the recording of documents in the land records office maintained by a recorder. It applies both to the filing of, and the searching for, documents in the recorder's office by whatever term or terms those functions and offices are known locally.

NORTH CAROLINA COMMENT

This article results from a study the General Statutes Commission was directed to perform by S.L. 2004-161, s. 6.1. The Commission filed its report with the General Assembly on January 26, 2005, and a supplement to that report on March 8, 2005. The Uniform Act's term "recorder" was replaced throughout with the term used in this State, "register of deeds."

Editor's Note. — Session Laws 2005-391, s. 2, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Real Property Electronic Recording Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

Official Comments, copyright © 2005, are reprinted in this Article with the permission of the National Conference of Commissioners on Uniform State Laws. It is believed that the Official Comments will prove of value to the practitioner in understanding and applying the text of this Article.

Session Laws 2005-391, s. 11, provides: "As soon as practicable, or within 24 months of the effective date of this act, all North Carolina registers of deeds and clerks of superior court shall submit to the Department of the Secretary of State legible and reproducible copies of the pages contained in their "Records of Notaries Public" created prior to 1991 for archiving in permanent storage. The copies shall be reproduced pursuant to standards set by the Department to ensure the legibility of the copies and the compatibility with the Department's existing systems. The Department shall be responsible for any expense incurred relating to the shipment or transfer of these records. The original permanent records shall be returned to the Register of Deeds if submitted to the Secretary for copying."

Session Laws 2005-391, s. 12, provides: "This act shall not affect any civil or criminal litigation pending on the effective date of this act. Any act committed prior to the effective date of this act which violated any provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction, and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to the effective date of this act shall remain valid as if this act had not been enacted."

§ 47-16.2. Definitions.

In this Article:

(1) "Document" means information that is:
  a. Inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and
  b. Eligible to be recorded in the land records maintained by the register of deeds.

(2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(3) "Electronic document" means a document that is received by the register of deeds in an electronic form.

(4) "Electronic signature" means an electronic sound, symbol, or process attached to or logically associated with a document and executed or adopted by a person with the intent to sign the document.

(5) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity. (2005-391, s. 1.)

OFFICIAL COMMENT

(1) **"Document."** A document consists of information stored on a medium, whether the medium be tangible or electronic, provided that the information is retrievable in a perceivable form. The traditional tangible medium has been paper on which information is inscribed by writing, typing, printing or similar means. It is perceivable by reading it directly from the paper on which it is inscribed. An electronic medium may be one on which information is stored magnetically and from which it may be retrieved and read indirectly on a computer monitor or a paper printout.

While a document recorded in a land records office will usually contain information affecting real property, it need not necessarily be so limited. It applies to any document that is recorded in the land records office maintained by the recorder. Deeds, grants of easements, and mortgages are documents subject to this act. Similarly, certificates and affidavits not directly affecting real property may be documents under this act if state law provides these documents are to be recorded in the land records office.

The definition of a document in this act is derived from the definition of the term “record” as contained in the Uniform Electronic Transactions Act (UETA) § 2(13). In the terms of that act, a document is a record that is eligible to be recorded in the land records maintained by the recorder. In selecting the defined term “document” for use throughout this act, an explicit decision was made not to use “record” as a defined term. The term “record” has a different meaning in real estate recording law and practice than it has in UETA. If the term “record” were used generally in this act, it might lead to confusion and misinterpretation.

In UETA, the term “record” refers to information on a tangible or electronic medium as does the term “document” in this act. In this act, however, depending on syntax, the term “record” and its variations can have several meanings, all of which deal with document storage and not the information itself. For example, this act deals with the *recording* process through which a person can *record* a document. The government officer who oversees the land *records* office is the *recorder*. These terms are so ingrained in the lexicon of real estate recording law and practice that it would not be productive to attempt to change them by this act.

(2) **“Electronic.”** The term “electronic” refers to the use of electrical, digital, magnetic, wireless, optical, electromagnetic and similar technologies. It is a descriptive term meant to include all technologies involving electronic processes. The listing of specific technologies is not intended to be a limiting one. For example, biometric identification technologies would be included if they affect communication and storage of information by electronic means. As electronic technologies expand and include other competencies, those competencies should also be included under this definition.

The definition of the term “electronic” in this act has the same meaning as it has in UETA § 2(5).

(3) **“Electronic document.”** An “electronic document” is a “document” that is in an “electronic” form. Both of these terms are previously defined. However, this definition adds an additional requirement not specifically stated in the individual definitions. In order to be an “electronic document” the document must be received by the recorder in an “electronic” form. The character of a document as “electronic” or “paper” will be determined at the moment it is received by the recorder.

Even though a document may have an existence in an “electronic” form prior or subsequent to being received by the recorder it might not be an “electronic document” under this act. For example, the document may have been created by an electronic process or have existed in an electronic form before being converted to, and received by the recorder in, a paper form. Thus, a document prepared on a computer by means of a word processing program may have been created electronically and may still exist electronically. If, however, the document is printed and submitted to the recorder on paper, the submitted document is not an electronic document. Similarly, after arriving in the recorder’s office in a paper form, the document may be converted to an electronic form prior to, or as part of, the recording process. The paper document does not become an electronic document because of the post-receipt conversion. (For a definition of the term “paper document,” *see* § 4(a).)

By comparison, a document received by the recorder in an electronic form, but subsequently converted to a paper form, will be considered to be an electronic document. For example, if a document is received electronically and then printed in a paper form in the recorder’s office prior to storage, it is, nonetheless, an electronic document. Thus, a document received by the process commonly known as a facsimile or a FAX, is an electronic document. Issues common to electronic documents, such as security and integrity, also relate to a facsimile or FAX document.

In many cases a document may have originally been executed in a paper form with “wet signatures” and subsequently imaged and converted into an electronic format. This act provides that, if such a converted document is received by the recorder in an electronic format, it will be considered to be an electronic document and may be recorded. (*See* § 3(a).)

This act does not state or limit the type of electronic documents that may be accepted by the recorder. Nor does it state the type of electronic signatures that are permissible. Those matters are subject to the standards adopted by the state Electronic Recording Commission or state agency pursuant to § 5.

This act applies only to documents that are received by the recorder in an electronic form and enables those documents to be recorded. The recordability of documents not received by the recorder in an electronic form continues to depend on other state law.

(4) **“Electronic signature.”** The term “electronic signature” is based on the definition of that term in UETA § 2(8). However, this definition uses the word “document” instead of “record” to identify the instrument being signed. (See *generally* paragraph 1, above, for a discussion of the reasons).

(5) **“Person.”** The definition of a “person” is the standard definition for that term used in acts adopted by the National Conference of Commissioners on Uniform State Laws. It includes individuals, associations of individuals, and corporate and governmental entities.

. . . .

NORTH CAROLINA COMMENT

The General Statutes Commission deleted the definition of "State" as unnecessary. *See* G.S. 12-3.

§ 47-16.3. Validity of electronic documents.

(a) If a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying this Article.

(b) If a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature.

(c) A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to notarize, acknowledge, verify, witness, or administer the oath, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature. Nothing in this act shall prohibit the North Carolina Board of Examiners for Engineers and Surveyors from requiring that the image of a seal accompany any plat or map that is presented electronically for recording. (2005-391, s. 1.)

OFFICIAL COMMENT

(a) Subsection (a) states the basic principle of this act - if a document would be recordable in a paper format, an electronic document with the same content and meeting the requirements of this act is also recordable. Any reference in a statute, regulation, or standard to a document as being on paper or a similar tangible medium in order to be recorded is superseded by this act. Similarly any statute, regulation, or standard that specifies that a document must be in writing in order to be recorded is also overruled by this act. Furthermore, since any paper-specific requirement such as the size of the paper or the color of the ink used for the document is inapplicable to an electronic document, those requirements do not prohibit or limit the recording of electronic documents.

This subsection also provides that any stipulation of state law requiring that a document be an original document is satisfied by an electronic document meeting the requirements of this act. For example, this section acknowledges that one form of electronic document is created by making an electronic duplicate of an original paper document. The duplicate is an electronic "picture" of the original document with all of its signatures and verifications. Under some existing state laws, the electronic duplicate may be considered to be a copy of the original paper document and not the original itself. The laws of the state may also provide that a copy of a document may not be recorded. This act corrects that circumstance and allows the electronic document containing the "picture" of the original document to be recorded. Of course, in order to be valid, the original paper document must be executed in accordance with law, including a signature and verification.

(b) Subsection (b) provides that any statute, regulation, or standard requiring that a document be signed in order to be recorded is satisfied by an electronic signature attached to an electronic document. The provisions of UETA and the federal Electronic Signatures in Global and National Commerce Act (E-Sign) provide that an electronic signature is not an impediment to the enforceability of an electronic document between the parties to the transaction. Similarly, this section provides that an electronic signature is not an impediment to the recording of the document.

(c) This section provides that any statute, regulation, or standard requiring that a notarization, acknowledgement, verification, witnessing, or taking of an oath be done on paper or similar tangible medium, that it be done in writing, or that it be signed, is satisfied by an electronic signature that is attached to, or logically associated with, the electronic document. It permits a notary public or other authorized person to act electronically without the need to do so on paper.

It also provides that any statute, regulation, or standard that requires a personal or corporate stamp, impression, or seal is satisfied by an electronic signature. These physical indicia are inapplicable to a fully electronic document. Thus, the notarial stamp or impression that is required under the laws of some states is not required for an electronic notarization under this act. Nor is there a need for a corporate stamp or impression as would otherwise be required under the laws of some states to verify the action of a corporate officer. Nevertheless, this act requires that the information that would otherwise be contained in the stamp, impression, or seal must be attached to, or logically associated with, the document or signature in an electronic fashion.

NORTH CAROLINA COMMENT

In subsection (c), in the first sentence, the General Statutes Commission deleted the Uniform Act's phrase, "person authorized to perform that act" and replaced it with a restated list of acts in order to clarify that, with respect to a document required to be made under oath, the "person" is someone authorized to administer an oath.

The last sentence of subsection (c) was added in the Senate.

§ 47-16.4. Recording of documents.

(a) In this section, "paper document" means a document that is received by the register of deeds in a form that is not electronic.

(b) A register of deeds:

(1) Who implements any of the functions listed in this section shall do so in compliance with standards adopted by the Secretary of State.

(2) May receive, index, store, archive, and transmit electronic documents.

(3) May provide for access to, and for search and retrieval of, documents and information by electronic means.

(4) Who accepts electronic documents for recording shall continue to accept paper documents as authorized by law and shall place entries for both types of documents in the same index.

(5) May convert paper documents accepted for recording into electronic form.

(6) May convert into electronic form information recorded before the register of deeds began to record electronic documents.

(7) May accept electronically any fee or tax that the register of deeds is authorized to collect.

(8) May agree with other officials of this State or a political subdivision thereof on procedures or processes to facilitate the electronic satisfaction of conditions to recording and the electronic payment of fees and taxes. (2005-391, s. 1.)

OFFICIAL COMMENT

(a) A "paper document" is one that is received by the recorder in a form that is not "electronic." Despite the use of the word "paper," this document form is not limited to documents on a paper medium; the use of the word "paper" is merely a convenience. It applies to any non-electronic document that the recorder is authorized to accept.

Just as with the definition of an "electronic document" in section 2 of this act, the moment at which the character of the document will be determined is the moment it is received by the recorder. If a document is received by the recorder in a non-electronic form, it is a "paper" document regardless of whether it has a prior or subsequent existence as an electronic document.

(b) Subsection (b) sets forth specific required or elective functions that apply to the recording of documents.

(1) With the exception of paragraphs (1) and (4), implementation of any functions described in subsection (b) is optional and a decision to implement one or more of them is to be made by the recorder. The act does not require that a recorder implement any or all of those functions. It merely allows each recorder to implement them when and if the recorder decides to proceed with electronic recording.

However, under paragraph (1) if a recorder does elect to implement any of the functions described in this section, the recorder must do so in accordance with the standards established by the Electronic Recording Commission or the state agency. All aspects of the functions described in this subsection are subject to the standards of the Commission or agency.

(2) Paragraph (2) provides that the recorder may choose to implement electronic recording functions. Recording functions are varied and deal with obtaining and storing of documents in a recording system. Under this paragraph, the recorder may elect to receive electronic documents. The recorder may store those electronic documents, or the information contained in them, and create an index of the documents or information. The recorder may also transmit electronic documents and communications to the recording party or to other parties. Finally, the recorder may archive the electronic documents or the information in them as well as the index in order to preserve and protect them. This is an election to be made by the recorder that is separate from the decision to provide electronic searching, as described in paragraph (3).

Since this act also applies to "Torrens" title registration systems, a recorder who operates a title registration system may choose to implement the functions of receiving, indexing, storing, archiving, and transmitting electronic documents for the title registration system.

(3) Paragraph (3) provides that the recorder may choose to implement electronic search and retrieval functions. Searching and retrieval functions include any process by which a title searcher obtains information from the land records system. The paragraph allows a recorder to authorize persons to access documents or their information, including index information, electronically. In so doing, the recorder may allow the accessing party to search the index and the stored documents or information electronically and to retrieve them in an electronic format. This is an election to be made by the recorder that is separate from the decision to record electronic documents, as described in paragraph (2). A recorder who operates a "Torrens" title registration system also may choose to implement the functions of accessing, searching, and retrieving documents or information in the title registration system.

(4) This act does not require that persons engaging in real estate transactions use electronic documents in order to have their documents recorded. It merely permits the recorder to accept electronic documents if they are presented electronically. Economics, availability of technology, and human nature suggest that not everyone will begin to use electronic real estate documents immediately. It will likely be some time before the use of electronic documents becomes dominant and perhaps well beyond that before paper documents disappear altogether from the conveyancing process. In recognition of that fact, paragraph (4) requires the recorder to continue to accept paper documents even after establishing an electronic recording system. This is a mandatory and not an elective provision.

This paragraph also provides that the recorder must index the paper documents together with electronic documents as part of a single indexing system. This will enable a title examiner to make a single search of one index for the purpose of ascertaining all relevant instruments that were recorded after the initiation of electronic recording. It avoids the inefficient and costly process of maintaining and searching two separate indexing systems - one for electronic documents and one for paper documents.

Efficiency also suggests that the unified index would be an electronic one. It would be more efficient to store the index information from paper documents in an electronic index than to convert and store the index information from electronic documents in a paper index system. Electronic index information can be sorted and managed more easily and efficiently than paper index information. In addition, an electronic index can be searched more quickly and without the searcher's physical presence in the recorder's office. However, the act does not require the index chosen by the recorder to be an electronic one.

(5) Paragraphs (5) and (6) relate to the conversion and storage of the text or information contained in paper documents in an electronic form. It does not concern the index information that is derived from those paper documents. The treatment of index information is described in the paragraph (4).

Paragraph (5) relates to the conversion of "new" paper documents received by the recorder after the implementation of an electronic recording system. It does not require that such newly-received paper documents be converted and stored in an electronic form. It does, however, permit the recorder to make a conversion of those paper documents into an electronic form and store them with electronic documents received by the recorder. If the paper documents are not converted into an electronic form, the recorder must continue to store them and, as public documents, the recorder must continue to provide a process for accessing them.

If the recorder does not convert "new" paper documents into an electronic form, the usefulness and efficiency of the electronic recording system may be limited. A title examiner will have to obtain physical access to the paper document information in traditional ways. Since electronic documents are stored electronically, the examiner will have to access two different storage systems - one for paper documents and one for electronic documents.

(6) Paragraph (6) relates to the conversion of information from "old" paper documents re-

corded prior to the implementation of an electronic recording system. As with newly-received paper documents, the act does not require the recorder to convert previously-recorded information into an electronic form. Such a conversion is, however, permitted under the act.

Dealing with "old" document information is more challenging than dealing with "new" documents simply because of the potentially large expenditure of time and money needed to convert a significant volume of paper information extending over many past years into an electronic form. The time period over which a fully-effective conversion would extend probably spans a period of forty to sixty or more years, depending on the customary period of search in the jurisdiction. Without the conversion, the usefulness and efficiency of the electronic recording system is limited, at least until the passage of a period after the adoption of the act that is equal to the customary period of search.

(7) Paragraph (7) provides that any fee or tax that is collected by the recorder may be collected through an electronic payment system. Without a means of paying the applicable fees and taxes electronically, the achievement of a speedy and efficient electronic recording system would not be possible. Although the document could be submitted electronically, the fee would have to be paid by traditional means. The effective completion of the recording would be delayed until that payment is received by the recorder.

The nature and operation of the electronic payment system is not specified. The selection is subject to standards set by the Electronic Recording Commission or state agency and the choice of the recorder. Among others, the alternatives might include a subscription service with a regular billing system, a prepayment system with recording and access charges applied against a deposited amount, or a payment per individual service system.

(8) Commonly, before a recorder may accept a document for recording it must be approved by one or more other offices in order to assure compliance with the other office's requirements. The person submitting the document may also be required to pay fees or taxes to the other office or offices. If the prior approval and the fee or tax paying processes are not conjoined with the electronic recording process, it will not be possible to effectuate the speedy electronic recording envisioned by this act.

For example, a document may first need to be submitted to the county assessor or treasurer to determine whether prior real estate taxes have been paid or whether current ones are due. Under current practice that submission and approval might have to be accomplished in a physical process independent of the electronic recording process. If a tax or fee is due, that sum might also have to be paid by check or other non-electronic process to the treasurer. Procedures such as these will delay the electronic recording process and will limit the achievement of a speedy, efficient electronic recording system.

Paragraph (8) permits and encourages the recorder to enter into agreements with other county and state offices for the purpose of implementing processes that will allow the simultaneous satisfaction of all conditions precedent to recording and the payment of all fees and taxes in a single transaction. Any fees and taxes paid by the recording party will be allocated among the recorder and the other offices in accordance with their agreements.

NORTH CAROLINA COMMENT

In subsection (b), the General Statutes Commission amended subdivision (b)(8) by replacing the phrase "other officials of a state or a political subdivision thereof, or of the United States," with "other officials of this State or a political subdivision thereof." The Commission also made three stylistic changes to the wording of the Uniform Act. In subdivision (b)(1), "standards established by" was changed to "standards adopted by." In subdivision (b)(4), the phrase "state law" was changed to "law." In subdivision (b)(8), the phrase "prior approvals and conditions precedent" was changed to "conditions."

§ 47-16.5. Administration and standards.

(a) Standard-Setting Agency. — The Secretary of State shall adopt standards to implement this Article upon recommendation of the Electronic Recording Council. The Secretary of State may direct the Council to revise any portion of the recommended standards the Secretary deems inadequate or inappropriate. Technological standards and specifications adopted by the Secretary of State to implement this Article are engineering standards for the purposes of G.S. 150B-2(8a)h.

(b) Electronic Recording Council Created. — The Electronic Recording Council is created in the Department of the Secretary of State to advise and assist the Secretary of State in the adoption of standards to implement this Article. The Council shall review the functions listed in G.S. 47-16.4 and shall formulate and recommend to the Secretary standards for recording electronic documents and implementing the other functions listed in G.S. 47-16.4. The Council shall report its findings and recommendations to the Secretary of State at least once each calendar year. The Council shall advise the Secretary of State on a continuing basis of the need to adopt, amend, revise, or repeal standards. The Council may advise the Secretary of State on any other matter the Secretary refers to the Council.

(c) Council Membership, Terms, and Vacancies. — The Council shall consist of 13 members as follows:

(1) Seven members appointed by the North Carolina Association of Registers of Deeds. It is the intent of the General Assembly that the North Carolina Association of Registers of Deeds shall appoint as members a representative selection of registers of deeds from large, medium, and small counties, urban and rural counties, and the different geographic areas of this State.
(2) One member appointed by the North Carolina Bar Association.
(3) One member appointed by the North Carolina Society of Land Surveyors.
(4) One member appointed by the North Carolina Bankers Association.
(5) One member appointed by the North Carolina Land Title Association.
(6) One member appointed by the North Carolina Association of Assessing Officers.
(7) The Secretary of Cultural Resources or the Secretary's designee.

In making appointments to the Council, each appointing authority shall select appointees with the ability and commitment to fulfill the purposes of the Council.

Appointed members shall serve four-year terms, except that the initial appointments by the North Carolina Bar Association, the North Carolina Bankers Association, the North Carolina Association of Assessing Officers, and three of the initial appointments by the North Carolina Association of Registers of Deeds shall be for two years. All initial terms shall commence on the effective date of this Article. Members shall serve until their successors are appointed. An appointing authority may reappoint a member for successive terms. A vacancy on the Council shall be filled in the same manner in which the original appointment was made, and the term shall be for the balance of the unexpired term.

(d) Council Meetings and Officers. — The Secretary of State shall call the first meeting of the Council. At the first meeting and biennially thereafter, the Council shall elect from its membership a chair and a vice-chair to serve two-year terms. Meetings may be called by the chair, the vice-chair, or the Secretary of State. Meetings shall be held as often as necessary, but at least once a year.

(e) Council Compensation. — None of the members of the Council shall receive compensation for serving on the Council, but Council members shall receive per diem, subsistence, and travel expenses in accordance with G.S. 138-5 and G.S. 138-6, as applicable.

(f) Staff and Other Assistance. — As soon as practicable and as needed thereafter, the Council shall identify the information technology expertise it needs and report its needs to the Secretary of State. The Council shall also report any other expertise needed to fulfill its responsibilities. The Secretary of State shall provide professional and clerical staff and other services and supplies, including meeting space, as needed for the Council to carry out its duties in an effective manner. The Secretary of State may appoint additional committees to advise and assist the Council in its work.

The Council shall consult with the North Carolina Local Government Information Systems Association, and may consult with any other person the Council deems appropriate, to advise and assist the Council in its work.

(g) Uniformity of Standards. — To keep the standards and practices of registers of deeds in this State in harmony with the standards and practices of recording offices in other jurisdictions that enact substantially this Article and to keep the technology used by registers of deeds in this State compatible with technology used by recording offices in other jurisdictions that enact substantially this Article, the Secretary of State and the Council shall consider all of the following in carrying out their responsibilities under this Article, so far as is consistent with its purposes, policies, and provisions:

(1) Standards and practices of other jurisdictions.
(2) The most recent standards adopted by national standard-setting bodies, such as the Property Records Industry Association.
(3) The views of interested persons and other governmental officials and entities.
(4) The needs of counties of varying size, population, and resources.
(5) Standards requiring adequate information security protection to ensure that electronic documents are accurate, authentic, adequately preserved, and resistant to tampering. (2005-391, s. 1.)

OFFICIAL COMMENT

(a) This section provides two alternatives for designating the entity that will adopt standards to implement this act.

Alternative A creates a state Electronic Recording Commission and provides for its general composition. The exact size of the board is to be determined by the legislature. The appointment of the commissioners is to be made by the governor or another state official or governmental body determined by the legislature.

Under Alternative A, the majority of the members of the commission must be recorders. Recorders, by the fact that the standards adopted by the Electronic Recording Commission will affect the operation of their offices, have a professional interest in generating efficient, functional standards. If the recorders are appointed from sufficiently diverse recording venues, they can also provide valuable input as to the needs of recording districts of varying size, population and resources, as described further in subsection (b).

Alternative B delegates the duty to adopt standards to implement this act to an existing state agency. In some states this oversight of the recording process, and in some cases the electronic recording process, has already been delegated to an existing state agency. In like fashion, some state legislatures may wish to delegate these duties to an existing state agency instead of creating a new commission as is directed in Alternative A.

If the state agency has oversight of many diverse functions, it might prove useful for the agency to establish a subdivision to implement and adopt standards for this act. The agency or subdivision might also wish to establish a regular process to obtain advice from persons with expertise in the area of recordings, particularly in electronic recordings.

(b) The Electronic Recording Commission or state agency is directed to adopt standards to implement the provisions of this act. As provided in section 4, recorders implementing any of the functions of this act must comply with those standards.

One of the objectives of this act is to facilitate the efficient use of electronic recording within the state and among the various adopting states. This subsection directs the Electronic Recording Commission or state agency to seek to keep the standards and practices of the recording offices in states using electronic recording in harmony and uniformity with each other. Ease of user access and interoperability and the promotion of interstate commerce depend highly on a similarity of standards and operating processes among the various recording offices. However, differences in operating processes and their governing standards may be justified based on legitimate differences that exist from venue to venue. The commission is not required to adopt the same standards and practices that exist in other states, but must give them serious consideration.

When adopting, amending or repealing standards the commission or agency must consider the following factors:

(1) the standards and practices of other

states adopting this uniform act or a substantially similar one. In many situations, Electronic Recording Commissions or state agencies of other states may have already considered the same issue. Their research and subsequent experiences may prove very helpful to the commission or state agency in making its decision.

(2) the most recent standards promulgated by national standard-setting bodies, such as the Property Records Industry Association (PRIA). National standard-setting organizations such as PRIA will likely have considered the issue that is now before the commission or agency and have developed a protocol or standard to deal with it. Furthermore, since these bodies are national in scope, they will likely already have considered the needs of recording districts of varying size, population and resources when promulgating their standards.

(3) the views of interested parties. Among others, these persons should include county recorders and potential users of the electronic recording system such as real estate attorneys, mortgage lenders, representatives from the title and escrow industries, real estate brokers, and notaries public. It must also consider the views of governmental offices that may interact with the recording offices, such as clerks of court, taxing authorities, and the office of the Secretary of State. Also included might be potential suppliers of hardware, software and services for electronic recording systems.

(4) the needs of counties of varying size, population and resources. Because most states are quite diverse in the size, population and resources of their recording venues, it is important that the Electronic Recording Commission or state agency consider all of their needs. Standards that are designed only for large, populous and well-funded recording districts may not promote the development of electronic recording in smaller, less-populous and not-as-well funded recording districts. This subsection recognizes that the standards should promote the overall good of the entire state and not just the good of certain types of recording venues. Thus, the commission is advised to consider the needs of the entire spectrum of recording districts.

(5) information security for electronic documents. When considering the adoption of standards, the commission or state agency is directed to consider a number of security concerns.

The authenticity of documents stored in any recording system is of utmost importance. If forged or invalid documents are accepted for recording, landowners and those depending on their titles can be seriously affected. Thus, the commission or state agency is directed to consider standards that would protect an electronic recording system from accepting and recording documents that are not authentic and genuine. Furthermore, even if an electronic document is authentic in its origin, it may be possible to intercept it in transmission and change its content. Such a change could cause problems equally problematic as those caused by an originally forged document. Thus, the commission or state agency is directed to consider standards that would protect documents from tampering and inaccuracies caused during transmission.

The subsection also directs the commission or state agency to consider standards for the proper preservation of electronic documents once they are in the electronic recording system. If an unauthorized person were to be able to "hack" or enter the electronic recording system, that person could cause considerable damage and injury to the records and persons having an interest in the affected land. Thus, the commission or state agency is directed to consider standards protecting the electronic land records system from unauthorized intrusion and tampering. Finally, the subsection directs the commission or state agency to consider adequate standards for the preservation of electronic documents. If there should only be one copy of the electronic land records and it is destroyed by an electronic or physical catastrophe, the security of the land records system would be seriously impaired. Thus, the commission or state agency should consider the means and methodology of preserving and replicating the electronic land records so that the recorder can recover from such a catastrophe with no loss of information.

NORTH CAROLINA COMMENT

This section blends the Uniform Act's alternatives for a standard-setting body and adds other provisions in order to produce a regulatory structure similar to the current regulatory structure in this State for setting standards for paper documents filed with a register of deeds. Subsections (a) through (f) replace subsection (a) of the Uniform Act. Subsection (g) is substantially the same as subsection (b) of the Uniform Act with conforming changes to reflect the different regulatory structure. *See* G.S. 147-54.3. In subdivision (g)(2), the Senate replaced the word "promulgated" with the word "adopted."

§ 47-16.6. Uniformity of application and construction.

In applying and construing this Article, consideration shall be given to promoting uniformity of interpretation of the Uniform Real Property Electronic Recording Act among states that enact it. (2005-391, s. 1.)

OFFICIAL COMMENT

This section recites the importance of uniformity among the adopting states when applying and construing the act. It is more general than the uniformity stated in section 5 for the Electronic Recording Commission or state agency when implementing or adopting standards. This section seeks uniformity in all situations when the application or interpretation of the act itself is considered or under review.

NORTH CAROLINA COMMENT

The General Statutes Commission made stylistic changes to the Uniform Act's language in this section that are not intended to alter the meaning. The Senate replaced the word "must" with the word "shall."

§ 47-16.7. Relation to Electronic Signatures in Global and National Commerce Act.

This Article modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C. § 7001, et seq.) but does not modify, limit, or supersede section 101(c) of that act (15 U.S.C. § 7001(c)) or authorize electronic delivery of any of the notices described in section 103(b) of that act (15 U.S.C. § 7003(b)). (2005-391, s. 1.)

OFFICIAL COMMENT

This section responds to the specific language of the Electronic Signatures in Global and National Commerce Act and is designed to avoid preemption of state law under that federal legislation.

Article 2.

Registration.

§ 47-17. Probate and registration sufficient without livery of seizin, etc.

All deeds, contracts or leases, before registration, except those executed prior to January 1, 1870, shall be acknowledged by the grantor, lessor or the person executing the same, or their signature proven on oath by one or more witnesses in the manner prescribed by law, and all deeds executed and registered according to law shall be valid, and pass title and estates without livery of seizin, attornment or other ceremony. (29, Ch. II, c. 3; 1715, c. 7; 1756, c. 58, s. 3; 1838-9, c. 33; R.C., c. 37, s. 1; Code, s. 1245; 1885, c. 147, s. 3; 1905, c. 277; Rev., s. 979; C.S., s. 3308.)

Local Modification. — (As to Article 2) Mitchell: 1987, c. 537.

Legal Periodicals. — See 1 N.C.L. Rev. 153, 155 (1923).

For article, "North Carolina's Real Estate Recording Laws: The Ghost of 1885," see 28 N.C. Cent. L.J. 199 (2006).

CASE NOTES

Applicability. — The North Carolina courts have extended the construction of this section so as to bring all deeds of conveyance within the purview of the statute. Ivey v. Granberry, 66 N.C. 223 (1872); Love v. Harbin, 87 N.C. 249 (1882); Jones v. Jones, 164 N.C. 320, 80 S.E. 430 (1913). See Bryan v. Eason, 147 N.C. 284, 61 S.E. 71 (1908).

For case construing this section to apply only to such deeds as operated at common law by livery of seizin, see Hogan v. Strayhorn, 65 N.C. 279 (1871).

Registration has the effect of livery of seizin. Hinton v. Moore, 139 N.C. 44, 51 S.E. 787 (1905); Jones v. Jones, 164 N.C. 320, 80 S.E. 430 (1913).

Formal Deed Regarded as Feoffment in Enforcing Parol Trust. — In properly constituted cases indicating the propriety of equitable relief in declaring and enforcing a parol trust, the formal deed by which the legal title is held is regarded as a feoffment not inconsistent with the trust sought to be established. Thompson v. Davis, 223 N.C. 792, 28 S.E.2d 556 (1944).

Where it appears from the face of a corporate deed that the corporate seal has not been affixed, an order admitting it to probate as a conveyance is unauthorized and registration thereon is invalid; for it is well settled that registration had upon an unauthorized probate is invalid and ineffectual to pass title against creditors and purchasers. However, the order of probate is sufficient to authorize its registration as a contract to convey under G.S. 47-18. Haas v. Rendleman, 62 F.2d 701 (4th Cir. 1933), cert. denied, 289 U.S. 750, 53 S. Ct. 695, 77 L. Ed. 1495 (1933).

Enforcing Defectively Framed Conditional Contract. — Called upon to choose between enforcing a defectively framed yet recognizable conditional contract, or treating it as a nullity for security purposes, the former is the choice indicated, there being no specific statutory requirement to use a precise formula of words. Mickel-Hopkins, Inc. v. Frassinetti, 278 F.2d 301 (4th Cir. 1960).

Evidence Supporting Judgment for Recovery of Land. — Evidence showing good record title in plaintiff, without any record evidence of title in defendant, was held to support judgment for plaintiff for recovery of land. Knowles v. Wallace, 210 N.C. 603, 188 S.E. 195 (1936).

Improperly Acknowledged Deed Held Invalid. — Where a deed was not properly acknowledged, in that the grantors did not actually appear before the notary public as recited on the face of the deed, the deed was invalid and not admissible in evidence to prove an essential link in the record chain. Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

Applied in Clark v. Butts, 240 N.C. 709, 83 S.E.2d 885 (1954).

Cited in GMAC v. United States, 23 F.2d 799 (4th Cir. 1928); McClure v. Crow, 196 N.C. 657, 146 S.E. 713 (1929); Owens v. Blackwood Lumber Co., 212 N.C. 133, 193 S.E. 219 (1937); Freeman v. Morrison, 214 N.C. 240, 199 S.E. 12 (1938).

§ 47-17.1. Documents registered or ordered to be registered in certain counties to designate draftsman; exceptions.

The register of deeds of any county in North Carolina shall not accept for registration, nor shall any judge order registration pursuant to G.S. 47-14, of any deeds or deeds of trust, executed after January 1, 1980, unless the first page of the deeds or deeds of trust bears an entry showing the name of either the person or law firm who drafted the instrument, except that papers or documents prepared in other states may be registered or ordered to be registered without having the name of either the person or law firm who drafted the instrument designated thereon. (1953, c. 1160; 1955, cc. 54, 59, 87, 88, 264, 280, 410, 628, 655; 1957, cc. 431, 469, 932, 982, 1119, 1290; 1959, cc. 266, 312, 548, 589; 1961, cc. 789, 1167; 1965, cc. 160, 597, 830; 1967, cc. 42, 139; c. 639, s. 2; c. 658; 1969, c. 10; 1971, c. 46; 1973, cc. 65, 283, 342; 1979, c. 703; 1981, c. 362, ss. 1, 2.)

Local Modification. — Alamance: 1957, c. 1290; Onslow: 1959, c. 783.

Editor's Note. — For similar act applicable to Caldwell, Camden, Chowan, Currituck, Pasquotank, Rutherford and Vance Counties, see Session Laws 1955, c. 273, as amended by Session Laws 1955, c. 575, and Session Laws 1967, c. 742.

§ 47-17.2. Assignments of mortgages, deeds of trust, or other agreements pledging real property as security.

It shall not be necessary in order to effect a valid assignment of a note and deed of trust, mortgage, or other agreement pledging real property or an interest in real property as security for an obligation, to record a written assignment in the office of the register of deeds in the county in which the real property is located. A transfer of the promissory note or other instrument secured by the deed of trust, mortgage, or other security interest that constitutes an effective assignment under the law of this State shall be an effective assignment of the deed of trust, mortgage, or other security instrument. The assignee of the note shall have the right to enforce all obligations contained in the promissory note or other agreement, and all the rights of the assignor in the deed of trust, mortgage, or other security instrument, including the right to substitute the trustee named in any deed of trust, and to exercise any power of sale contained in the instrument without restriction. The provisions of this section do not preclude the recordation of a written assignment of a deed of trust, mortgage, or other security instrument, with or without the promissory note or other instrument that it secures, provided that the assignment complies with applicable law. (1993, c. 288, s. 4.)

§ 47-18. Conveyances, contracts to convey, options and leases of land.

(a) No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainer or lesser but from the time of registration thereof in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county. Unless otherwise stated either on the registered instrument or on a separate registered instrument duly executed by the party whose priority interest is adversely affected, (i) instruments registered in the office of the register of deeds shall have priority based on the order of registration as determined by the time of registration, and (ii) if instruments are registered simultaneously, then the instruments shall be presumed to have priority as determined by:

(1) The earliest document number set forth on the registered instrument.

(2) The sequential book and page number set forth on the registered instrument if no document number is set forth on the registered instrument.

The presumption created by this subsection is rebuttable.

(b) This section shall not apply to contracts, leases or deeds executed prior to March 1, 1885, until January 1, 1886; and no purchase from any such donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to December 1, 1885, when the person holding or claiming under such unregistered deed shall be in actual possession and enjoyment of such land, either in person or by his tenant, at the time of the execution of such second deed, or when the person claiming under or taking such second deed had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person holding or claiming thereunder. (Code, s. 1245; 1885, c. 147, s. 1; Rev., s. 980; C.S., s. 3309; 1959, c. 90; 1975, c. 507; 2003-219, s. 2; 2005-212, s. 2.)

Cross References. — For statute of frauds with reference to contracts for sale of land, leases, etc., see G.S. 22-2.

Legal Periodicals. — As to priority by recordation and effect of recordation on title by estoppel, see 27 N.C.L. Rev. 376 (1949).

For note on rights of lessees under oral leases, see 31 N.C.L. Rev. 498 (1953).

For article concerning the quest for clear land titles in North Carolina, see 44 N.C.L. Rev. 89 (1965).

For caselaw survey as to recordation, see 44 N.C.L. Rev. 1032 (1966).

For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For survey of 1976 case law on commercial law, see 55 N.C.L. Rev. 943 (1977).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

For article, "Drafting, Interpreting, and Enforcing Commercial and Shopping Center Leases," see 14 Campbell L. Rev. 275 (1993).

For essay, "Russell v. Hill (N.C. 1899) Misunderstood Lessons," see 73 N.C.L. Rev. 2031 (1995).

For article, "North Carolina's Real Estate Recording Laws: The Ghost of 1885," see 28 N.C. Cent. L.J. 199 (2006).

CASE NOTES

I. In General.
II. Registration as Between Parties.
III. What Instruments Affected.
IV. Persons Protected and Rights Thereof.
V. Notice.
VI. Effect of Defective Registration.
VII. Unregistered Deed as Color of Title.

I. IN GENERAL.

This section and § 47-20 as originally enacted may be construed interchangeably in view of the similarity of their terminology. Cowen v. Withrow, 112 N.C. 736, 17 S.E. 575 (1893).

The recording statute for deeds of trust, G.S. 47-20, is virtually identical to this section, governing outright conveyances, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Comparison with § 47-20. — The Connor Act, the 1885 amendment to this section, has substantially the same legal effect upon deeds that the Act of 1829, codified as G.S. 47-20, had upon mortgages and deeds in trust, leaving them, although unregistered, valid as between the parties and as to all others except purchasers for value and creditors. King v. McRackan, 168 N.C. 621, 84 S.E. 1027 (1915), rehearing denied, 171 N.C. 752, 88 S.E. 226 (1916). See also, Robinson v. Willoughby, 70 N.C. 358 (1874).

This section and § 47-20 are not mere notice statutes for the protection of third parties. To the contrary, recordation is vital to the acquisition of ownership. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

This section and § 47-20 as originally enacted were intended to uproot all secret liens, trusts, unregistered mortgages, etc., and it has been held that no notice, however full and formal, will supply the place of registration. Hooker v. Nichols, 116 N.C. 157, 21 S.E. 207 (1895). See also, Robinson v. Willoughby, 70 N.C. 358 (1874).

Transformation into Pure Race State. — The Connor Act of 1885, currently codified as this section, transformed North Carolina into a "pure race" state for the recording of deeds, contracts to convey, and other instruments affecting interests in land; under its terms, no such instrument is effective as against either lien creditors, or purchasers for value, until the time of its registration. Love v. United States, 889 F. Supp. 1548 (E.D.N.C. 1994).

This section is intended to remedy the evil of uncertainty of title to real estate caused by persons withholding deeds, contracts, etc., based upon a valuable consideration, from the public records. Bell v. Couch, 132 N.C. 346, 43 S.E. 911 (1903).

The purpose of this section is to enable purchasers to rely with safety upon examination of the records, and act upon the assurance that, as against all persons claiming under the "donor, bargainor, or lessor," what did not appear did not exist. Grimes v. Guion, 220 N.C. 676, 18 S.E.2d 170 (1942); Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984).

Purpose of this section is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

And to Provide a Method for Determining Nature of Title. — This section was enacted for the purpose of providing a plan and a method by which an intending purchaser or encumbrancer can safely determine just what kind of a title he is in fact obtaining. Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528 (1948).

And for Determining Conflicting Claims and Priorities. — The primary purpose and intent of the legislature, in the passage of the Connor Act of 1885 (this section) was to establish a known and ready method for the settlement of conflicting claims and priorities arising from registrations. Spence v. Foster Pottery Co., 185 N.C. 218, 117 S.E. 32 (1923).

Our recording statutes are intended to provide a single reliable means for purchasers to determine the state of the title to real estate. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

The purpose of this section is to point out to prospective purchasers the one place where they must go to find the condition of land titles — the public registry. Hayes v. Ricard, 245 N.C. 687, 97 S.E.2d 105 (1957).

Title Examiner Must Read Prior Conveyances. — In title examination when checking the grantor's out conveyances, it is not enough to merely insure that the subject property was not conveyed out previously. The title examiner must read the prior conveyances to determine that they do not contain restrictions applicable to the use of the subject property. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

This section does not favor persons withholding from the public record deeds or contracts to convey or reconvey lands, particularly when third parties have given valuable consideration for same. Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984).

Secret trusts and hidden encumbrances, all unregistered, and for all of which there is a failure of proof of notice, must not be allowed to defeat a bona fide purchaser for value. Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984).

The object of registration in the county where the land lies is to give notice to creditors and purchasers for value or others whose rights might otherwise be seriously and unjustly impaired by the deed. Warren v. Williford, 148 N.C. 474, 62 S.E. 697 (1908); Weston v. Roper Lumber Co., 160 N.C. 263, 75 S.E. 800 (1912); Massachusetts Bonding & Ins. Co. v. Knox, 220 N.C. 725, 18 S.E.2d 436 (1942); Clark v. Butts, 240 N.C. 709, 83 S.E.2d 885 (1954).

Records as Notice. — The purpose of the registration laws is to give notice, and where the index is sufficient to put a careful and prudent examiner upon inquiry, the records are notice of all matters which would be discovered by reasonable inquiry; but the records are intended to be self-sufficient, and a person examining a title is not required to go out upon the premises and ascertain who is in possession and under what claim, the proviso of this section being applicable only to deeds executed prior to December 1, 1885. Dorman v. Goodman, 213 N.C. 406, 196 S.E. 352 (1938).

Date of Registration Controls Title. — Under this section, a grantee in a deed acquires title thereto, as against subsequent purchasers for value, from the date of the registration of the instrument. Sills v. Ford, 171 N.C. 733, 88 S.E. 636 (1916); Clark v. Butts, 240 N.C. 709, 83 S.E.2d 885 (1954); Hayes v. Ricard, 245 N.C. 687, 97 S.E.2d 105 (1957).

First Registration Prevails. — Among two or more contracts to sell land, the one first registered will confer the superior right. Combes v. Adams, 150 N.C. 64, 63 S.E. 186 (1908); Dulin v. Williams, 239 N.C. 33, 79 S.E.2d 213 (1953); Clark v. Butts, 240 N.C. 709, 83 S.E.2d 885 (1954); Hayes v. Ricard, 245 N.C. 687, 97 S.E.2d 105 (1957).

As between two purchasers for value of the same interest in land, the one whose deed is first registered acquires title. Bourne v. Lay & Co., 264 N.C. 33, 140 S.E.2d 769 (1965).

An unregistered deed does not convey complete title and is ineffectual as against subsequent grantees under registered deeds and creditors of the grantor. Glass v. Lynchburg Shoe Co., 212 N.C. 70, 192 S.E. 899 (1937).

Effect of Reference in Registered Deed to Unregistered Encumbrance. — A reference in a registered deed to an unregistered encumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject thereto. Bourne v. Lay & Co., 264 N.C. 33, 140 S.E.2d 769 (1965).

Principles applicable to sufficiency of references necessary to impart vitality to a prior unregistered encumbrance may be stated as follows: (1) The creditor holding the prior unregistered encumbrance must be named and identified with certainty; (2) The property must be conveyed "subject to" or in subordination to such prior encumbrance; (3) The amount of such prior encumbrance must be definitely stated; and (4) The reference to the prior unregistered encumbrance must amount to a ratification and adoption thereof. Bourne v. Lay & Co., 264 N.C. 33, 140 S.E.2d 769 (1965), holding a reference to a lease in a deed not sufficient to make the registered deed subordinate to the unregistered lease; Terry v. Brothers Inv. Co., 77 N.C. App. 1, 334 S.E.2d 469 (1985); State v. Addington, 143 N.C. 683, 57 S.E. 398 (1907).

Quitclaim Deed. — A subsequently dated but prior recorded deed, including a quitclaim deed supported by consideration, takes precedence over a prior dated but subsequently recorded fee simple deed. Hayes v. Ricard, 245 N.C. 687, 97 S.E.2d 105 (1957).

Rents Already Accrued and Rents Accruing in Future. — North Carolina recognizes a difference between rents which have already accrued and rents which will be accruing in the future. Already accrued rents are personalty (choses in action) while rents accruing in the future are incorporeal hereditaments — interests in real property. Thus the recordation of the deed of trust was necessary to perfect the security interest in rents accruing in the future. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

Necessity for Recording Condemnation Judgment in Favor of United States. — A careful consideration of the Conformity Act, G.S. 1-237, in relation to docketing judgments of federal courts, and of this section, does not sustain the position that a condemnation judgment in favor of the United States must be recorded in the county where the land lies and cross-indexed in order to protect the United States' ownership in land that it has acquired. The government stands in a position quite different from an individual, and if the statute normally applies to an individual, it may not be applicable against the United States. United States v. Norman Lumber Co., 127 F. Supp. 518 (M.D.N.C. 1955), aff'd, 223 F.2d 868 (4th Cir.), cert. denied, 350 U.S. 902, 76 S. Ct. 181, 100 L. Ed. 792 (1955).

Lis Pendens. — Lis pendens and registration each have the purpose of giving constructive notice by record, and this section and G.S. 1-117 must be construed in pari materia. While the lis pendens statutes do not affect the registration laws, the converse is not true. Massachusetts Bonding & Ins. Co. v. Knox, 220 N.C. 725, 18 S.E.2d 436 (1942).

Recordation Raises Rebuttable Presumption That Deed was Duly Executed and Delivered. — When a deed is duly recorded as required by law, the public record thereof is admissible in evidence and raises a rebuttable presumption that the original was duly executed and delivered. Williams v. North Carolina State Bd. of Educ., 284 N.C. 588, 201 S.E.2d 889 (1974).

Registration Does Not Cure Lack of Mental Capacity. — Where a deed, void for mental incapacity of the grantor to make it, is registered prior to one theretofore made by the same grantor, for a valuable consideration, when the grantor had sufficient mental capacity, the registration under this section can give no effect to the invalid deed, and the valid deed, though subsequently registered, will be effective. Thompson v. Thomas, 163 N.C. 500, 79 S.E. 896 (1913).

Where plaintiff's deed was executed fraudulently, in which fraud plaintiff participated, for the purpose of depriving defendant of her life estate in the land, theretofore created by paper-writing executed by plaintiff's grantor, this section did not apply, and defendant's rights were superior to those of plaintiff under the registered deed, even though the paper-writing giving defendant a life estate was not registered, since the protection of this section extends only to creditors and purchasers for value. Twitty v. Cochran, 214 N.C. 265, 199 S.E. 29 (1938).

In a sale of lands in proceedings for partition, the conversion from realty to personalty does not take place until the land is sold and the sale is confirmed by the court. Therefore, an unregistered deed made by some of the cotenants of their interest in the lands held in common is not good as against a subsequently made and registered deed by the same grantors of the same interest, to another, after the decree of sale for partition, but before the sale was confirmed. McLean v. Leitch, 152 N.C. 266, 67 S.E. 490 (1910).

Registered Deed Good Although Deed to Grantor Was Unregistered. — Upon registration, the deed is good even as against creditors and purchasers for value, even though the deed by which the grantor acquired title is unregistered. Durham v. Pollard, 219 N.C. 750, 14 S.E.2d 818 (1941).

Right to Easement. — Under this section, where a grantor conveys land by registered deed creating an easement in land reserved by the grantor, his grantee is entitled to the easement unaffected by an unregistered contract to convey the reserved land executed prior to the deed. Walker v. Phelps, 202 N.C. 344, 162 S.E. 727 (1932).

Where a deed provides that it is subject to a written lease previously executed by the grantor, the grantee takes the premises subject to the lease, even though the lease is for more than three years and is not recorded. Hildebrand Mach. Co. v. Post, 204 N.C. 744, 169 S.E. 629 (1933).

Allegation that third persons conspired to deprive plaintiff of his rights under an unregistered option does not state a cause of action against such third persons, since in the absence of registration third persons have a legal right to deal with the property as if there were no option and an agreement to do a lawful act cannot constitute a wrongful conspiracy. Eller v. Arnold, 230 N.C. 418, 53 S.E.2d 266 (1949).

Priorities Between Unregistered Deed and Execution of Judgment. — A sale of land under the execution of a judgment in the due course and practice of the court, and conveyance to the purchaser at the sale, regular in form and sufficiently describing the land, conveys title superior to that of an unregistered deed from the judgment debtor to another, previously made, as no notice, however formal, is sufficient to supply that required by registration, even though a mortgage for the balance of the purchase price had been given by the grantee of the debtor and duly registered before the docketing of the judgment under the execution of which the conveyance had been made to the purchaser at the sale. Wimes v. Hufham, 185 N.C. 178, 116 S.E. 402 (1923).

Extent of Right of Judgment Creditor or Purchaser at Execution Sale. — A judgment creditor or purchaser at an execution sale can acquire no greater lien or interest in the property of the judgment debtor than such debtor had at the time the judgment lien became effective. Bristol v. Hallyburton, 93 N.C. 384 (1885); Spence v. Foster Pottery Co., 185 N.C. 218, 117 S.E. 32 (1923).

Rights of Creditor Whose Judgment Was Docketed Between Execution and Registration of Prior Deed. — The grantee, in a deed executed by the grantor and deposited with the holder of a mortgage under an agreement between the latter and the grantee that it should not be registered until the payment of the purchase price, took subject to the lien of a judgment creditor of the grantor, whose judgment was rendered and docketed between execution and registration of the deed. Board of Comm'rs v. Micks, 118 N.C. 162, 24 S.E. 729 (1896).

Priority of Judgment Obtained Before Registration of Prior Deed — In General. — Where a judgment is obtained against a grantor of land subsequent to the execution of the conveyance, but prior to the time of its registration, the lien of the judgment has priority over the title of the grantee, and the lands conveyed are subject to execution under the judgment. Maxton Realty Co. v. Carter, 170 N.C. 5, 86 S.E. 714 (1915).

The lien of a regularly docketed judgment is superior to a claim under an unrecorded deed from the judgment debtor. Eaton v. Doub, 190 N.C. 14, 128 S.E. 494 (1925).

Same — Agreement Between Parties as to Registration. — Under the provisions of this section, the holder of a subsequently registered conveyance takes subject to the lien of a judgment creditor of the grantor where the judgment was rendered and docketed before the registration of the deed, even though there was an agreement between the grantor and the grantee that such deed should not be registered till the payment of the purchase money. Francis v. Herren, 101 N.C. 497, 8 S.E. 353 (1888); Bostic v. Young, 116 N.C. 766, 21 S.E. 552 (1895); Board of Comm'rs v. Micks, 118 N.C. 162, 24 S.E. 729 (1896); Colonial Trust Co. v. Sterchie Bros., 169 N.C. 21, 85 S.E. 40 (1915).

Same — Judgment Against Grantee. — Where a judgment has been obtained and docketed against the grantee, the lien thereof immediately attaches upon the registration of his deed, and cannot be defeated by a deed in trust subsequently registered carrying out the agreement theretofore resting only in parol; and the consideration recited in the grantee's deed is immaterial. Colonial Trust Co. v. Sterchie Bros., 169 N.C. 21, 85 S.E. 40 (1915).

When a grantee accepts a conveyance subject to an outstanding claim or interest evidenced by an unrecorded instrument executed by his grantor, he takes the property burdened by that claim or interest; by accepting such a deed he ratifies the unrecorded instrument and agrees to take the property subject to it and is estopped to deny the unrecorded instrument's validity. This principle derives from the theory that reference to the unrecorded encumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject to the encumbrance. Terry v. Brothers Inv. Co., 77 N.C. App. 1, 334 S.E.2d 469 (1985).

Collateral Attack by Creditors for Want of Registration. — The want of registration does not invalidate an instrument so that creditors, merely as such, may treat it as a nullity in a collateral proceeding; but it is void against proceedings instituted by them and prosecuted to a sale of the property or acquisition of a lien, as against all who derive title thereunder. Brem v. Lockhart, 93 N.C. 191 (1885); Boyd v. Turpin, 94 N.C. 137 (1886); Francis v. Herren, 101 N.C. 497, 8 S.E. 353 (1888).

Liberal Construction of Subsection (b). — The words of what is now subsection (b) of this section should receive a liberal construction so as to give full force and effect to the spirit and intention of the section. Cowen v. Withrow, 112 N.C. 736, 17 S.E. 575 (1893).

Under this section a conveyance of land made prior to the 1885 amendment, known as the Connor Act, is not valid against creditors or bona fide purchasers, unless registered before January 1, 1886. Phillips v. Hodges, 109 N.C. 248, 13 S.E. 769 (1891).

The use of the words "unregistered deed" in subsection (b) of this section is in their broad generic sense and has reference to the same scope as the words "conveyance of land, or contract to convey, or lease of land" as used in subsection (a) of this section. McNeill v. Allen, 146 N.C. 283, 59 S.E. 689 (1907).

Execution Purchaser with Notice Prior to 1885 Subordinate to Prior Unregistered Deed. — The provision of subsection (b) of this section that no purchase of land from a donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to December 1, 1885, where there is constructive or actual notice, applies as well to a purchaser of land at an execution sale with actual notice as to a purchaser from the "bargainor or lessor." Cowen v. Withrow, 112 N.C. 736, 17 S.E. 575 (1893).

A deed executed prior to the act of 1885, but not registered until after the registration of a mortgage from the same grantor, is competent evidence to show title in the grantee, he being in possession before the passage of the said act. Laton v. Crowell, 136 N.C. 377, 48 S.E. 767 (1904).

As to deeds executed prior to December 1, 1885, see also Lanier v. Roper Lumber Co., 177 N.C. 200, 98 S.E. 593 (1919). See Collins v. Davis, 132 N.C. 106, 43 S.E. 579 (1903).

Applied in Fidelity & Cas. Co. v. Massachusetts Mut. Life Ins. Co., 74 F.2d 881 (4th Cir. 1935); McCollum v. Smith, 233 N.C. 10, 62 S.E.2d 483 (1950); Henry v. Shore, 18 N.C. App. 463, 197 S.E.2d 270 (1973); Cities Serv. Oil Co. v. Pochna, 30 N.C. App. 360, 226 S.E.2d 884 (1976); Hill v. Pinelawn Mem. Park, 50 N.C. App. 231, 275 S.E.2d 838 (1981); Smith v. Watson, 71 N.C. App. 351, 322 S.E.2d 588 (1984); Johnson v. Brown, 71 N.C. App. 660, 323 S.E.2d 389 (1984).

Cited in Johnson v. Fry, 195 N.C. 832, 143 S.E. 857 (1928); Threlkeld v. Malcragson Land Co., 198 N.C. 186, 151 S.E. 99 (1930); Jones v. Rhea, 198 N.C. 190, 151 S.E. 255 (1930); Tucker v. Almond, 209 N.C. 333, 183 S.E. 407 (1936); Tocci v. Nowfall, 220 N.C. 550, 18 S.E.2d 225 (1942); Ricks v. Batchelor, 225 N.C. 8, 33 S.E.2d 68 (1945); Carolina Power & Light Co. v. Bowman, 228 N.C. 319, 45 S.E.2d 531 (1947); Pearce v. Hewitt, 261 N.C. 408, 134 S.E.2d 662 (1964); Jenkins v. Coombs, 21 N.C. App. 683, 205 S.E.2d 728 (1974); Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Hornets Nest Girl Scout Council, Inc. v. Cannon Found., Inc., 79 N.C. App. 187, 339 S.E.2d 26 (1986); VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); In re Raleigh/Spring Forest Apts. Assocs., 118 Bankr. 42 (Bankr. E.D.N.C. 1990); In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990); National Adv. Co. v. North Carolina DOT, 124 N.C. App. 620, 478 S.E.2d 248 (1996); Haw River Land & Timber v. Lawyers Title Ins., 152 F.3d 275 (4th Cir. 1998).

II. REGISTRATION AS BETWEEN PARTIES.

A deed is good and valid between the parties thereto without registration, and may be proved on the trial as at common law. Hinton v. Moore, 139 N.C. 44, 51 S.E. 787 (1905); Warren v. Williford, 148 N.C. 474, 62 S.E. 697 (1908); Weston v. Roper Lumber Co., 160 N.C. 263, 75 S.E. 800 (1912); Glass v. Lynchburg Shoe Co., 212 N.C. 70, 192 S.E. 899 (1937).

An unregistered deed is good as between the parties thereto, and the fact that it is not registered does not affect the equities between the parties, the sole purpose of the statute being to determine and make certain the question of title. Patterson v. Bryant, 216 N.C. 550, 5 S.E.2d 849 (1939).

As Are Contracts to Convey. — Contracts to convey land, as between the parties thereto, may be read in evidence without being registered. Hargrove v. Adcock, 111 N.C. 166, 16 S.E. 16 (1892).

The manifest purpose of this section is to protect purchasers for value and creditors, and leave the parties to contracts for the sale of lands inter se to litigate their rights under the rules of evidence in force. Hargrove v. Adcock, 111 N.C. 166, 16 S.E. 16 (1892).

Contract Specifically Enforceable Between Parties. — A written contract to convey standing timber is specifically enforceable as between the parties without registration, and after registration is specifically enforceable even against subsequent purchasers for value. Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R.2d 571 (1948).

The junior lienholder's intervening deed of trust gained priority over all subsequently recorded deeds of trust, including the deed of trust given by transferees when the bank marked the senior deed of trust satisfied as the result of the transfer of the property. First Union Nat'l Bank v. Lindley Labs., Inc., 132 N.C. App. 129, 510 S.E.2d 187 (1999).

Formerly registration was necessary even as between the parties. This was the rule prior to the 1885 amendment, known as the Connor Act. White v. Holly, 91 N.C. 67 (1884); Hargrove v. Adcock, 111 N.C. 166, 16 S.E. 16 (1892).

Registration After Commencement of Action. — As between the parties, there being no question of title arising from prior registration of junior deeds, a deed registered after the commencement of an action is admissible in evidence. Hudson v. Jordan, 108 N.C. 10, 12 S.E. 1029 (1891), rehearing denied, 110 N.C. 250, 14 S.E. 741 (1892).

The registration laws are not for the protection of the grantor, and therefore laches on the part of his first grantee in failing to promptly record his deed is not available as an equitable defense in such grantee's action for damages for failure of title by reason of the execution by the grantor of a second deed to the same property which is first recorded. Patterson v. Bryant, 216 N.C. 550, 5 S.E.2d 849 (1939).

III. WHAT INSTRUMENTS AFFECTED.

Under subsection (a), conveyances, contracts to convey, and leases for more than three years are not valid to pass title against a purchaser for a valuable consideration unless and until registered in the county where the land lies. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

This section is restricted to written instruments capable of registration. Spence v. Foster Pottery Co., 185 N.C. 218, 117 S.E. 32 (1923); Eaton v. Doub, 190 N.C. 14, 128 S.E. 494 (1925); Sansom v. Warren, 215 N.C. 432, 2 S.E.2d 459 (1939).

This section, in terms, applies only to conveyances of land, contracts to convey, and leases of land for more than three years. Such instruments deal with estates that lie in grant, and are required to be in writing. Spence v. Foster Pottery Co., 185 N.C. 218, 117 S.E. 32 (1923).

Parol and Implied Trusts Are Not Affected. — Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of this section. Wood v. Tinsley, 138 N.C. 507, 51 S.E. 59 (1905); Sills v. Ford, 171 N.C. 733, 88 S.E. 636 (1916); Pritchard v. Williams, 175 N.C. 319, 95 S.E. 570 (1918); Roberts v. Massey, 185 N.C. 164, 116 S.E. 407 (1923); Spence v. Foster Pottery Co., 185 N.C. 218, 117 S.E. 32 (1923); Eaton v. Doub, 190 N.C. 14, 128 S.E. 494 (1925); Sansom v. Warren, 215 N.C. 432, 2 S.E.2d 459 (1939).

When the plaintiff seeks to engraft a parol trust in his favor against the holder of the legal title to lands, only a bona fide purchaser for value without notice is protected, and this under the broad principles of equity, and creditors expressly referred to in this section are not included. Spence v. Foster Pottery Co., 185 N.C. 218, 117 S.E. 32 (1923).

Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of the registration statutes. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Where the parties intended deed to pass entire property, but through a mutual mistake of the parties, it failed to do so, defendant grantor held, as a constructive trustee for grantee, that portion of the land which the parties intended to be conveyed. Therefore, the case fell outside the registration act. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

A declaration of trust is not required to be registered as against creditors, by virtue of the provisions of this section. Crossett v. McQueen, 205 N.C. 48, 169 S.E. 829 (1933).

A building restriction, being an easement which must be created by a grant, is within this section. Davis v. Robinson, 189 N.C. 589, 127 S.E. 697 (1925).

Contract to Convey Land. — This section protects purchasers for value against an unregistered contract to convey land, that is, where an owner of land contracts to convey land, such contract, until registered in the county where the land lies, is ineffective as against any who purchases for value from him. Eller v. Arnold, 230 N.C. 418, 53 S.E.2d 266 (1949).

An unrecorded contract to convey land is not valid as against a subsequent purchaser for value, or those holding under such a purchaser, even though he acquired title with actual notice of the contract. Beasley v. Wilson, 267 N.C. 95, 147 S.E.2d 577 (1966). See Note to § 47-20.

An unrecorded contract to convey land is not valid as against a subsequent purchaser for value even though he acquired title with actual notice of the contract. Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984).

A contract to convey standing timber constitutes a contract to convey land within the meaning of this section. Winston v. Williams & McKeithan Lumber Co., 227 N.C. 339, 42 S.E.2d 218 (1947); Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528, 3 A.L.R.2d 571 (1948); Dulin v. Williams, 239 N.C. 33, 79 S.E.2d 213 (1953).

Option to Purchase Land. — Under subsection (a) of this section as it stood before the 1975 amendment, registration of an option to purchase land was not essential to its validity as against lien creditors or purchasers for a valuable consideration from the optionor. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

Exercise of Option to Renew Lease. — In a suit to quiet title brought by a lessor, the trial court properly held that lessees had a leasehold interest in a tract through 2011, provided that they continued to tender rent; it was not necessary under G.S. 47-18 to record the exercise of an option to renew a lease, and by accepting rent for over 30 years, the lessor and its predecessors had waived the requirement of notice to extend the lease. Spruce Pine Indus. Park, Inc. v. Explosives Supply Co., 179 N.C. App. 524, 634 S.E.2d 264, 2006 N.C. App. LEXIS 1974 (2006).

Agreement for Division of Proceeds of Sale. — An instrument which is neither a conveyance of land, nor a contract to convey, nor a lease of land, but only an agreement for a division of the proceeds of sales thereafter to be made of land, and authority to one to take entire control and management of sales of land for the parties, is not required to be registered. Lenoir v. Valley River Mining Co., 113 N.C. 513, 18 S.E. 73 (1893).

Assignment of Rents. — Rents accrued are choses in action and an assignment thereof need not be recorded. Rents accruing are incorporeal hereditaments and, if for a period of more than three years, must be registered to pass any property as against purchasers for valuable consideration. First & Citizens Nat'l Bank v. Sawyer, 218 N.C. 142, 10 S.E.2d 656 (1940).

Lost and Unlost Deeds. — This section applies both to lost and unlost deeds executed after December 1, 1885; and there was no error in rejecting parol evidence to show that the plaintiff's grantor deeded the land in controversy to W in 1891, and that the said deed had been lost before registration, where the plaintiff was purchaser for value of said title under registered conveyances. Hinton v. Moore, 139 N.C. 44, 51 S.E. 787 (1905).

Where the corporate seal has not been affixed to a corporate deed, an order admitting it to probate as a conveyance is unauthorized but is sufficient to authorize its registration as a contract to convey. Haas v. Rendleman, 62 F.2d 701 (4th Cir. 1933), cert. denied, 289 U.S. 750, 53 S. Ct. 695, 77 L. Ed. 1495 (1933).

Exclusive Right to Sell Given to Broker. — Where an exclusive right to sell property given by the owner to a real estate broker is not registered as required by this section, third parties may deal with the locus as if there were no contract, since no notice, however full and formal, will take the place of registration. Eller v. Arnold, 230 N.C. 418, 53 S.E.2d 266 (1949).

Plaintiff broker alleged that he had been given an exclusive contract to sell certain property, that he had secured a prospect, and that thereafter the prospect and another real estate broker entered into an agreement under which the prospect, after expiration of plaintiff's option, purchased the property through the other broker upon such other broker's agreement to split his commission. It was held that in view of the absence of an allegation that plaintiff's option was registered, the complaint failed to state a cause of action. Eller v. Arnold, 230 N.C. 418, 53 S.E.2d 266 (1949).

Grants. — This section does not apply to grants, the registration of which is regulated by G.S. 146-47 and 146-48. Wyman v. Taylor, 124 N.C. 426, 32 S.E. 740 (1899).

Lease in Writing. — In order to affect with notice and bind a purchaser of lands to a contract of lease for more than three years made by a tenant with a former owner, it is necessary that the lease be registered in the proper county, and consequently, the lease must be in writing. Mauney v. Norvell, 179 N.C. 628, 103 S.E. 372 (1920), overruled on other grounds, Kent v. Humphries, 303 N.C. 675, 281 S.E.2d 43 (1981).

A lease for more than three years, to be enforceable, must be in writing, and to protect it against creditors or subsequent purchasers for value, the lease must be recorded. Bourne v. Lay & Co., 264 N.C. 33, 140 S.E.2d 769 (1965).

Short-Term Parol Leases. — The fact that parol leases for not more than three years are excepted from the operation of this section is not to be interpreted as meaning that a lessee under such lease is protected at all hazards or that his rights are superior to those of a bona fide purchaser for value from the lessor. These short-term parol tenancies are merely exempted from the operation of this section. This being so, one must look for guidance to the law as it stood prior to the passage of this section and as it now stands where the section has no application. Perkins v. Langdon, 237 N.C. 159, 74 S.E.2d 634 (1953).

Assignment of Lease for More Than Three Years. — Though not mentioned in either G.S. 22-2 or this section, an assignment of a lease for more than three years must, to be enforceable, be in writing, and to protect against creditors or subsequent purchasers, must be recorded. Herring v. Volume Merchandise, Inc., 249 N.C. 221, 106 S.E.2d 197 (1958).

Mere Personal Contract. — This section requires recordation of all deeds, contracts to convey, and leases for more than three years affecting the title to real property. But it neither requires nor authorizes the registration of a mere personal contract. Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528 (1948).

Mortgage. — A mortgage has been held to come within the term "conveyance" as used in this section. First Nat'l Bank v. Sauls, 183 N.C. 165, 110 S.E. 865 (1922). See § 47-20 and note.

Agreement to Release Mortgage. — An unexecuted verbal agreement, made by a mortgagee for a valuable consideration, to release a real estate mortgage does not come within the statute of frauds, and it logically follows, if such an agreement is not required to be in writing to be enforceable as between the parties, that certainly it is not required to be recorded to be enforceable as between the parties. Nye v. University Dev. Co., 10 N.C. App. 676, 179 S.E.2d 795 (1971).

A tobacco acreage allotment is not within the purview of this section. Hart v. Hassell, 250 F. Supp. 893 (E.D.N.C. 1966).

Wills. — This section has no application to wills. Cooley v. Lee, 170 N.C. 18, 86 S.E. 720 (1915); Barnhardt v. Morrison, 178 N.C. 563, 101 S.E. 218 (1919).

The general term "conveyance," as used in this section, cannot be construed to include wills. Bell v. Couch, 132 N.C. 346, 43 S.E. 911 (1903).

It is not necessary to examine the book of wills to see if the grantor of lands has devised them, or a part thereof, to another, and actual notice thereof will not affect the title conveyed by a registered deed. Harris v. Dudley Lumber Co., 147 N.C. 631, 61 S.E. 604 (1908).

Purchaser from Devisee Prevails

Against Unregistered Deed. — This section, requiring conveyances of land, contracts to convey, and leases to be recorded, applies when the grantee in a deed fails to record his deed until after the probate of a will of the grantor devising the same land, and after the registration of a deed for the same land from the devisee to a purchaser for value. Bell v. Couch, 132 N.C. 346, 43 S.E. 911 (1903).

IV. PERSONS PROTECTED AND RIGHTS THEREOF.

Who Are Protected, Generally. — By virtue of this section, only creditors of the donor, bargainor, or lessor, and purchasers for value are protected against an unregistered deed, contract to convey, or lease of land for more than three years. Warren v. Williford, 148 N.C. 474, 62 S.E. 697 (1908); Gosney v. McCullers, 202 N.C. 326, 162 S.E. 746 (1932); Virginia-Carolina Joint Stock Land Bank v. Mitchell, 203 N.C. 339, 166 S.E. 69 (1932); Case v. Arnold, 215 N.C. 593, 2 S.E.2d 694 (1939); Durham v. Pollard, 219 N.C. 750, 14 S.E.2d 818 (1941).

Creditors and purchasers for value are entitled to rely on the record of the instrument as written and recorded, under this section and G.S. 47-20, and as to them the mortgagee is not entitled to reformation. Lowery v. Wilson, 214 N.C. 800, 200 S.E. 861 (1939).

Because a real estate installment sales contract was recorded before a later transferee's deed to the same property was recorded, and because the buyers under the contract paid all money due under the contract, the buyers had valid title to the property and, pursuant to G.S. 47-18, were protected against the transferee, a subsequent purchaser for value. Watson v. Millers Creek Lumber Co., 178 N.C. App. 552, 631 S.E.2d 839, 2006 N.C. App. LEXIS 1563 (2006).

The recording of a deed is essential to its validity only as against creditors and purchasers for a valuable consideration. Ballard v. Ballard, 230 N.C. 629, 55 S.E.2d 316 (1949); Dulin v. Williams, 239 N.C. 33, 79 S.E.2d 213 (1953).

The registration of a deed conveying an interest in land is essential to its validity as against a purchaser for a valuable consideration from the grantor. Bourne v. Lay & Co., 264 N.C. 33, 140 S.E.2d 769 (1965).

This section does not protect all purchasers, but only innocent purchasers for value. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Status of Innocent Purchaser for Value Precluded by Actual Notice of Pending Litigation. — While actual notice of another unrecorded conveyance does not preclude the status of an innocent purchaser for value, actual notice of pending litigation affecting title to the property does preclude such status. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

State's Title Superior Where Intervenor's Interest Derived from Deed Recorded After Filing of Lis Pendens. — Since the State's title to property derived from a Racketeer Influenced and Corrupt Organizations Act forfeiture proceeding related back to the date of the institution of the action when the notice of lis pendens was filed pursuant to G.S. 75D-5, the State's title was superior to the interest of an intervenor which derived from a deed from her husband recorded after the institution of the RICO action, and after the filing of the notice of lis pendens. State ex rel. Thornburg v. Tavern & Other Bldgs. & Lots at 1907 N. Main St., 96 N.C. App. 84, 384 S.E.2d 585 (1989).

Purchaser Obtaining and Recording Deed After Service of Summons Not Protected. — A purchaser of real property who obtains and records a deed thereto after being served with a summons in an action by a prior purchaser demanding conveyance of that property is not protected as a purchaser for value under the recordation statute. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Heir Not Protected. — The recording act protects only creditors of the grantor, bargainor, or lessor and purchaser for value against an unregistered conveyance of land. The same reasoning which prevents a party from introducing into evidence against a lien creditor or purchaser for value a deed invalidly registered does not apply to exclude an invalidly registered deed introduced against a party claiming an interest in the land by descent. An heir is not a purchaser for value entitled to the protection of the recording act. Hi-Fort, Inc. v. Burnette, 42 N.C. App. 428, 257 S.E.2d 85 (1979).

Burden on Purchaser. — Where a purchaser claims protection under the registration laws, he has the burden of proving, by a preponderance of the evidence, that he is an innocent purchaser for value, i.e., that he paid valuable consideration and had no actual notice, or constructive notice by reason of lis pendens, of pending litigation affecting title to the property. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981); Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984).

Creditors Put Upon Same Plane as Purchasers. — No distinction is made in the statute or in the opinions of the court construing and applying the statute between creditors and purchasers for value. No conveyance of land is valid to pass any property from the donor or grantor, against either creditors or purchasers for value, but from the registration thereof. As to a purchaser for value who has recorded his deed, it has been held that a prior deed from the same grantor, unregistered, does not exist, as a conveyance or as color of title. The same is true as against the creditors. Eaton v. Doub, 190 N.C. 14, 128 S.E. 494 (1925).

Under the recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Volunteers and Donees Not Protected. — For lack of timely registration, this section only postpones or subordinates a deed older in date to creditors and purchasers for value. As against volunteers or donees, the older deed, though not registered, will, as a rule, prevail. Tyner v. Barnes, 142 N.C. 110, 54 S.E. 1008 (1906).

While the cancellation of a preexisting debt may be sufficient consideration to constitute the grantee in a registered deed from the debtor a purchaser for value within the protection of the Connor Act (this section), so as to take free from the claim of the grantee in a prior unregistered deed from the debtor, where the debtor transfers the property without consideration to a third person, who in turn transfers the property to the creditor without any consideration moving from the creditor to such third person, the creditor cannot maintain that the cancellation of the debt constitutes him a purchaser for value so as to be protected under the Connor Act, since his deed from the third person is not supported by any consideration, and it is required that the creditor be a "purchaser for value from the donor, bargainor, or lessor" in order to be protected. Sansom v. Warren, 215 N.C. 432, 2 S.E.2d 459 (1939).

The trustee in bankruptcy is regarded as a purchaser for value under the amendment to the National Bankruptcy Act, and acquires a valid title as against the holder of the unregistered deed under this section. Lynch v. Johnson, 171 N.C. 611, 89 S.E. 61 (1916).

Widow. — For case holding that where a man executed and delivered a deed to a tract of land prior to his marriage and remained on the land up to his death, and the deed was not recorded until after his death, his widow was not entitled to dower, and that she was not a purchaser, see Haire v. Haire, 141 N.C. 88, 53 S.E. 340 (1906).

Possessor Under Unregistered Contract to Convey. — One who goes into possession of land under a parol contract to convey, paying the purchase money and making improvements thereon, cannot assert the right to remain in possession until he is repaid the amount expended for purchase money and improvements as against a purchaser for value from the vendor under a duly registered deed. Wood v. Tinsley, 138 N.C. 507, 51 S.E. 59 (1905); Haas v. Smith, 235 N.C. 341, 69 S.E.2d 714 (1952).

As to a purchaser for value from the common grantor, the rule applies to one in possession, under an unregistered deed, who has enhanced the value of the land by improvements, even though such improvements were made in good faith. Eaton v. Doub, 190 N.C. 14, 128 S.E. 494 (1925). See also, Wood v. Tinsley, 138 N.C. 507, 51 S.E. 59 (1905), correcting expressions in Kelly v. Johnson, 135 N.C. 647, 47 S.E. 674 (1904), conflicting with these views.

Tort-Feasor Neither a Purchaser Nor a Creditor. — A tort-feasor whose negligence has damaged a chattel in the rightful possession of the mortgagor is neither a purchaser nor a creditor within the contemplation of our registration laws; an action may be maintained against him for the consequent damage either by the mortgagor or mortgagee, and a settlement with one will preclude a recovery by the other. Harris v. Seaboard Air Line Ry., 190 N.C. 480, 130 S.E. 319 (1925).

Trustee or Mortgagee as Purchaser. — A trustee or mortgagee, whether for old or new debts, is a purchaser for valuable consideration. Brem v. Lockhart, 93 N.C. 191 (1885).

Purchaser Under Execution Sale. — The purchaser at an execution sale who registers his deed prior to a deed from the defendant in execution to his wife which was executed before the sale acquires the title to the land; and the wife in possession of the land conjointly with her husband at the time of the sale and of the execution of the sheriff's deed to the plaintiff is not within the saving clause of the act, as the plaintiff does not take as purchaser from the "donor, bargainor or lessor," as against a donee in possession under an unregistered deed, but from the sheriff, who is the agent of the law. Cowen v. Withrow, 109 N.C. 636, 13 S.E. 1022 (1891).

V. NOTICE.

This section serves to provide constructive notice of claims to real property. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Sections 1-116, 1-118 and this section serve to provide record notice, upon the absence of which a prospective innocent purchaser may rely. Hill v. Pinelawn Mem. Park, 304 N.C. 159, 282 S.E.2d 779 (1981).

Pursuant to G.S. 1-116, 1-1118, and 47-18, the fact that a pre-petition lis pendens had been filed against property purportedly owned by a Chapter 7 debtor was sufficient to give the Chapter 7 trustee constructive notice that there was a possible cloud on the title to the property and to preserve the superior lien of a mortgagee's nominee, once the nominee perfected its lien by judgment and levy. In re

Suggs, 355 B.R. 525, 2006 Bankr. LEXIS 2840 (Bankr. M.D.N.C. 2006).

A purchaser has constructive notice of all duly recorded documents that a proper examination of the title should reveal. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

Only actual prior recordation of an interest in land will put bona fide purchaser for value or lien creditor on notice of an intervening interest or encumbrance on real property. Simmons v. Quick-Stop Food Mart, Inc., 307 N.C. 33, 296 S.E.2d 275 (1982).

No notice, however full or formal, will supply the want of registration of a deed. Collins v. Davis, 132 N.C. 106, 43 S.E. 579 (1903). See McClure v. Crow, 196 N.C. 657, 146 S.E. 713 (1929); Knowles v. Wallace, 210 N.C. 603, 188 S.E. 195 (1936); Smith v. Turnage-Winslow Co., 212 N.C. 310, 193 S.E. 685 (1937); Case v. Arnold, 215 N.C. 593, 2 S.E.2d 694 (1939); Turner v. Glenn, 220 N.C. 620, 18 S.E.2d 197 (1942); Grimes v. Guion, 220 N.C. 676, 18 S.E.2d 170 (1942); State Trust Co. v. Braznell, 227 N.C. 211, 41 S.E.2d 744 (1947); Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528 (1948); Eller v. Arnold, 230 N.C. 418, 53 S.E.2d 266 (1949); Dulin v. Williams, 239 N.C. 33, 79 S.E.2d 213 (1953); Dula v. Parsons, 243 N.C. 32, 89 S.E.2d 797 (1955); Hayes v. Ricard, 245 N.C. 687, 97 S.E.2d 105 (1957); New Home Bldg. Supply Co. v. Nations, 259 N.C. 681, 131 S.E.2d 425 (1963); Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

The equitable doctrine of estoppel has no application to an innocent purchaser of lands for a valuable consideration, where the party setting up the estoppel under his deed has not had the latter recorded; for no notice, however full or formal, will, under this section, supply the place of registration. Sexton v. Elizabeth City, 169 N.C. 385, 86 S.E. 344 (1915).

Where defendant alleged that she went into possession of land, paid taxes and made improvements, under a parol agreement with the owner that if the owner should fail to return and repay the taxes and pay for the improvements defendant should have the land in fee, and that plaintiff, seeking to recover possession of the land by virtue of a duly registered deed from the heirs of the vendor, took with knowledge of the terms of the agreement and knowledge that defendant was in possession thereunder, it was held that the parol agreement was ineffectual as against plaintiff notwithstanding his knowledge, since no notice, however full and formal, will supply notice by registration as required by this section. Grimes v. Guion, 220 N.C. 676, 18 S.E.2d 170 (1942).

Absent Fraud or Estoppel. — Actual knowledge, however full and formal, of a grantee in a registered deed of a prior unregistered deed or lease will not defeat his title as a purchaser for value in the absence of fraud or matters creating estoppel. Bourne v. Lay & Co., 264 N.C. 33, 140 S.E.2d 769 (1965).

This section provides, for reasons of public policy, that the rights of successive grantees of the same property shall be determined by registration, and that even actual knowledge on the part of the grantee in a registered instrument of the execution of a prior unregistered deed will not defeat his title as purchaser for a valuable consideration in the absence of fraud or matters creating an estoppel. Patterson v. Bryant, 216 N.C. 550, 5 S.E.2d 849 (1939).

Record of Nonrecordable Instrument Does Not Constitute Notice. — The record of an instrument does not constitute constructive notice if it is not of a class which is authorized or required by law to be recorded. Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528 (1948).

The registration of an instrument operates as constructive notice only when the statute authorizes its registration, and then only to the extent of those provisions which are within the registration statutes. Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528 (1948).

The registration of a deed or other instrument not entitled or required to be recorded is not constructive notice to subsequent purchasers. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

Registration is constructive notice as to all instruments authorized to be registered, but is not constructive notice of provisions not coming within the registration laws, even if they are embodied in an instrument required to be recorded. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

Actual Knowledge Not Sufficient Notice of Restrictive Covenant. — It is well settled in the state that a restrictive covenant is not enforceable, either at law or in equity, against a subsequent purchaser of property burdened by the covenant unless notice of the covenant is contained in an instrument in his chain of title. Unlike in many states, actual knowledge, no matter how full and formal, is not sufficient to bind a purchaser in the state with notice of the existence of a restrictive covenant. Runyon v. Paley, 331 N.C. 293, 416 S.E.2d 177 (1992).

Notice of Restrictive Covenants Recorded with First Conveyance of Subdivision Lots. — Defendants had record notice of restrictive covenants governing a subdivision, where the covenants were not recorded as part of the subdivision plat, but were recorded with the first conveyance out of lots in the subdivision. Stegall v. Robinson, 81 N.C. App. 617, 344 S.E.2d 803 (1986).

Option Agreement as Notice of Its Exercise. — Under this section as it stood before the 1975 amendment, a recorded option agreement did not constitute constructive notice to defendants that plaintiffs had exercised their option and had instituted an action to compel specific performance, since prior to the 1975 amendment this section did not apply to options. Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

Registration Is Not Notice as to After-Acquired Interest. — A written contract executed by a tenant in common without the knowledge or authorization of his cotenants to sell the timber on the entire tract was recorded. The tenant in common later acquired an additional interest in the land. It was held that registration was constructive notice to all subsequent purchasers as to the tenant's original interest, but the vendee's right to demand conveyance of the timber as to the after-acquired interest rested upon the personal contract of the vendor, which was not required to be recorded by this section, and therefore registration was not notice to subsequent purchasers as to such after-acquired title. Chandler v. Cameron, 229 N.C. 62, 47 S.E.2d 528 (1948).

The mere possession of the locus in quo under an unregistered 99-year lease or any other circumstances is not sufficient notice to the owner of the fee under a valid paper chain of title. Dye v. Morrison, 181 N.C. 309, 107 S.E. 138 (1921).

VI. EFFECT OF DEFECTIVE REGISTRATION.

Registration of Defectively Probated Deed Ineffective. — The registration of a deed upon an unauthorized probate is invalid, and it cannot be introduced in evidence for the purpose of showing an essential link in the chain of title. Allen v. Burch, 142 N.C. 524, 55 S.E. 354 (1906).

In order for a registered deed to give constructive notice to creditors or purchasers for value, the probate must not be defective upon its face as to a material requirement, and where the probate is taken upon the examination of an attesting witness it must actually or constructively appear upon the face of the probate that the certificate was made upon evidence taken of the subscribing witness under oath, and if not so appearing the registration of the deed is insufficient to give the statutory notice. McClure v. Crow, 196 N.C. 657, 146 S.E. 713 (1929).

Lenders that sought to be subrogated to the rights of prior lenders who held recorded deeds of trust on the properties stated a claim for equitable subrogation, as interpreted under the North Carolina pure race recording statute, G.S. 47-18. Commonwealth Land Title Ins. Co. v. Miller (In re Project Homestead, Inc.), — Bankr. —, 2007 Bankr. LEXIS 2853 (Bankr. M.D.N.C. Aug. 17, 2007).

When Probate Appears in Conformity with Law. — While a probate of a deed to lands defective upon its face is ineffectual to pass title as against creditors, etc., it is otherwise when the probate appears to have been in conformity with law, regularly taken by a notary public in some other state, and there is no evidence that the grantee in the commissioner's deed under the foreclosure of a mortgage had actual notice of the defect. County Sav. Bank v. Tolbert, 192 N.C. 126, 133 S.E. 558 (1926).

VII. UNREGISTERED DEED AS COLOR OF TITLE.

In General. — Formerly an unregistered deed was in all cases color of title if sufficient in form. Hunter v. Kelly, 92 N.C. 285 (1885). After the passage of the Connor Act in 1885 it was held that an unregistered deed was not color of title. Austin v. Staten, 126 N.C. 783, 36 S.E. 338 (1900).

The question was again considered in Collins v. Davis, 132 N.C. 106, 43 S.E. 579 (1903), and the ruling in Austin v. Staten was modified so that it only applied in favor of the holder of a subsequent deed executed upon a valuable consideration, and the court has since then consistently adhered to the latter decision. Janney v. Robbins, 141 N.C. 400, 53 S.E. 863 (1906); Burwell v. Chapman, 159 N.C. 209, 74 S.E. 635 (1912); Gore v. McPherson, 161 N.C. 638, 77 S.E. 835 (1913); King v. McRackan, 168 N.C. 621, 84 S.E. 1027 (1915), rehearing denied, 171 N.C. 752, 88 S.E. 226 (1916).

Where one makes a deed for land, for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder, and remains therein for more than 7 years, such deed does not constitute color of title and bar the entry of a grantee, in a subsequent deed for a valuable consideration, who has duly registered his deed. Collins v. Davis, 132 N.C. 106, 43 S.E. 579 (1903).

Except in cases coming within this rule, the rights acquired by adverse possession for 7 years under color of title are not disturbed or affected by this section. Roberts v. Massey, 185 N.C. 164, 116 S.E. 407 (1923); Eaton v. Doub, 190 N.C. 14, 128 S.E. 494 (1925).

Adverse Possession Under Deeds Foreign to True Title. — The principle that under this section an unregistered deed does not constitute color of title does not extend to a claim by adverse possession held continuously for the requisite time under deeds "foreign" to the true title or entirely independent of the title under which the plaintiff makes his claim. Janney v. Robbins, 141 N.C. 400, 53 S.E. 863 (1906).

As Against Subsequent Deed Duly Registered. — Where one makes a deed for land for a valuable consideration and the grantee fails to register it, but enters into possession thereunder and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for a valuable consideration who has duly registered his deed. King v. McRackan, 168 N.C. 621, 84 S.E. 1027 (1915), rehearing denied, 171 N.C. 752, 88 S.E. 226 (1916).

As Against Judgment Creditors. — The possession of a grantee under an unregistered deed of lands is not under color of title as against subsequent judgment creditors of his grantor, who have thus obtained their liens on the locus in quo, the source of title being a common one, nor can the grantee establish his rights to betterments. Eaton v. Doub, 190 N.C. 14, 128 S.E. 494 (1925).

Registration as Affecting Commencement of Limitations. — The statute of limitations does not begin to run in favor of the lessee in possession under a 99-year lease of lands until the registration of the lease, as against the owner of the fee under a paper chain of title from a common source. Dye v. Morrison, 181 N.C. 309, 107 S.E. 138 (1921).

§ 47-18.1. Registration of certificate of corporate merger, consolidation, or conversion.

(a) If title to real property in this State is vested by operation of law in another entity upon the merger, consolidation, or conversion of an entity, such vesting is effective against lien creditors or purchasers for a valuable consideration from the entity formerly owning the property, only from the time of registration of a certificate thereof as provided in this section, in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county.

(b) The Secretary of State shall adopt uniform certificates of merger, consolidation, or conversion, to be furnished for registration, and shall adopt such fees as are necessary for the expense of such certification. If the entity involved is not a domestic entity, a similar certificate by any competent authority in the jurisdiction of incorporation or organization may be registered in accordance with this section.

(c) A certificate of the Secretary of State prepared in accordance with this section shall be registered by the register of deeds in the same manner as deeds, and for the same fees, but no formalities as to acknowledgment, probate, or approval by any other officer shall be required. The name of the entity formerly owning the property shall appear in the "Grantor" index, and the name of the entity owning the property by virtue of the merger, consolidation, or conversion shall appear in the "Grantee" index. (1967, c. 950, s. 3; 1991, c. 645, s. 2(b); 1999-369, s. 5.1.)

§ 47-18.2. Registration of Inheritance and Estate Tax Waiver.

An Inheritance and Estate Tax Waiver or other consent to transfer issued by the Secretary of Revenue bearing the signature of the Secretary of Revenue or the official facsimile signature of the Secretary of Revenue may be registered by the Register of Deeds in the county or counties where the real estate described in the Inheritance and Estate Tax Waiver or consent to transfer is located in the same manner as deeds, and for the same fees, but no formalities as to acknowledgement, probate, or approval by an officer shall be required. The name of the decedent owning the real property at death shall appear in the "Grantor" index. Nothing herein shall require a personal representative or other person interested in the decedent's estate to register Inheritance and Estate Tax Waivers or consents to transfer. (1987, c. 548, s. 3.)

§ 47-18.3. Execution of corporate instruments; authority and proof.

(a) Notwithstanding anything to the contrary in the bylaws or articles of incorporation, when it appears on the face of an instrument registered in the office of the register of deeds that the instrument was signed in the ordinary course of business on behalf of a domestic or foreign corporation by its chairman, president, chief executive officer, a vice-president or an assistant vice-president, treasurer, or chief financial officer, such an instrument shall be as valid with respect to the rights of innocent third parties as if executed pursuant to authorization from the board of directors, unless the instrument reveals on its face a potential breach of fiduciary obligation. The subsection shall not apply to parties who had actual knowledge of lack of authority or of a breach of fiduciary obligation.

(b) Any instrument registered in the office of the register of deeds, appearing on its face to be executed by a corporation, foreign or domestic, and bearing a seal which purports to be the corporate seal, setting forth the name of the corporation engraved, lithographed, printed, stamped, impressed upon, or otherwise affixed to the instrument, is prima facie evidence that the seal is the duly adopted corporate seal of the corporation, that it has been affixed as such by a person duly authorized so to do, that the instrument was duly executed and signed by persons who were officers or agents of the corporation acting by authority duly given by the board of directors, and that any such instrument is the act of the corporation, and shall be admissible in evidence without further proof of execution.

(c) Nothing in this section shall be deemed to exclude the power of any corporate representatives to bind the corporation pursuant to express, implied, inherent or apparent authority, ratification, estoppel, or otherwise.

(d) Nothing in this section shall relieve corporate officers from liability to the corporation or from any other liability that they may have incurred from any violation of their actual authority.

(e) Any corporation may convey an interest in real property which is transferable by instrument which is duly executed by either an officer, manager, or agent of said corporation and has attached thereto a signed and attested resolution of the board of directors of said corporation authorizing the said officer, manager, or agent to execute, sign, seal, and attest deeds, conveyances, or other instruments. This section shall be deemed to have been complied with if an attested resolution is recorded separately in the office of the register of deeds in the county where the land lies, which said resolution shall be applicable to all deeds executed subsequently thereto and pursuant to its authority. Notwithstanding the foregoing, this section shall not require a signed and attested resolution of the board of directors of the corporation to be attached to an instrument or separately recorded in the case of an instrument duly executed by the corporation's chairman, president, chief executive officer, a vice-president, assistant vice-president, treasurer, or chief financial officer. All deeds, conveyances, or other instruments which have been heretofore or shall be hereafter so executed shall, if otherwise sufficient, be valid and shall have the effect to pass the title to the real or personal property described therein. (1991, c. 647, s. 2; 1999-221, s. 4.)

§ 47-19. Unregistered deeds prior to January, 1920, registered on affidavit.

Any person holding any unregistered deed or claiming title thereunder, executed prior to the first day of January, 1920, may have the same registered without proof of the execution thereof by making an affidavit, before the officer having jurisdiction to take probate of such deed, that the grantor, bargainor or maker of such deed, and the witnesses thereto, are dead or cannot be found, that he cannot make proof of their handwriting, and that affiant believes such deed to be a bona fide deed and executed by the grantor therein named. Said affidavit shall be written upon or attached to such deed, and the same, together with such deed, shall be entitled to registration in the same manner and with the same effect as if proved in the manner prescribed by law for other deeds. (1885, c. 147, s. 2; 1905, c. 277; Rev., s. 981; 1913, c. 116; 1915, cc. 13, 90; C.S., s. 3310; Ex. Sess., 1924, c. 56; 1951, c. 771.)

CASE NOTES

Affidavit in Case of Corporation. — Where a corporation is the holder of such a deed, the affidavit under this section may properly be made by its president. Richmond Cedar Works v. Pinnix, 208 F. 785 (E.D.N.C. 1913).

Affirmation of Belief That Deed Is Bona Fide. — The probate of a deed dated in 1845 upon an affidavit that the affiant claimed title under the said deed and that the maker of said deed and the witnesses thereto were dead, and that he could not make proof of their handwriting, was defective, in that it did not appear by the affidavit that the affiant believed such a deed to be a bona fide deed and executed by the grantor therein named. Allen v. Burch, 142 N.C. 524, 55 S.E. 354 (1906).

§ 47-20. Deeds of trust, mortgages, conditional sales contracts, assignments of leases and rents; effect of registration.

(a) No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this Article; provided however that any transaction subject to the provisions of the Uniform Commercial Code (Chapter 25 of the General Statutes) is controlled by the provisions of that act and not by this section. Unless otherwise stated either on the registered instrument or on a separate registered instrument duly executed by the party whose priority interest is adversely affected, (i) instruments registered in the office of the register of deeds shall have priority based on the order of registration as determined by the time of registration, and (ii) if instruments are registered simultaneously, then the instruments shall be presumed to have priority as determined by:

(1) The earliest document number set forth on the registered instrument.

(2) The sequential book and page number set forth on the registered instrument if no document number is set forth on the registered instrument.

The presumption created by this subsection is rebuttable.

(b) For purposes of this section and G.S. 47-20.1, the following definitions apply:

(1) "Rents, issues, or profits" means all amounts payable by or on behalf of any lessee, tenant, or other person having a possessory interest in real estate on account of or pursuant to any written or oral lease or other instrument evidencing a possessory interest in real property or pursuant to any form of tenancy implied by law, and all amounts payable by or on behalf of any licensee or permittee or other person occupying or using real property under license or permission from the owner or person entitled to possession. The term shall not include farm products as defined in G.S. 25-9-102(34), timber, the proceeds from the sale of farm products or timber, or the proceeds from the recovery or severance of any mineral deposits located on or under real property.

(2) "Assignment of leases, rents, issues, or profits" means every document assigning, transferring, pledging, mortgaging, or conveying an inter-

est in leases, licenses to real property, and rents, issues, or profits arising from real property, whether set forth in a separate instrument or contained in a mortgage, deed of trust, conditional sales contract, or other deed or instrument of conveyance.

(3) "Collateral assignment" means any assignment of leases, rents, issues, or profits made and delivered in connection with the grant of any mortgage, or the execution of any conditional sales contract or deed of trust or in connection with any extension of credit made against the security of any interest in real property, where the assignor retains the right to collect or to apply such lease revenues, rents, issues, or profits after assignment and prior to default.

(c) The recording of a written document in accordance with G.S. 47-20.1 containing an assignment of leases, rents, issues, or profits arising from real property shall be valid and enforceable from the time of recording to pass the interest granted, pledged, assigned, or transferred as against the assignor, and shall be perfected from the time of recording against subsequent assignees, lien creditors, and purchasers for a valuable consideration from the assignor.

(d) Where an assignment of leases, rents, issues, or profits is a collateral assignment, after a default under the mortgage, deed of trust, conditional sales contract, or evidence of indebtedness which such assignment secures, the assignee shall thereafter be entitled, but not required, to collect and receive any accrued and unpaid or subsequently accruing lease revenues, rents, issues, or profits subject to the assignment, without need for the appointment of a receiver, any act to take possession of the property, or any further demand on the assignor. Unless otherwise agreed, after default the assignee shall be entitled to notify the tenant or other obligor to make payment to him and shall also be entitled to take control of any proceeds to which he may be entitled. The assignee must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections.

(e) This section shall not exclude other methods of creating, perfecting, collecting, sequestering, or enforcing a security interest in rents, issues, or profits provided by the law of this State. (1829, c. 20; R.C., c. 37, s. 22; Code, s. 1254; Rev., s. 982; 1909, c. 874, s. 1; C.S., s. 3311; 1953, c. 1190, s. 1; 1959, c. 1026, s. 2; 1965, c. 700, s. 8; 1967, c. 562, s. 5; 1991, c. 234, s. 1; 2000-169, s. 35; 2003-219, s. 3; 2005-212, s. 3.)

Cross References. — As to security interests in motor vehicles, see G.S. 20-58 through 20-58.10. As to perfection of security interests under the Uniform Commercial Code, see G.S. 25-9-301 et seq. As to filing of security interests under the Uniform Commercial Code, see G.S. 25-9-401 et seq. As to discharge of record of mortgagees and deeds of trust, see G.S. 45-37. As to registration of conveyances, contracts to convey, options and leases of land, see G.S. 47-18. As to insurance policies for benefit of mortgagees, see G.S. 58-43-15.

Legal Periodicals. — As to notice and registration, see 15 N.C.L. Rev. 166 (1937).

For comment on persons protected by this section, see 28 N.C.L. Rev. 305 (1950).

For comment on the 1953 amendatory act, see 31 N.C.L. Rev. 429 (1953).

For article, "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

For article, "Future Advances and Title Insurance Coverage," see 15 Wake Forest L. Rev. 329 (1979).

For article, "North Carolina's Real Estate Recording Laws: The Ghost of 1885," see 28 N.C. Cent. L.J. 199 (2006).

CASE NOTES

I. In General.
II. Registration as Between Parties.
III. Persons Protected.
IV. Notice.

I. IN GENERAL.

The object of this section is to prevent fraud, and to that end it requires the registration of encumbrances so that purchasers and creditors may have notice of their existence and nature, and all persons may see for what the encumbrances were created. When the registration is made, creditors of the mortgagor are able to avail themselves of their legal remedy against the equity of redemption in the land. This publicity affords the creditors all the benefit they can reasonably ask or that the law intended. Starke v. Etheridge, 71 N.C. 240 (1874).

The purpose of North Carolina's recording statute is to enable intending purchasers and encumbrancers to rely with safety on the public record concerning the status of land titles. However, the recording statute only protects innocent purchasers for value. Chrysler Credit Corp. v. Burton, 599 F. Supp. 1313 (M.D.N.C. 1984).

The purpose of this section is to prevent fraud, and liens registered under this Article are still subject to the common law of North Carolina for determination of their validity. The statute merely adds an additional requirement that a mortgagee must meet before successfully asserting an interest in rents and profits of a mortgaged property against third parties. It is designed to protect third parties. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

This section and § 47-18 were intended to uproot all secret liens, trusts, unregistered mortgages, etc. Hooker v. Nichols, 116 N.C. 157, 21 S.E. 207 (1895). See also, Robinson v. Willoughby, 70 N.C. 358 (1874).

This section is designed to protect creditors and purchasers for value against any adverse claim founded on an unrecorded lien. M. & J. Fin. Corp. v. Hodges, 230 N.C. 580, 55 S.E.2d 201 (1949).

Section Intended Primarily to Protect Creditors and Purchasers. — This section was intended primarily to protect creditors and purchasers, and not to attach to the instrument additional efficacy as between the mortgagor and the mortgagee. South Ga. Motor Co. v. Jackson, 184 N.C. 328, 114 S.E. 478 (1922).

The General Assembly, by enacting the recording statutes, clearly intended that prospective purchasers should be able to safely rely on the public records. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

This section is merely a recording statute that serves to protect third parties by giving record notice of a purported interest. Recordation does not serve to add to the substantive rights of a purported lien holder. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

No distinction is made in the statute between creditors and purchasers for value. Lowery v. Wilson, 214 N.C. 800, 200 S.E. 861 (1939).

Under the recording statutes, there is no distinction between creditors and purchasers for value: no conveyance of land is valid to pass any property as to either but from the registration of the conveyance. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

This section is liberally construed. GMAC v. Mayberry, 195 N.C. 508, 142 S.E. 767 (1928).

Construction of This Section and § 47-18 Identical. — In view of the practical identity of the terminology of this section and G.S. 47-18, the construction put upon them will be identical. Francis v. Herren, 101 N.C. 497, 8 S.E. 353 (1888); Cowan v. Withrow, 112 N.C. 736, 17 S.E. 575 (1893).

This section, the recording statute for deeds of trust, is virtually identical to the statute governing outright conveyances, G.S. 47-18, and the two are construed alike. These statutes provide in essence that the party winning "the race to the courthouse" will have priority in title disputes. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

This section regulates priority as between written instruments affecting the title to property and other legal claims. M. & J. Fin. Corp. v. Hodges, 230 N.C. 580, 55 S.E.2d 201 (1949).

Compliance Required. — The probate and registration of deeds and mortgages are entirely statutory, and creditors and purchasers are entitled to rely upon at least a substantial compliance with the statute. National Bank v. Hill, 226 F. 102 (E.D.N.C. 1915).

Anyone at any time can register papers in compliance with this section, but such recordation does not create a perfected security interest. In re Westchase I Assocs., 119 Bankr. 521 (Bankr. W.D.N.C. 1990).

In its interpretation of the North Carolina recording statutes, the North Carolina Supreme Court has insisted on strict compliance. McKnight v. M. & J. Fin. Corp., 247 F.2d 112 (4th Cir. 1957).

Instrument Effective from Time of Registration. — A mortgage deed, not registered within time, when registered operates from the time of registration only, and has no relation back to its date. Davison v. Beard, 9 N.C. 520 (1823).

Priority is given to the mortgage first recorded, by virtue of this section. Wayne Nat'l Bank v. National Bank, 197 N.C. 68, 147 S.E. 691 (1929).

Determination of Priorities Between Mortgages by Time of Filing. — The priorities between two mortgages or deeds of trust on land, appearing upon the index of the register of deeds to have been registered on the same month, exact date not given, nothing else appearing, may be determined by the time of filing for registration, and their relative position on the index. Blacknall v. Hancock, 182 N.C. 369, 109 S.E. 72 (1921).

Want of Registration at Any Particular Time Does Not Avoid Instruments. — This section does not avoid a deed of trust for want of registration at any particular time, but declares that it shall not operate "but from" the registration, and that is deemed to be done on the day of its delivery to the register, as noted by him on the deed. McKinnon v. McLean, 19 N.C. 79 (1836).

Execution Lien Superior to Unrecorded Mortgage. — Where the assignee of a note and mortgage failed to record the mortgage before an execution was issued in order to satisfy a judgment secured by a creditor, the lien of execution is superior to the assignee's mortgage. M. & J. Fin. Corp. v. Hodges, 230 N.C. 580, 55 S.E.2d 201 (1949).

Mortgagees in unregistered mortgage had no priority as against assets of corporate mortgagor in receivership. This is so for the reason that by adjudication of insolvency and the appointment of the receiver, the creditors at large of the corporation, represented by the receiver, became in legal contemplation creditors for a valuable consideration within the meaning of this section, and therefore, the deed of trust as to the receiver was void. Eno Inv. Co. v. Protective Chems. Lab., 233 N.C. 294, 63 S.E.2d 637 (1951).

Effect of Defective Registration. — A defective registration is no registration and is void, and hence it does not prevent the rights of subsequent purchasers for value from attaching upon the property. Cowan v. Dale, 189 N.C. 684, 128 S.E. 155 (1925).

Mortgage Incorrectly Stating Amount Secured. — Through mistake a mortgage was executed to secure $15.00 instead of $1,500.00, and was so recorded. Later, creditors of the mortgagor obtained judgments against him which were duly recorded. It was held that creditors and purchasers for value are entitled to rely on the record of the instrument as written and recorded, and as to them the mortgage was not entitled to reformation. Lowery v. Wilson, 214 N.C. 800, 200 S.E. 861 (1939).

As to registration of chattel mortgages and conditional sales prior to Uniform Commercial Code, see Dukes v. Jones, 51 N.C. 14 (1858); Butts v. Screws, 95 N.C. 215 (1886); Chemical Co. v. Johnson, 98 N.C. 123, 3 S.E. 723 (1887); Weaver v. Chunn, 99 N.C. 431, 6 S.E. 370 (1888); Harris v. Allen, 104 N.C. 86, 10 S.E. 127 (1889); In re Southern Textile Co., 174 F. 523 (2d Cir. 1909); Bank of Colerain v. Cox, 171 N.C. 76, 87 S.E. 967 (1916); Rogers v. Booker, 184 N.C. 183, 113 S.E. 671 (1922); South Georgia Motor Co. v. Jackson, 184 N.C. 328, 114 S.E. 478 (1922); Cowan v. Dale, 189 N.C. 684, 128 S.E. 155 (1925); Whitehurst v. Garrett, 196 N.C. 154, 144 S.E. 835 (1928); Bundy v. Commercial Credit Co., 202 N.C. 604, 163 S.E. 676 (1931); Carolina Coach Co. v. Begnell, 203 N.C. 656, 166 S.E. 903 (1932); Industrial Disct. Corp. v. Radecky, 205 N.C. 163, 170 S.E. 640 (1933); Weil v. Herring, 207 N.C. 6, 175 S.E. 836 (1934); Hartford Accident & Indem. Co. v. Coggin, 78 F.2d 471 (4th Cir.), cert. denied, 296 U.S. 620, 56 S. Ct. 141, 80 L. Ed. 440, rehearing denied, 296 U.S. 663, 56 S. Ct. 169, 80 L. Ed. 472 (1935); Coggin v. Hartford Accident & Indem. Co., 9 F. Supp. 785 (M.D.N.C.), rev'd on other grounds, 78 F.2d 471 (4th Cir. 1935), cert. denied, 296 U.S. 620, 56 S. Ct. 141, 80 L. Ed. 440, rehearing denied, 296 U.S. 663, 56 S. Ct. 169, 80 L. Ed. 472 (1935); Universal C.I.T. Credit Corp. v. Walters, 230 N.C. 443, 53 S.E.2d 520 (1949); M. & J. Fin. Corp. v. Hodges, 230 N.C. 580, 55 S.E.2d 201 (1949); Associates Disct. Corp. v. McKinney, 230 N.C. 727, 55 S.E.2d 513 (1949); Montague Bros. v. Shepherd Co., 231 N.C. 551, 58 S.E.2d 118 (1950); Sheffield v. Walker, 231 N.C. 556, 58 S.E.2d 356 (1950); Friendly Fin. Corp. v. Quinn, 232 N.C. 407, 61 S.E.2d 192 (1950); National Sur. Corp. v. Sharpe, 236 N.C. 35, 72 S.E.2d 109 (1952); Coastal Sales Co. v. Weston, 245 N.C. 621, 97 S.E.2d 267 (1957); McKnight v. M. & J. Fin. Corp., 247 F.2d 112 (4th Cir. 1957); McCreary Tire & Rubber Co. v. Crawford, 253 N.C. 100, 116 S.E.2d 491 (1960); Southern Auto. Fin. Co. v. Pittman, 253 N.C. 550, 117 S.E.2d 423 (1960); Mickel-Hopkins, Inc. v. Frassinetti, 278 F.2d 301 (4th Cir. 1960); Wachovia Bank & Trust Co. v. Wayne Fin. Co., 262 N.C. 711, 138 S.E.2d 481 (1964); Gordon Johnson Co. v. Dawes, 338 F.2d 628 (4th Cir. 1964); National Bank v. Sprinkle, 3 N.C. App. 242, 164 S.E.2d 611 (1968).

This section does not apply to the application of the equitable subrogation of lien in favor of one advancing money to pay off existing mortgage liens upon lands. Wallace v. Benner, 200 N.C. 124, 156 S.E. 795 (1931).

Agreement Giving Holders of Preferred Stock a Lien. — Where preferred stockholders of a corporation are given a priority over creditors by an agreement in its charter and certificates of stock giving the holders thereof a lien on its realty, even if the agreement is construed as a mortgage, it is inoperative as to creditors without compliance with this section requiring registration. Ellington v. Raleigh Bldg. Supply Co., 196 N.C. 784, 147 S.E. 307 (1929).

Recordation Necessary to Perfect Secu-

rity Interest in Rents Accruing in Future. — North Carolina recognizes a difference between rents which have already accrued and rents which will be accruing in the future. Already accrued rents are personalty (choses in action) while rents accruing in the future are incorporeal hereditaments — interests in real property. Thus the recordation of the deed of trust was necessary to perfect the security interest in rents accruing in the future. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

Purchase-Money Deed of Trust Executed by Husband and Registered Prior to Deed to Wife. — Where the owner of lands deeded them to wife, according to the language of the registered instrument, and husband alone executed a purchase-money deed of trust on the lands, which was registered prior to the registration of the deed in fee to the wife, the records were insufficient to show that the husband had any interest in the land, and the purchase-money deed of trust was ineffective as against creditors or subsequent purchasers for value from the wife, and where the husband and wife thereafter executed a mortgage, which was duly registered, the mortgagee was entitled to foreclose same upon default as against those claiming title by foreclosure under the purchase-money deed of trust, and this result was not affected by the fact that the mortgage, in the clause warranting title, referred to the purchase-money deed of trust by page number of the registry book, since such reference did not constitute even constructive notice in that the records would not have shown that the husband had any interest in the land, and since no notice, however full and formal, will supply want of registration. Smith v. Turnage-Winslo, 212 N.C. 310, 193 S.E. 685 (1937).

Applied in Ward v. Southern Sand & Gravel Co., 33 F.2d 773 (M.D.N.C. 1929); First Nat'l Bank v. Raleigh Sav. Bank & Trust Co., 37 F.2d 301 (4th Cir. 1930); King v. Premo & King, Inc., 258 N.C. 701, 129 S.E.2d 493 (1963); In re Blanks, 64 Bankr. 467 (Bankr. E.D.N.C. 1986).

Cited in Hooker v. Nicholas, 116 N.C. 157, 21 S.E. 207 (1895); John Hetherington & Sons v. Rudisill, 28 F.2d 713 (4th Cir. 1928); Andrews Music Store v. Boone, 197 N.C. 174, 148 S.E. 39 (1929); Threlkeld v. Malcragson Land Co., 198 N.C. 186, 151 S.E. 99 (1930); Jordan v. Wetmur, 202 N.C. 279, 162 S.E. 610 (1932); In re Wallace, 212 N.C. 490, 193 S.E. 819 (1937); Freeman v. Morrison, 214 N.C. 240, 199 S.E. 12 (1938); Massachusetts Bonding & Ins. Co. v. Knox, 220 N.C. 725, 18 S.E.2d 436 (1942); Universal Fin. Co. v. Clary, 227 N.C. 247, 41 S.E.2d 760 (1947); General Fin. & Thrift Corp. v. Guthrie, 227 N.C. 431, 42 S.E.2d 601 (1947); Home Fin. Co. v. O'Daniel, 237 N.C. 286, 74 S.E.2d 717 (1953); Handley Motor Co. v. Wood, 237 N.C. 318, 75 S.E.2d 312 (1953); In re Steele, 122 F. Supp. 948 (E.D.N.C. 1954); Haworth v. GMAC, 238 F.2d 203 (4th Cir. 1956); Franklin Nat'l Bank v. Ramsey, 252 N.C. 339, 113 S.E.2d 723 (1960); In re Raleigh/Spring Forest Apts. Assocs., 118 Bankr. 42 (Bankr. E.D.N.C. 1990); Haw River Land & Timber v. Lawyers Title Ins., 152 F.3d 275 (4th Cir. 1998).

II. REGISTRATION AS BETWEEN PARTIES.

Validity Without Registration. — As between the parties, a mortgage is valid without registration. Leggett v. Bullock, 44 N.C. 283 (1853); Ellington v. Raleigh Bldg. Supply Co., 196 N.C. 784, 147 S.E. 307 (1929); In re Finley, 6 F. Supp. 105 (M.D.N.C. 1933).

The decisions of the Supreme Court of North Carolina interpreting this statute, which are binding upon federal courts in this respect, clearly hold that an unrecorded mortgage or deed of trust is valid under this section as between the parties and as against general creditors, unless the claims of the general creditors have become fastened upon the property, as by insolvency or bankruptcy proceedings, before the recording takes place. In re Cunningham, 64 F.2d 296 (4th Cir. 1933), citing National Bank v. Hill, 226 F. 102 (E.D.N.C. 1915); Hinton v. Williams, 170 N.C. 115, 86 S.E. 994 (1915); Observer Co. v. Little, 175 N.C. 42, 94 S.E. 526 (1917).

An unregistered instrument is valid as between the parties. Coastal Sales Co. v. Weston, 245 N.C. 621, 97 S.E.2d 267 (1957).

Personal Representative Occupies Intestate's Position. — As between the original parties, the lien of an unregistered mortgage holds priority. Leggett v. Bullock, 44 N.C. 283 (1853); Deal v. Palmer, 72 N.C. 582 (1875); Wallace v. Cohen, 111 N.C. 103, 15 S.E. 892 (1892).

The personal representative of a deceased mortgagor stands in the shoes of the latter. Hence plaintiff, holding an unregistered second mortgage on the lands of the defendant's intestate, was entitled to his lien upon the funds derived from the sale in excess of the first mortgage, in preference to other creditors of the deceased. McBrayer v. Harrill, 152 N.C. 712, 68 S.E. 204 (1910).

The personal representative takes only that title which the deceased had in the property at the time of his death, and an unrecorded mortgage lien has the same status as against the personal representative that it had against the deceased, regardless of whether the estate is solvent or insolvent. Coastal Sales Co. v. Weston, 245 N.C. 621, 97 S.E.2d 267 (1957).

Defendant was not a "party" to deed of trust for purposes of the rule that as between parties the instrument first executed, rather than the one first registered, has lien priority, where she signed the instrument merely to release her marital interest and did not incur any liability thereon as a grantor to plaintiff as a grantee. Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Inapplicability of Registration Statutes to Parol and Constructive Trusts. — Parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and purview of the registration statutes. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

Where the parties intended deed to pass entire property, but through a mutual mistake of the parties, it failed to do so, defendant grantor held, as a constructive trustee for grantee, that portion of the land which the parties intended to be conveyed. Therefore, the case fell outside the registration act. Arnette v. Morgan, 88 N.C. App. 458, 363 S.E.2d 678 (1988).

III. PERSONS PROTECTED.

The common-law rule that the title of the mortgagee is good as against any person in possession has been altered by this section only to the extent of protecting as against an unregistered lien, creditors and those purchasers who deraign title from the mortgagor. Friendly Fin. Corp. v. Quinn, 232 N.C. 407, 61 S.E.2d 192 (1950).

Purchaser's Burden of Proof. — Where a purchaser claims protection under the registration laws, he has the burden of proving by a preponderance of the evidence that he is an innocent purchaser for value, i.e., that he paid valuable consideration and that he had no actual notice, or constructive notice by reason of lis pendens, of pending litigation affecting title to the property. Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984).

The word "creditors," as used in this section, means those who have acquired a lien by judicial process or other means. Community Credit Co. v. Norwood, 257 N.C. 87, 125 S.E.2d 369 (1962).

The word "creditor," as used in this section, does not mean a general creditor; it means a lien creditor, i.e., one who has a recorded mortgage. Wachovia Bank & Trust Co. v. Wayne Fin. Co., 262 N.C. 711, 138 S.E.2d 481 (1964).

Unregistered mortgages are of no validity whatsoever as against creditors and purchasers for value. And they take effect as against such interested third parties from and after registration just as if they had been executed then and there. M. & J. Fin. Corp. v. Hodges, 230 N.C. 580, 55 S.E.2d 201 (1949).

But this section does not protect every creditor against unrecorded mortgages. It protects only purchasers for a valuable consideration from the mortgagor, and creditors who have first fastened a lien upon the property in some manner sanctioned by law. Coastal Sales Co. v. Weston, 245 N.C. 621, 97 S.E.2d 267 (1957).

General Creditors Are Not Protected. — It is well settled by the decisions in this State that unless a general creditor has secured a specific lien on the property of the mortgagor or grantor before the registration of the deed or mortgage, the deed or mortgage is valid as against general creditors from its registration. National Bank v. Hill, 226 F. 102 (E.D.N.C. 1915). See also, In re Cunningham, 64 F.2d 296 (4th Cir. 1933); In re Finley, 6 F. Supp. 105 (M.D.N.C. 1933).

A general creditor must yield to the lien of a chattel mortgage from the moment of its registration, unless the lien can be successfully assailed as a fraudulent conveyance. Coggin v. Hartford Accident & Indem. Co., 9 F. Supp. 785 (M.D.N.C.), rev'd on other grounds, 78 F.2d 471 (4th Cir.), cert. denied, 296 U.S. 620, 56 S. Ct. 141, 80 L. Ed. 440, rehearing denied, 296 U.S. 663, 56 S. Ct. 169, 80 L. Ed. 472 (1935).

Creditor Must Acquire Lien. — Before a creditor can defeat the lien of a mortgage that is properly registered, he must acquire a prior lien by way of judgment, as against land, and by levying an execution against personal property. Coggin v. Hartford Accident & Indem. Co., 9 F. Supp. 785 (M.D.N.C.), rev'd on other grounds, 78 F.2d 471 (4th Cir.), cert. denied, 296 U.S. 620, 56 S. Ct. 441, 80 L. Ed. 440, rehearing denied, 296 U.S. 663, 56 S. Ct. 169, 80 L. Ed. 472 (1935).

In order for a creditor to avail himself of this section, it is very generally understood that he must by some judicial process or method take steps to fasten his claim upon the property. In one or more of the decisions on the subject, it is said that he should be "armed with legal process" for the purpose. Observer Co. v. Little, 175 N.C. 42, 94 S.E. 526 (1917).

Trustee in Bankruptcy. — A trustee in bankruptcy stands in the shoes of a "purchaser for a valuable consideration" from the period of 4 months prior to the time of the filing of the petition in bankruptcy. In re Dail, 257 F. Supp. 326 (E.D.N.C. 1966). See also, Holt v. Crucible Steel Co., 224 U.S. 262, 32 S. Ct. 414, 56 L. Ed. 756 (1912); National Bank v. Hill, 226 F. 102 (E.D.N.C. 1915).

A mortgagee who failed to register his mortgage has no rights to the property mortgaged as against the trustee in bankruptcy of a corporation to which the mortgagor subsequently conveyed the property in consideration of stock in such corporation. Holt v. Albert Pick & Co., 25 F.2d 378 (4th Cir. 1928), cert. denied, 278 U.S. 602, 49 S. Ct. 9, 73 L. Ed. 530 (1928).

Bankruptcy trustee properly and rightfully asserted his claim for equitable subrogation such that he obtained a first priority deed of trust on debtors' real property where creditor was not a bona fide purchaser when it made its loan to the debtors in exchange for a second mortgage and did not change its position in reliance on the fact that another creditor, successor to a priority deed, filed its deed of trust in the wrong county; if the debtors had not filed bankruptcy, as between the two creditors, the latter still could have filed its deed of trust in the proper county and sought equitable subrogation to the first priority deed of trust. In re Kline, 242 Bankr. 306 (W.D.N.C. 1999).

Before a creditor can claim a lien given by a state statute on property of a bankrupt, he must perfect same, as required by such statute. In re Franklin, 151 F. 642 (E.D.N.C. 1907), aff'd sub nom. Mills v. Virginia-Carolina Lumber Co., 164 F. 168 (4th Cir. 1908).

For cases construing this section in connection with the provisions of the former Bankruptcy Act relating to preferences, see Brigman v. Covington, 219 F. 500 (4th Cir. 1915); Commercial Cas. Ins. Co. v. Williams, 37 F.2d 326 (4th Cir. 1930), cert. denied, 281 U.S. 757, 50 S. Ct. 409, 74 L. Ed. 1167 (1930); In re Cunningham, 64 F.2d 296 (4th Cir. 1933); In re Finley, 6 F. Supp. 105 (M.D.N.C. 1933); Hartford Accident & Indem. Co. v. Coggin, 78 F.2d 471 (4th Cir.), cert. denied, 296 U.S. 620, 56 L. Ed. 441, 80 L. Ed. 440, rehearing denied, 296 U.S. 663, 56 S. Ct. 169, 80 L. Ed. 472 (1935).

Trustee Under Deed of Assignment for Benefit of Creditors. — The trustee under a deed of assignment for the benefit of creditors is a purchaser for a valuable consideration within the meaning of this section, and upon adjudication of insolvency and the appointment of a receiver, the unsecured creditors, then represented by the receiver, are deemed to have fastened a lien on the insolvent's property. Coastal Sales Co. v. Weston, 245 N.C. 621, 97 S.E.2d 267 (1957), citing M. & J. Fin. Corp. v. Hodges, 230 N.C. 580, 55 S.E.2d 201 (1949), and Eno Inv. Co. v. Protective Chems. Laboratory, Inc., 233 N.C. 294, 63 S.E.2d 637 (1951).

Judgment Creditor. — Under this section, a deed of trust is of no validity whatever as against a judgment creditor unless it is registered. Bostic v. Young, 116 N.C. 766, 21 S.E. 552 (1895).

Attachment Creditor. — The registration of a mortgage prior to attachments issued by a creditor makes it superior to the creditor's lien, but only on property situated in the county where the mortgage was registered. Williamson v. Bitting, 159 N.C. 321, 74 S.E. 808 (1912).

Section Protects Creditors of Mortgagor, Not Those of Mortgagee. — An unregistered mortgage or deed of trust is void as against creditors of the mortgagor, and not of the mortgagee. Chemical Co. v. Johnson, 98 N.C. 123, 3 S.E. 723 (1887).

Creditors of Mortgagor's Estate. — The rights of secured and unsecured creditors alike are fixed at the instant of the debtor's death, and the circumstance of death cannot have the effect of fastening a lien upon property of the estate in favor of unsecured creditors. Thus, the mortgagee under an unrecorded mortgage has a lien on the property as against the administratrix of the mortgagor's estate superior to the claim of general creditors of the estate who had not fastened a lien upon the property at the time of intestate's death. Coastal Sales Co. v. Weston, 245 N.C. 621, 97 S.E.2d 267 (1957).

Preexisting Debt as Valuable Consideration to Creditor. — As to liens coming within the purview of this section, a preexisting debt is a valuable consideration and is sufficient to support the claim of a creditor who has fastened his lien upon the property of his debtor. M. & J. Fin. Corp. v. Hodges, 230 N.C. 580, 55 S.E.2d 201 (1949).

Intervening Deed of Trust. — The junior lienholder's intervening deed of trust gained priority over all subsequently recorded deeds of trust, including the deed of trust given by transferees when the bank marked the senior deed of trust satisfied as the result of the transfer of the property. First Union Nat'l Bank v. Lindley Labs., Inc., 132 N.C. App. 129, 510 S.E.2d 187 (1999).

Collateral Attack by Creditors. — The want of registration does not invalidate an instrument so that creditors, merely as such, may treat it as a nullity in a collateral proceeding; but it is void against proceedings instituted by them and prosecuted to a sale of the property or acquirement of a lien, as against all who derive title thereunder. Brem v. Lockhart, 93 N.C. 191 (1885); Boyd v. Turpin, 94 N.C. 137 (1886); Francis v. Herren, 101 N.C. 497, 8 S.E. 353 (1888).

Trustee or Mortgagee as Purchaser for Value. — A trustee or mortgagee, whether for old or new debts, is a purchaser for a valuable consideration. Brem v. Lockhart, 93 N.C. 191 (1885).

Mortgagee for Future and Contingent Debts. — A debtor may lawfully mortgage his property to secure future and contingent debts, and that he does so is not of itself proof of a fraudulent intent. The mortgagee in such case is deemed a purchaser for value, and his rights are not affected by a prior unregistered mortgage. Moore v. Ragland, 74 N.C. 343 (1876).

Subsequent Purchasers Whose Deeds Are Registered. — A mortgage not registered in time is ineffectual against purchasers subsequent to the mortgage whose conveyances are registered before the mortgage. Cowan v. Green, 9 N.C. 384 (1823).

Priority Between Mortgage Filed and Judgment Rendered at Same Term. — Where an individual executed a mortgage upon his land, and the mortgage was filed for registration during a term of the superior court, at a subsequent day of which a judgement was rendered against him and duly docketed, it was held that the lien of the judgment was prior to that of the mortgage. Fleming v. Graham, 110 N.C. 374, 14 S.E. 922 (1892).

Mortgagee for Purchase Price. — A mortgage executed and registered contemporaneously with a deed by the same parties to the same land, to secure the balance of the purchase price, is one act, giving the mortgagee a lien on the land described superior to that of a later executed and registered mortgage thereon. Allen v. Stainback, 186 N.C. 75, 118 S.E. 903 (1923).

Where mortgagee of automobile permits mortgagor to keep it on display for sale with others, and the mortgage sufficiently describes the property, giving the serial and motor numbers, and is duly registered under this section, the mortgagee does not lose his right of lien as against a subsequent purchaser from the mortgagor. Whitehurst v. Garrett, 196 N.C. 154, 144 S.E. 835 (1928).

As to tort-feasor as a purchaser or creditor, see Harris v. Seaboard Air Line Ry., 190 N.C. 480, 130 S.E. 319 (1925).

Mechanic's Lien for Work Done to Bring Property into Compliance with Restrictive Covenants. — Where it was undisputed that plaintiff first furnished labor or materials at lot for the purpose of bringing the property into compliance with the terms of applicable protective covenants on June 8, 1987, over a year after defendant's deed of trust on the property was recorded, plaintiff did not have priority over defendant and defendant was entitled to judgment as a matter of law. K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan Ass'n, 96 N.C. App. 474, 386 S.E.2d 226 (1989).

IV. NOTICE.

Constructive Notice to All the World. — Under this section, deeds of trust and mortgages, when properly probated and registered, are constructive notice to all the world. Whitehurst v. Garrett, 196 N.C. 154, 144 S.E. 835 (1928).

Sections Not Mere Notice Statutes for Protection of Third Parties. — Section 47-18 and this section are not mere notice statutes for the protection of third parties. To the contrary, recordation is vital to the acquisition of ownership. Westchase I Assocs. v. Lincoln Nat'l Life Ins. Co., 126 Bankr. 692 (W.D.N.C. 1991).

Putting Third Persons upon Inquiry. — Record of an unsatisfied mortgage is sufficient notice to put a third person upon inquiry, and whatever puts a person upon inquiry is in equity notice to him of all the facts which such inquiry would have disclosed. Collins v. Davis, 132 N.C. 106, 43 S.E. 579 (1903).

Registration upon a defective probate does not effect actual or constructive notice of the existence of a mortgage deed, so as to affect a subsequent purchaser for value. Todd, Schenck & Co. v. Outlaw, 79 N.C. 235 (1878).

Where the execution of a corporate deed of trust was not proved as the statute required, its registration was without warrant or authority of law, and as against creditors and purchasers for value it was not registered until subsequently probated in proper form and again registered. National Bank v. Hill, 226 F. 102 (E.D.N.C. 1915).

No Mere Notice Will Supply Registration. — No notice, however full and formal, will supply the place of registration required by this section. Robinson v. Willoughby, 70 N.C. 358 (1874); Hooker v. Nichols, 116 N.C. 157, 21 S.E. 207 (1895); Blacknall v. Hancock, 182 N.C. 369, 109 S.E. 72 (1921); Avery County Bank v. Smith, 186 N.C. 635, 120 S.E. 215 (1923); Whitehurst v. Garrett, 196 N.C. 154, 144 S.E. 835 (1928); Mills v. Kemp, 196 N.C. 309, 145 S.E. 557 (1928); Salassa v. Western Carolina Title & Mtg. Co., 196 N.C. 501, 146 S.E. 83 (1929); Weeks v. Adams, 196 N.C. 512, 146 S.E. 130 (1929); Ellington v. Raleigh Bldg. Supply Co., 196 N.C. 784, 147 S.E. 307 (1929); Duncan v. Gulley, 199 N.C. 552, 155 S.E. 244 (1930); Lawson v. Key, 199 N.C. 664, 155 S.E. 570 (1930); New Home Bldg. Supply Co. v. Nations, 259 N.C. 681, 131 S.E.2d 425 (1963); Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

The "witness" exception to the recordation requirement is not applicable in this jurisdiction. Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986).

Instrument First Registered Prevails. — A registered mortgage on lands constitutes a first lien on the mortgaged lands as against prior mortgages or equities which the registration books in the county in which the land lies does not disclose. Duncan v. Gulley, 199 N.C. 552, 155 S.E. 244 (1930).

Where a mortgage on lands is executed and delivered, but is not registered until after the registration of a later executed mortgage, the prior registered mortgage is a first lien on the land, and it is not sufficient to change this result that the prior registered mortgage was marked upon its face "second mortgage." Nor can notice aliunde advantage the holder of the mortgage first executed. Story v. Slade, 199 N.C. 596, 155 S.E. 256 (1930), distinguishing Williams v. Lewis, 158 N.C. 571, 74 S.E. 17 (1912).

A mortgage given for the purchase money of land is not entitled to priority over a second mortgage which is filed first, though the second mortgagee has notice thereof. Quinnerly v. Quinnerly, 114 N.C. 145, 19 S.E. 99 (1894).

Where Fraud Is Used. — Where one who knows of a prior unregistered deed of trust or mortgage procures a mortgage for his own benefit on the same property, which is registered first, he gets the first lien on the property, unless he used fraud to prevent the registration of the mortgage which is first in date. Traders Nat'l Bank v. Lawrence Mfg. Co., 96 N.C. 298, 3 S.E. 363 (1887).

When Subsequent Mortgage Recites Prior Encumbrance. — Where the subsequent mortgage of the same property recites that it is made subject to a prior mortgage, such recitation is more than a mere notice of the prior encumbrance; it establishes a trust in equity in favor of the prior encumbrancer, even though the prior mortgage is not registered. Avery County Bank v. Smith, 186 N.C. 635, 120 S.E. 215 (1923), citing Blacknall v. Hancock, 182 N.C. 369, 109 S.E. 72 (1921), and distinguishing North State Piano Co. v. Spruill & Brother, 150 N.C. 168, 63 S.E. 723 (1909).

Where a trust deed is given to secure purchase money for land, and later a mortgage is given on the same land, which refers to the trust deed as a prior lien for purchase money, and the mortgage is registered before the trust deed, the debt secured by the trust deed must be paid by the mortgagee from the proceeds of the sale of the land, but the mortgagee is entitled to the possession of the land. Bank v. Vass, 130 N.C. 590, 41 S.E. 791 (1902).

Where a second mortgage is executed and delivered, but is not registered until after the registration of a third mortgage, the mortgage third in execution is prior to the mortgage secondly executed and subsequently registered, and this result is not changed by the fact that the mortgage third in execution contained a reference to a first and second deed of trust, and contained a warranty against encumbrances "except as above stated," the references being insufficient to show that the parties intended to recognize the prior instruments as superior liens. Lawson v. Key, 199 N.C. 664, 155 S.E. 570 (1930).

Recording and indexing a mortgage executed by one not the owner of the property mentioned therein will not give constructive notice binding upon third parties dealing with the true owner. It is, at least as to third parties, as though no mortgage had been made. McKnight v. M. & J. Fin. Corp., 247 F.2d 112 (4th Cir. 1957).

Although bank which held a deed of trust had actual notice of a prior deed of trust, the doctrine of estoppel by deed did not operate to estop the bank from denying the earlier deed, where the earlier deed of trust lay outside of the chain of title of the grantor of the deed of trust. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.1. Place of registration; real property.

To be validly registered pursuant to G.S. 47-20, a deed of trust or mortgage of real property must be registered in the county where the land lies, or if the land is located in more than one county, then the deed of trust or mortgage must be registered in each county where any portion of the land lies in order to be effective as to the land in that county. (1953, c. 1190, s. 2.)

CASE NOTES

A mortgage must be registered in the county where the land lies. King v. Portis, 77 N.C. 25 (1877).

Land Lying in Two or More Counties. — A mortgage of a tract of land described by metes and bounds and registered in one county only, both mortgagor and mortgagee believing the whole tract to be situated in such county, when in fact a part of said tract is situated in an adjoining county, is inoperative as against creditors and purchasers for value beyond the limits of the county in which it was registered. King v. Portis, 77 N.C. 25 (1877).

Applied in In re Kline, 242 Bankr. 306 (W.D.N.C. 1999).

Cited in Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.2. Place of registration; personal property.

(a) As used in this section:

(1) "Mortgage" includes a deed of trust and a conditional sales contract; unless subject to the filing requirements of Article 9 of the Uniform Commercial Code (Chapter 25) and duly filed pursuant thereto;

(2) "Mortgagor" includes a grantor in a deed of trust and a conditional sales vendee.

(b) To be validly registered pursuant to G.S. 47-20, a mortgage of personal property must be registered as follows:

(1) If the mortgagor is an individual:
  a. Who resides in this State, the mortgage must be registered in the county where the mortgagor resides when the mortgage is executed.
  b. Who resides outside this State, the mortgage must be registered in each county in this State where any of the tangible mortgaged property is located at the time the mortgage is executed, in order to be effective as to such property; and if any of the mortgaged property consists of a chose in action which arises out of the business transacted at a place of business operated by the mortgagor in this State, then the mortgage must be registered in the county where such place of business is located.

(2) If the mortgagor is a partnership, either limited or unlimited:
  a. Which has a principal place of business in this State, the mortgage must be registered in the county where such place of business is located at the time the mortgage is executed.
  b. Which does not have a principal place of business in this State but has any place of business in this State, the mortgage must be registered in every county in this State where any such place of business is located at the time the mortgage is executed. Where such mortgage is registered in one or more of such counties but is not registered in every county required under this subsection, it shall, nevertheless, be effective as to the property in every county in which it is registered.
  c. Which has no place of business in the State, the mortgage must be registered in every county in this State where a partner resides at the time the mortgage is executed. Where such mortgage is registered in one or more of such counties but is not registered in every county required under this subsection, it shall, nevertheless, be effective as to the property in every county in which it is registered.
  d. Which has no place of business in this State, and no partner residing in this State, the mortgage must be registered in each county in this State where any of the mortgaged property is located when the mortgage is executed, in order to be effective as to the property in such county.

(3) If the mortgagor is a domestic corporation:
  a. Which has a registered office in this State, the mortgage must be registered in the county where such registered office is located when the mortgage is executed.
  b. Which having been formed prior to July 1, 1957, has no such registered office but does have a principal office in this State as shown by its certificate of incorporation, or amendment thereto, or legislative charter, the mortgage must be registered in the county where the principal office is said to be located by such certificate of incorporation, or amendment thereto, or legislative charter when the mortgage is executed.

(4) If the mortgagor is a foreign corporation:
  a. Which has a registered office in this State, the mortgage must be registered in the county where such registered office is located when the mortgage is executed.
  b. Which, having been domesticated prior to July 1, 1957, has no such registered office in this State, but does have a principal office in

this State, the mortgage must be registered in the county where the principal office is said to be located by the statement filed with the Secretary of State in its application for permission to do business in this State or other document filed with the Secretary of State showing the location of such principal office in this State when the mortgage is executed.

c. Which has not been domesticated in this State, the mortgage must be registered in the same county or counties as a mortgage executed by a nonresident individual.

(5) If the personal property concerned is a vehicle required to be registered under the motor vehicle laws of the State of North Carolina, then the provisions of this section shall not apply but the security interest arising from the deed of trust, mortgage, conditional sales contract, or lease intended as security of such vehicle may be perfected by recordation in accordance with the provisions of G.S. 20-58 through 20-58.10. (1953, c. 1190, s. 2; 1957, c. 979, ss. 1, 2; 1961, c. 835, s. 12; 1965, c. 700, s. 8.)

Cross References. — As to perfection of security interests in vehicles requiring certificates of title, see G.S. 20-58 et seq. As to filing of security interests in personal property under the Uniform Commercial Code, see G.S. 25-9-401.

Legal Periodicals. — For comment on this section, see 31 N.C.L. Rev. 429 (1953).

For 1984 survey, "The Application of the North Carolina Motor Vehicle Act and the Uniform Commercial Code to the Sale of Motor Vehicles by Consignment," see 63 N.C.L. Rev. 1105 (1985).

CASE NOTES

Registration of Mortgage or Other Lien on Vehicles. — It is no longer necessary to record the mortgage or other lien on vehicles required to be registered under the State motor vehicle laws in the county where the debtor resides. Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

As to nonapplicability of U.C.C. provisions as to filing of financing statements to vehicles, see Ferguson v. Morgan, 282 N.C. 83, 191 S.E.2d 817 (1972).

Location of Principal Office of Corporation. — Under this section prior to the 1957 amendment, the actual location of the principal office of a corporation rather than the location set out in the certificate of incorporation was held to govern the place of registration. Haworth v. GMAC, 238 F.2d 203 (4th Cir. 1956).

Applied in National Bank v. Greensboro Motor Co., 264 N.C. 568, 142 S.E.2d 166 (1965); In re Dail, 257 F. Supp. 326 (E.D.N.C. 1966).

§ 47-20.3. Place of registration; instruments covering both personal property and real property.

To be validly registered pursuant to G.S. 47-20, a mortgage, deed of trust or conditional sales contract, or any combination of these, of both personal property and real property must be registered pursuant to the provisions of G.S. 47-20.1 for the real property covered by the instrument and pursuant to the provisions of G.S. 47-20.2 for the personal property covered by the instrument, and in each case the registration must be indexed in the records designated for the particular type of property involved. (1953, c. 1190, s. 2.)

Cross References. — As to filing of security interests under the Uniform Commercial Code, see G.S. 25-9-401.

§ 47-20.4. Place of registration; chattel real.

To be validly registered pursuant to G.S. 47-20, a deed of trust or mortgage of a leasehold interest or other chattel real must be registered in the county where the land involved lies, or if the land involved is located in more than one county, then the deed of trust or mortgage must be registered in each county where any portion of the land involved lies in order to be effective as to the land in that county. (1959, c. 1026, s. 1.)

§ 47-20.5. Real property; effectiveness of after-acquired property clause.

(a) As used in this section, "after-acquired property clause" means any provision or provisions in an instrument which create a security interest in real property acquired by the grantor of the instrument subsequent to its execution.

(b) As used in this section, "after-acquired property," and "property subsequently acquired" mean any real property which the grantor of a security instrument containing an after-acquired property clause acquires subsequent to the execution of such instrument, and in which the terms of the after-acquired property clause would create a security interest.

(c) An after-acquired property clause is effective to pass after-acquired property as between the parties to the instrument containing such clause, but shall not be effective to pass title to after-acquired property as against lien creditors or purchasers for a valuable consideration from the grantor of the instrument unless and until such instrument has been registered or reregistered at or subsequent to the time such after-acquired property is acquired by such grantor and the deed to the grantor of the after-acquired property is registered.

(d) In lieu of reregistering the instrument containing the after-acquired property clause as specified in subsection (c), such instrument may be made effective to pass title to after-acquired property as against lien creditors and purchasers for a valuable consideration from the grantor of the instrument by registering a notice of extension as specified in subsection (e) at or subsequent to the time of acquisition of the after-acquired property by the grantor.

(e) The notice of extension shall

(1) Show that effective registration of the after-acquired property clause is extended,

(2) Include the names of the parties to the instrument containing the after-acquired property clause,

(3) Refer to the book and page where the instrument containing the after-acquired property clause is registered, and

(4) Be signed by the grantee or the person secured by the instrument containing the after-acquired property clause or his successor in interest.

(f) The register of deeds shall index the notice of extension in the same manner as the instrument containing the after-acquired property clause.

(g) Except as provided in subsection (h) of this section, no instrument which has been heretofore executed or registered and which contains an after-acquired property clause shall be effective to pass title to after-acquired property as against lien creditors or purchasers for a valuable consideration from the grantor of such instrument unless and until such instrument or a notice of extension thereof has been registered or reregistered as herein provided.

(h) Notwithstanding the provisions of this section with respect to registration, reregistration and registration of notice of extension, an after-acquired property clause in an instrument which creates a security interest made by a public utility as defined in G.S. 62-3(23) or a natural gas company as defined in section 2(6) of the Natural Gas Act, 15 U.S.C.A. 717a(6), or by an electric or telephone membership corporation incorporated or domesticated in North Carolina shall be effective to pass after-acquired property as against lien creditors or purchasers for a valuable consideration from the grantor of the instrument from the time of original registration of such instrument. (1967, c. 861, s. 1; 1969, c. 813, ss. 1-3; 1997-386, s. 1.)

Legal Periodicals. — For note on the effectiveness of after-acquired property clauses in this State, see 6 Wake Forest Intra. L. Rev. 378 (1970).

CASE NOTES

Legislative Intent. — The adoption of this section, which requires that after-acquired property clauses in security agreements be extended or re-recorded after each subsequent purchase of real property, indicates a legislative insistence that due recordation in the chain of title must remain the only effective means of protecting title. Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984).

§ 47-20.6. Affidavit for permanent attachment of titled manufactured home to real property.

(a) If the owner of real property or the owner of the manufactured home who has entered into a lease with a primary term of at least 20 years for the real property on which the manufactured home is affixed has surrendered the title to a manufactured home that is placed on the real property and the title has been cancelled by the Division of Motor Vehicles under G.S. 20-109.2, the owner, or the secured party having the first security interest in the manufactured home at time of surrender, shall record the affidavit described in G.S. 20-109.2 with the office of the register of deeds of the county where the real property is located. Upon recordation, the affidavit shall be indexed on the grantor index in the name of the owner of the manufactured home and on the grantee index in the name of the secured party or lienholder, if any.

(b) After the affidavit is recorded, the manufactured home becomes an improvement to real property. Any lien on the manufactured home shall be perfected and given priority in the manner provided for a lien on real property.

(c) Following recordation of the affidavit, all existing liens on the real property are considered to include the manufactured home. Thereafter, no conveyance of any interest, lien, or encumbrance shall attach to the manufactured home, unless the interest, lien, or encumbrance is applicable to the real property on which the home is located and is recorded in the office of the register of deeds of the county where the real property is located in accordance with the applicable sections of this Chapter.

(d) The provisions of this section control over the provisions of G.S. 25-9-334 relating to the priority of a security interest in fixtures, as applied to manufactured homes. (2001-506, s. 3; 2003-400, s. 2.)

§ 47-20.7. Declaration of intent to affix manufactured home; transfer of real property with manufactured home attached.

(a) A person who owns real property on which a manufactured home has been or will be placed or the owner of a manufactured home who has entered into a lease with a primary term of at least 20 years for the real property on which the manufactured home has been or will be placed, as defined in G.S.

105-273(13), and either where the manufactured home has never been titled by the Division of Motor Vehicles or where the title to the manufactured home has been surrendered and cancelled by the Division prior to January 1, 2002, may record in the office of the register of deeds of the county where the real property is located a declaration of intent to affix the manufactured home to the property and may convey or encumber the real property, including the manufactured home, by a deed, deed of trust, or other instrument recorded in the office of the register of deeds.

(b) The declaration of intent, deed, deed of trust, or other instrument shall contain a description of the manufactured home, including the name of the manufacturer, the model name, if applicable, the serial number, and a statement of the owner's intention that the manufactured home be treated as property.

(c) On or after the filing of the instrument with the office of the register of deeds pursuant to subsection (a) of this section, the manufactured home placed, or to be placed, on the property becomes an improvement to real property. Any lien on the manufactured home shall be perfected and have priority in the manner provided for a lien on real property.

(d) The provisions of this section control over the provisions of G.S. 25-9-334 relating to the priority of a security interest in fixtures, as applied to manufactured homes. (2001-506, s. 3; 2003-400, s. 3.)

§ 47-21. Blank or master forms of mortgages, etc.; embodiment by reference in instruments later filed.

It shall be lawful for any person, firm or corporation to have a blank or master form of mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, filed, indexed and recorded in the office of the register of deeds. When any such blank or master form is filed, the register of deeds shall record it and shall index it in the manner now provided by law for the indexing of instruments recorded in the office of the register of deeds, except that the name of the person, firm or corporation whose name appears on such blank or master form shall be inserted in the indices as grantor and also as grantee. The fee for filing, recording and indexing such blank or master form shall be that for recording instruments in general, as provided in G.S. 161-10(a)(1).

When any deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, refers to the provisions, terms, covenants, conditions, obligations, or powers set forth in any such blank or master form recorded as herein authorized, and states the office of recordation of such blank or master form, book and page where same is recorded such reference shall be equivalent to setting forth in extenso in such deed, mortgage, deed of trust, or other instrument conveying an interest in, or creating a lien on, real and/or personal property, the provisions, terms, covenants, conditions, obligations and powers set forth in such blank or master form. Provided this section shall not apply to Alleghany, Ashe, Avery, Beaufort, Bladen, Camden, Carteret, Chowan, Cleveland, Columbus, Dare, Gates, Granville, Guilford, Halifax, Iredell, Jackson, Martin, Moore, Perquimans, Sampson, Stanly, Swain, Transylvania, Vance, Washington and Watauga Counties. (1935, c. 153; 1971, c. 156; 2001-390, s. 4.)

Legal Periodicals. — For a discussion of this section, see 13 N.C.L. Rev. 395 (1935).

For an article on rules, ethics and reform in connection with transferring North Carolina real estate, see 49 N.C.L. Rev. 593 (1971).

§ 47-22. Counties may provide for photographic or photostatic registration.

The board of county commissioners of any county is hereby authorized and empowered to provide for photographic or photostatic recording of all instruments filed in the office of the register of deeds and in other offices of such county where said board may deem such recording feasible. The board of county commissioners may also provide for filing such copies of said instruments in loose-leaf binders. (1941, c. 286; 1971, c. 1185, s. 12.)

§ 47-23: Repealed by Session Laws 1953, c. 1190, s. 3.

§ 47-24. Conditional sales or leases of railroad property.

When any railroad equipment and rolling stock is sold, leased or loaned on the condition that the title to the same, notwithstanding the possession and use of the same by the vendee, lessee, or bailee, shall remain in the vendor, lessor or bailor until the terms of the contract, as to the payment of the installments, amounts or rentals payable, or the performance of other obligations thereunder, shall have been fully complied with, such contract shall be invalid as to any subsequent judgment creditor, or any subsequent purchaser for a valuable consideration without notice, unless —

(1) The same is evidenced by writing duly acknowledged before some person authorized to take acknowledgments of deeds.
(2) Such writing is registered as mortgages are registered, in the office of the register of deeds in at least one county in which such vendee, lessee or bailee does business.
(3) Each locomotive or car so sold, leased or loaned has the name of the vendor, lessor, or bailor, or the assignee of such vendor, lessor or bailor plainly marked upon both sides thereof, followed by the word owner, lessor, bailor or assignee as the case may be.

This section shall not apply to or invalidate any contract made before the twelfth day of March, 1883. (1883, c. 416; Code, s. 2006; Rev., s. 984; 1907, c. 150, s. 1; C.S., s. 3313.)

§ 47-25. Marriage settlements.

All marriage settlements and other marriage contracts, whereby any money or other estate is secured to the wife or husband, shall be proved or acknowledged and registered in the same manner as deeds for lands, and shall be valid against creditors and purchasers for value only from registration. (1785, c. 238; R.C., c. 37, ss. 24, 25; 1871-2, c. 193, s. 12; Code, ss. 1269, 1270, 1281; 1885, c. 147; Rev., s. 985; C.S., s. 3314.)

CASE NOTES

Registration in Another State. — An antenuptial contract entered into between a husband whose domicile was in North Carolina and a wife whose domicile was in New York, which was duly registered in New York but not in North Carolina, was good against the creditors of the husband, even though the property was removed to North Carolina and changed from what it originally was when the contract was signed. Hicks v. Skinner, 71 N.C. 539 (1874), appeal dismissed, 72 N.C. 1 (1875).

Law at Time of Execution Governs. — Where a marriage took place and a deed was made between husband and wife prior to 1868, it was governed by the law as it then existed and was not affected by the changes in marital relations brought about by the Constitution of 1868 and the statutes passed in pursuance thereof, even though the deed was not registered until 1884. Walton v. Parish, 95 N.C. 259 (1886).

Deed of Dual Character. — A deed combining the two characters of a deed of trust to secure creditors and a deed of settlement in trust for a wife and children may operate and have effect in both characters, provided it has been duly proved and registered. Johnston v. Malcom, 59 N.C. 120 (1860).

A deed of settlement in trust for a wife and children, proved and registered three years after the date of its execution, was held to be valid as against creditors whose debts were contracted after such registration. Johnston v. Malcom, 59 N.C. 120 (1860).

Agreement Not a Marriage Settlement. — An agreement by which husband consented that wife could convert one tract of land, which was in no wise subject to the claims of his creditors, into another tract of land, and in which, in order to enable her to make the conversion, he stipulated to allow her to hold as her separate property the price of her land until it could be reinvested in another tract of land, was not a marriage settlement falling within this section. Teague v. Downs, 69 N.C. 280 (1873).

§ 47-26. Deeds of gift.

All deeds of gift of any estate of any nature shall within two years after the making thereof be proved in due form and registered, or otherwise shall be void, and shall be good against creditors and purchasers for value only from the time of registration. (1789, c. 315, s. 2; R.C., c. 37, s. 18; Code, s. 1252; 1885, c. 147; Rev., s. 986; C.S., s. 3315.)

Legal Periodicals. — For article discussing the doctrine of color of title in North Carolina, see 13 N.C. Cent. L.J. 123 (1982).

CASE NOTES

"Making," as used in this section, means execution. The execution of a deed is not complete until the instrument is signed, sealed and delivered. Turlington v. Neighbors, 222 N.C. 694, 24 S.E.2d 648 (1943); Muse v. Muse, 236 N.C. 182, 72 S.E.2d 431 (1952).

A deed of gift is absolutely void when not registered within two years after its making. Booth v. Hairston, 195 N.C. 8, 141 S.E. 480 (1928); Ferguson v. Ferguson, 225 N.C. 375, 35 S.E.2d 231 (1945).

Where a deed appearing on its face to be a deed of gift is not registered in two years from its execution as required by this section, it is void, and may be set aside in an action by creditors of the grantor, regardless of whether it was executed in fraud of creditors. Reeves v. Miller, 209 N.C. 362, 183 S.E. 294 (1936).

A deed of gift is void if it is not recorded within two years of its execution. Chicago Title Ins. Co. v. Wetherington, 127 N.C. App. 457, 490 S.E.2d 593 (1997), cert. denied, 347 N.C. 574, 498 S.E.2d 380 (1998).

After two years the legislature is without power to bring a deed of gift to life again by the enactment of a statute lengthening the period in which it may be registered. Booth v. Hairston, 195 N.C. 8, 141 S.E. 480 (1928). See also, Cutts v. McGhee, 221 N.C. 465, 20 S.E.2d 376 (1942).

The time of the registration of deeds of gift under this section was not affected by G.S. 146-57, which extended the time in which certain instruments could be registered until September 1, 1926. Booth v. Hairston, 193 N.C. 278, 136 S.E. 879 (1927), petition for rehearing dismissed, 195 N.C. 8, 141 S.E. 480 (1928).

Revesting of Title in Grantor. — Between the parties thereto a deed of gift, not registered, is good during the two years after the making of it, but upon failure to register it within such time, it becomes void ab initio and title vests in the grantor. Winstead v. Woolard, 223 N.C. 814, 28 S.E.2d 507 (1944); Kirkpatrick v. Sanders, 261 F.2d 480 (4th Cir. 1958), cert. denied, 359 U.S. 1000, 79 S. Ct. 1138, 3 L. Ed. 2d 1029 (1959).

Acknowledgment after Lapse of Two Years Not Re-execution. — Where the owner of lands executed a deed of gift thereto and delivered same to the grantee, and some three and a half years thereafter he acknowledged the deed and filed same for registration, the acknowledgment was not a re-execution of the deed, and the deed of gift, not having been registered within two years of its execution, was void, and could not be revived by curative act of the legislature. Cutts v. McGhee, 221 N.C. 465, 20 S.E.2d 376 (1942).

A deed deposited in escrow with a third party, to be recorded after the death of the grantors, which was not recorded until over two years after its execution, was void. Harris v. Briley, 244 N.C. 526, 94 S.E.2d 476 (1956).

Deeds Back to Grantor Held Void. — Individual who conveyed 297 acres to her two sons some 18 years before her death did not own the land involved at the time of her death despite the execution of deeds back to her from her sons, as these deeds were void, because they were deeds of gift and were not recorded within two years after their execution, as this section requires; and the fact that the two deeds in question recited a consideration and were under seal did not preclude a finding that they were deeds of gift. Patterson v. Wachovia Bank & Trust Co., 68 N.C. App. 609, 315 S.E.2d 781 (1984).

Registration as Notice. — Registration of a prior voluntary deed is notice to a subsequent purchaser. Taylor v. Eatman, 92 N.C. 601 (1885).

Recorded Deed of Gift Is Valid Without Consideration. — A deed of gift, duly signed and delivered, is an executed contract. If recorded within the time prescribed by this section it is valid, as between the parties and their heirs, without good or valuable consideration. Edwards v. Batts, 245 N.C. 693, 97 S.E.2d 101 (1957).

A recital of consideration in deeds conveying land is presumed to be correct. Pelaez v. Pelaez, 16 N.C. App. 604, 192 S.E.2d 651 (1972), cert. denied, 282 N.C. 582, 193 S.E.2d 745 (1973).

Right-of-way deed which, besides reciting consideration as "One Dollar and other valuable consideration," contained a statement that the consideration for the conveyance was the obligation imposed upon grantees to maintain an all-weather driveway across the right-of-way, usable by all parties, was not without consideration, and the fact that the driveway was not maintained did not convert the deed, supported by consideration, into a deed of gift. Higdon v. Davis, 315 N.C. 208, 337 S.E.2d 543 (1985).

Evidence held to show instrument executed for valuable consideration and therefore not void under this section. Cannon v. Blair, 229 N.C. 606, 50 S.E.2d 732 (1948).

Consideration Held Insufficient to Remove Deed from Operation of Section. — The agreement by a wife to perform ordinary marital duties is not sufficient consideration to remove a deed made to her from the operation of this section. Sprinkle v. Ponder, 233 N.C. 312, 64 S.E.2d 171 (1951).

Applied in Allen v. Allen, 209 N.C. 744, 184 S.E. 485 (1936); Batchelor v. Mitchell, 238 N.C. 351, 78 S.E.2d 240 (1953); Penninger v. Barrier, 29 N.C. App. 312, 224 S.E.2d 245 (1976); High v. Parks, 42 N.C. App. 707, 257 S.E.2d 661 (1979); Higdon v. Davis, 71 N.C. App. 640, 324 S.E.2d 5 (1984).

Cited in Blades v. Wilmington Trust Co., 207 N.C. 771, 178 S.E. 565 (1935); Young v. Young, 43 N.C. App. 419, 259 S.E.2d 348 (1979); Hayes v. Turner, 98 N.C. App. 451, 391 S.E.2d 513 (1990); Fulcher v. Golden, 147 N.C. App. 161, 554 S.E.2d 410, 2001 N.C. App. LEXIS 1069 (2001).

§ 47-27. Deeds of easements.

All persons, firms, or corporations now owning or hereafter acquiring any deed or agreement for rights-of-way and easements of any character whatsoever shall record such deeds and agreements in the office of the register of deeds of the county where the land affected is situated. Where such deeds and agreements may have been acquired, but no use has been made thereof, the person, firm, or corporation holding such instrument, or any assignment thereof, shall not be required to record them until within 90 days after the beginning of the use of the easements granted thereby. If after 90 days from the beginning of the easement granted by such deeds and agreements the person, firm, or corporation holding such deeds or agreements has not recorded the same in the office of the register of deeds of the county where the land affected is situated, then the grantor in the said deed or agreement may, after 10 days' notice in writing served and returned by the sheriff or other officer of the county upon the said person, firm, or corporation holding such lease or agreement, file a copy of the said lease or agreement for registration in the office of the register of deeds of the county where the original should have been recorded, but such copy of the lease or agreement shall have attached thereto the written notice above referred to, showing the service and return of the sheriff or other officer. The registration of such copy shall have the same force and effect as the original would have had if recorded: Provided, said copy shall be duly probated before being registered.

Nothing in this section shall require the registration of the following classes of instruments or conveyances, to wit:

(1) It shall not apply to any deed or instrument executed prior to January 1, 1910.

(2) It shall not apply to any deed or instrument so defectively executed or witnessed that it cannot by law be admitted to probate or registration, provided that such deed or instrument was executed prior to the ratification of this section.

(3) It shall not apply to decrees of a competent court awarding condemnation or confirming reports of commissioners, when such decrees are on record in such courts.

(4) It shall not apply to local telephone companies, operating exclusively within the State, or to agreements about alleyways.

The failure of electric companies or power companies operating exclusively within this State or electric membership corporations, organized pursuant to Chapter 291 of the Public Laws of 1935 [G.S. 117-6 through 117-27], to record any deeds or agreements for rights-of-way acquired subsequent to 1935, shall not constitute any violation of any criminal law of the State of North Carolina.

No deed, agreement for right-of-way, or easement of any character shall be valid as against any creditor or purchaser for a valuable consideration but from the registration thereof within the county where the land affected thereby lies.

From and after July 1, 1959, the provisions of this section shall apply to require the Department of Transportation to record as herein provided any deeds of easement, or any other agreements granting or conveying an interest in land which are executed on or after July 1, 1959, in the same manner and to the same extent that individuals, firms or corporations are required to record such easements. (1917, c. 148; 1919, c. 107; C.S., s. 3316; 1943, c. 750; 1959, c. 1244; 1973, c. 507, s. 5; 1977, c. 464, s. 34.)

Local Modification. — Alleghany: C.S. 3316; Halifax: 1939, c. 45; Harnett and Lee: C.S. 3316; Martin: 1939, c. 45; Surry and Wilkes: C.S. 3316.

Editor's Note. — Section 117-27, referred to in this section, was repealed by Session Laws 1965, c. 287, s. 15.

Legal Periodicals. — For article, "North Carolina's Real Estate Recording Laws: The Ghost of 1885," see 28 N.C. Cent. L.J. 199 (2006).

CASE NOTES

The effect of the 1943 amendment was to require that any deed, agreement for right of way, or easement of any character be registered before it could be valid against a bona fide purchaser for value. DOT v. Humphries, 347 N.C. 649, 496 S.E.2d 563 (1998).

Prior to the 1959 amendment unrecorded right-of-way agreements were required to be recorded in order to prevail over a bona fide purchaser for value. DOT v. Humphries, 347 N.C. 649, 496 S.E.2d 563 (1998).

The provision of this section exempting decrees of condemnation from the requirement of registration was not repealed by the 1919 and 1943 amendments, and an easement created by judgment in condemnation proceedings is good as against creditors and purchasers for value from the owner of the servient tenement, notwithstanding the absence of registration. Carolina Power & Light Co. v. Bowman, 228 N.C. 319, 45 S.E.2d 531 (1947).

The provision of this section exempting decrees of courts of competent jurisdiction in condemnation proceedings from the requirement as to registration supersedes the provisions of G.S. 40-19 that a copy of the judgment in eminent domain proceedings be registered in the county where the land lies, and the provision of G.S. 1-228 that judgments in which transfers of title are declared shall be registered under the same rules as are prescribed for deeds. Carolina Power & Light Co. v. Bowman, 228 N.C. 319, 45 S.E.2d 531 (1947).

Applicability to Board of Transportation. — This section is expressly applicable to the Highway Commission (Board of Transportation). North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967); DOT v. Auten, 106 N.C. App. 489, 417 S.E.2d 299 (1992), overruled in part, DOT v. Humphries, 347 N.C. 649, 496 S.E.2d 563 (1998).

An easement obtained by the Highway Commission (now Board of Transportation) prior to June 1, 1959, did not have to be recorded. Kaperonis v. North Carolina State Hwy. Comm'n, 260 N.C. 587, 133 S.E.2d 464 (1963).

Applicability to Department of Transportation. — This section, which governs deeds for rights-of-way and easements, provides that the Department of Transportation does not have to record such interests in land which were acquired prior to July 1, 1959. DOT v. Wolfe, 116 N.C. App. 655, 449 S.E.2d 11 (1994).

If the General Assembly had intended for DOT to be exempt from filing, it could have included it in the exclusions listed in the statute. DOT v. Humphries, 347 N.C. 649, 496 S.E.2d 563 (1998).

Inapplicable to Enforcement of Easement Between Signatory Parties. — Settlement agreement providing that a resort was permitted during a lease period to maintain certain signs on specified areas of property owned by a property owners association created an enforceable easement because the parties intended to create an easement, and there was no evidence suggesting that recordation was necessary to render the easement enforceable between the signatory parties; the provisions of G.S. 47-27 were inapplicable because neither innocent purchasers for value nor foreign parties were affected. Fairfield Resorts, Inc. v. Fairfield Mts. Prop. Owners Ass'n, — F. Supp. 2d —, 2007 U.S. Dist. LEXIS 52499 (W.D.N.C. July 18, 2007).

Invalidity of Deeds of Easements Prior to Recordation. — This section makes deeds and conveyances of easements and rights-of-way invalid as to creditors and purchasers for value prior to recordation. North Carolina State Hwy. Comm'n v. Nuckles, 271 N.C. 1, 155 S.E.2d 772 (1967).

Priority of Duly Recorded Easement. — Where the owner of land conveys a portion thereof, together with an easement, over his remaining lands by deed duly recorded, grantees of the servient tenement, directly or by mesne conveyances, take title subject to the duly recorded easement, notwithstanding that no deed in their chain of title refers to such easement. Waldrop v. Brevard, 233 N.C. 26, 62 S.E.2d 512 (1950).

Where a property interest spans more than one county, it is only effective against other claimants in the counties in which it has been recorded. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994), aff'd, 340 N.C. 107, 455 S.E.2d 160 (1995).

Facts Constituting Notice. — If the facts disclosed in an instrument appearing in a purchaser's chain of title would naturally lead an honest and prudent person to make inquiry concerning the rights of others, these facts constituted notice of everything which such inquiry, pursued in good faith and with reasonable diligence, would have disclosed. North Carolina State Hwy. Comm'n v. Wortman, 4 N.C. App. 546, 167 S.E.2d 462 (1969).

Race to the Courthouse. — As North Carolina is a pure race jurisdiction, where defendants failed to register their grant of easement in Person County before plaintiffs registered their deed there, plaintiffs won the "race to the courthouse," and their interest superseded the later-recorded interest claimed by defendants. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994), aff'd, 340 N.C. 107, 455 S.E.2d 160 (1995).

As a pure race state, North Carolina focuses on recordation, above and beyond anything else. DOT v. Humphries, 347 N.C. 649, 496 S.E.2d 563 (1998).

The General Assembly intended this section to operate under the same theory as the Connor Act, as a pure race statute. DOT v. Humphries, 347 N.C. 649, 496 S.E.2d 563 (1998).

Purchaser for Value. — North Carolina does not require that a purchaser for valuable consideration be an "innocent purchaser." A "purchaser for value" or a "purchaser for valuable consideration" is simply defined as one who has paid a valuable consideration for the execution of an instrument of conveyance. Rowe v. Walker, 114 N.C. App. 36, 441 S.E.2d 156 (1994), aff'd, 340 N.C. 107, 455 S.E.2d 160 (1995).

Map or Plat as Part of Deed. — A map or plat referred to in a deed becomes a part of the deed and need not be registered. North Carolina State Hwy. Comm'n v. Wortman, 4 N.C. App. 546, 167 S.E.2d 462 (1969).

Defendant's failure to record the alleged oral termination of easement did not accord plaintiff (successor to easement) a superior interest therein. Howell v. Clyde, 127 N.C. App. 717, 493 S.E.2d 323 (1997), cert. denied, 347 N.C. 576, 502 S.E.2d 592 (1998).

Cited in Borders v. Yarbrough, 237 N.C. 540, 75 S.E.2d 541 (1953); Waters v. North Carolina Phosphate Corp., 310 N.C. 438, 312 S.E.2d 428 (1984).

§ 47-28. Powers of attorney.

Every power of attorney, wherever made or concerning whatsoever matter, may, on acknowledgment or proof of the same before any competent official, be registered in the county wherein the property or estate which it concerns is situate, if such power of attorney relate to the conveyance thereof; if it does not relate to the conveyance of any estate or property, then in the county in which the attorney resides or the business is to be transacted. (Code, s. 1249; 1899, c. 235, s. 15; Rev., s. 987; C.S., s. 3317.)

Cross References. — As to form for acknowledgment of instrument executed by attorney in fact, see G.S. 47-43.

§ 47-29. Recording of bankruptcy records.

A copy of the petition with the schedules omitted beginning a proceeding under the United States Bankruptcy Act, or of the decree of adjudication in such proceeding, or of the order approving the bond of the trustee appointed in such proceeding, shall be recorded in the office of any register of deeds in North Carolina, and it shall be the duty of the register of deeds, on request, to record the same. The register of deeds shall be entitled to the same fees for such registration as he is now entitled to for recording conveyances. (1939, c. 254.)

Legal Periodicals. — For comment on this section, see 17 N.C.L. Rev. 344 (1939).

§ 47-29.1. Recordation of enviornmental notices.

(a) A permit for the disposal of waste on land shall be recorded as provided in G.S. 130A-301.

(a1) The disposal of land clearing and inert debris in a landfill with a disposal area of ½ acre or less pursuant to G.S. 130A-301.1 shall be recorded as provided in G.S. 130A-301.1(c).

(a2) A Notice of Open Dump shall be recorded as provided in G.S. 130A-301(f).

(a3) Expired pursuant to Session Laws 1995, c. 502, s. 4, as amended by Session Laws 2001-357, s. 2, effective September 30, 2003.

(b) An inactive hazardous substance or waste disposal site shall be recorded as provided in G.S. 130A-310.8.

(c) A Notice of Brownfields Property shall be recorded as provided in G.S. 130A-310.35.

(d) A Notice of Oil or Hazardous Substance Discharge Site shall be recorded as provided in G.S. 143-215.85A.

(e) A Notice of Dry-Cleaning Solvent Remediation shall be recorded as provided in G.S. 143-215.104M.

(f) A Notice of Contaminated Site shall be recorded as provided in G.S. 143B-279.10.

(g) A Notice of Residual Petroleum shall be recorded as provided in G.S. 143B-279.11.

(h) A land-use restriction that provides for the maintenance of stormwater best management practices or site consistency with approved stormwater project plans shall be recorded as provided in G.S. 143-214.7(c1). (1995, c. 502, s. 2.1; 1997-330, s. 1; 2001-357, s. 2; 2001-384, s. 10; 2006-246, s. 16(a).)

Editor's Note. — The number of this section was assigned by the Revisor of Statutes, the number in Session Laws 1995, c. 502, s. 2.1 having been G.S. 47-28.

Session Laws 1995, c. 502, which enacted this section effective July 28, 1995, in s. 4, as amended by Session Laws 2001-357, s. 2, provides that the sentence of subsection (a) subsequently renumbered as subsection (a3) by Session Laws 2001-384, s. 10, expires September 30, 2003.

Session Laws 2001-384, s. 13, provides; "This act becomes effective 1 September 2001. This act applies to any cleanup of a discharge or release of petroleum from an underground storage tank pursuant to Part 2A of Article 21A of Chapter 143 of the General Statutes except that land-use restrictions and recordation of residual contamination are not required with respect to a discharge or release of petroleum for which the Department of Environment and Natural Resources issued a determination that no further action is required prior to 1 September 2001."

Effect of Amendments. — Session Laws 2006-246, s. 16(a), effective retroactively to July 1, 2006, added subsection (h).

§ 47-30. Plats and subdivisions; mapping requirements.

(a) Size Requirements. — All land plats presented to the register of deeds for recording in the registry of a county in North Carolina after September 30, 1991, having an outside marginal size of either 18 inches by 24 inches, 21 inches by 30 inches, or 24 inches by 36 inches, and having a minimum one and one-half inch border on the left side and a minimum one-half inch border on the other sides shall be deemed to meet the size requirements for recording under this section. Where size of land areas, or suitable scale to assure legibility require, plats may be placed on two or more sheets with appropriate match lines. Counties may specify either:

(1) Only 18 inches by 24 inches;
(2) A combination of 18 inches by 24 inches and 21 inches by 30 inches;
(3) A combination of 18 inches by 24 inches and 24 inches by 36 inches; or
(4) A combination of all three sizes.

Provided, that all registers of deeds where specific sizes other than the combination of all three sizes have been specified, shall be required to submit said size specifications to the North Carolina Association of Registers of Deeds for inclusion on a master list of all such counties. The list shall be available in each register of deeds office by October 1, 1991. For purposes of this section, the terms "plat " and "map" are synonymous.

(b) Plats to Be Reproducible. — Each plat presented for recording shall be a reproducible plat, either original ink on polyester film (mylar), or a reproduced drawing, transparent and archival (as defined by the American National Standards Institute), and submitted in this form. The recorded plat must be such that the public may obtain legible copies. A direct or photographic copy of each recorded plat shall be placed in the plat book or plat file maintained for that purpose and properly indexed for use. In those counties in which the register has made a security copy of the plat from which legible copies can be made, the original may be returned to the person indicated on the plat.

(c) Information Contained in Title of Plat. —

(d) Certificate; Form. — There shall appear on each plat a certificate by the person under whose supervision the survey or plat was made, stating the origin of the information shown on the plat, including recorded deed and plat references shown thereon. The ratio of precision before any adjustments must be shown. Any lines on the plat that were not actually surveyed must be clearly indicated and a statement included revealing the source of information. Where a plat consists of more than one sheet, only one sheet must contain the certification and all other sheets must be signed and sealed.

The certificate required above shall include the source of information for the survey and data indicating the ratio of precision of the survey before adjustments and shall be in substantially the following form:

"I, ____________, certify that this plat was drawn under my supervision from an actual survey made under my supervision (deed description recorded in Book ________, page ________, etc.) (other); that the boundaries not surveyed are clearly indicated as drawn from information found in Book ________, page ________; that the ratio of precision as calculated is 1: ________; that this plat was prepared in accordance with G.S. 47-30 as amended. Witness my original signature, registration number and seal this ______ day of ______, A.D., ______.

Seal or Stamp

____
Surveyor
Registration Number"

Nothing in this requirement shall prevent the recording of a map that was prepared in accordance with a previous version of G.S. 47-30 as amended, properly signed, and notarized under the statutes applicable at the time of the signing of the map. However, it shall be the responsibility of the person presenting the map to prove that the map was so prepared.

(e) Method of Computation. — An accurate method of computation shall be used to determine the acreage and ratio of precision shown on the plat. Area by estimation is not acceptable nor is area by planimeter, area by scale, or area copied from another source, except in the case of tracts containing inaccessible sections or areas. In such case the surveyor may make use of aerial photographs or other appropriate aids to determine the acreage of any inaccessible areas when the areas are bounded by natural and visible monuments. In such case the methods used must be stated on the plat and all accessible areas of the tract shall remain subject to all applicable standards of this section.

(f) Plat to Contain Specific Information. — Every plat shall contain the following specific information:

(1) An accurately positioned north arrow coordinated with any bearings shown on the plat. Indication shall be made as to whether the north index is true, magnetic, North Carolina grid ("NAD 83" or "NAD 27"), or is referenced to old deed or plat bearings. If the north index is magnetic or referenced to old deed or plat bearings, the date and the source (if known) the index was originally determined shall be clearly indicated.

(2) The azimuth or course and distance of every property line surveyed shall be shown. Distances shall be in feet or meters and decimals thereof. The number of decimal places shall be appropriate to the class of survey required.

(3) All plat distances shall be by horizontal or grid measurements. All lines shown on the plat shall be correctly plotted to the scale shown. Enlargement of portions of a plat are acceptable in the interest of clarity, where shown as inserts. Where the North Carolina grid system is used the grid factor shall be shown on the face of the plat. If grid distances are used, it must be shown on the plat.

(4) Where a boundary is formed by a curved line, the following data must be given: actual survey data from the point of curvature to the point of tangency shall be shown as standard curve data, or as a traverse of bearings and distances around the curve. If standard curve data is used the bearing and distance of the long chord (from point of curvature to point of tangency) must be shown on the plat.

(5) Where a subdivision of land is set out on the plat, all streets and lots shall be accurately plotted with dimension lines indicating widths and all other information pertinent to reestablishing all lines in the field. This shall include bearings and distances sufficient to form a continuous closure of the entire perimeter.

(6) Where control corners have been established in compliance with G.S. 39-32.1, 39-32.2, 39-32.3, and 39-32.4, as amended, the location and pertinent information as required in the reference statute shall be plotted on the plat. All other corners which are marked by monument or natural object shall be so identified on all plats, and where practical all corners of adjacent owners along the boundary lines of the subject

tract which are marked by monument or natural object shall be shown.

(7) The names of adjacent landowners, or lot, block, parcel, subdivision designations or other legal reference where applicable, shall be shown where they could be determined by the surveyor.

(8) All visible and apparent rights-of-way, watercourses, utilities, roadways, and other such improvements shall be accurately located where crossing or forming any boundary line of the property shown.

(9) Where the plat is the result of a survey, one or more corners shall, by a system of azimuths or courses and distances, be accurately tied to and coordinated with a horizontal control monument of some United States or State Agency survey system, such as the North Carolina Geodetic Survey where the monument is within 2,000 feet of the subject property. Where the North Carolina Grid System coordinates of the monument are on file in the North Carolina Office of State Budget and Management, the coordinates of both the referenced corner and the monuments used shall be shown in X (easting) and Y (northing) coordinates on the plat. The coordinates shall be identified as based on "NAD 83," indicating North American Datum of 1983, or as "NAD 27,"indicating North American Datum of 1927. The tie lines to the monuments shall also be sufficient to establish true north or grid north bearings for the plat if the monuments exist in pairs. Within a previously recorded subdivision that has been tied to grid control, control monuments within the subdivision may be used in lieu of additional ties to grid control. Within a previously recorded subdivision that has not been tied to grid control, if horizontal control monuments are available within 2,000 feet, the above requirements shall be met; but in the interest of bearing consistency with previously recorded plats, existing bearing control should be used where practical. In the absence of Grid Control, other appropriate natural monuments or landmarks shall be used. In all cases, the tie lines shall be sufficient to accurately reproduce the subject lands from the control or reference points used.

(10) A vicinity map (location map) shall appear on the plat.

(11) Notwithstanding any other provision contained in this section, it is the duty of the surveyor, by a certificate on the face of the plat, to certify to one of the following:
  a. That the survey creates a subdivision of land within the area of a county or municipality that has an ordinance that regulates parcels of land;
  b. That the survey is located in a portion of a county or municipality that is unregulated as to an ordinance that regulates parcels of land;
  c. Any one of the following:
    1. That the survey is of an existing parcel or parcels of land and does not create a new street or change an existing street;
    2. That the survey is of an existing building or other structure, or natural feature, such as a watercourse; or
    3. That the survey is a control survey.
  d. That the survey is of another category, such as the recombination of existing parcels, a court-ordered survey, or other exception to the definition of subdivision;
  e. That the information available to the surveyor is such that the surveyor is unable to make a determination to the best of the surveyor's professional ability as to provisions contained in (a) through (d) above.

However, if the plat contains the certificate of a surveyor as stated in a., d., or e. above, then the plat shall have, in addition to said surveyor's certificate, a certification of approval, or no approval required, as may be required by local ordinance from the appropriate government authority before the plat is presented for recordation. If the plat contains the certificate of a surveyor as stated in b. or c. above, nothing shall prevent the recordation of the plat if all other provisions have been met.

(g) Recording of Plat. — In certifying a plat for recording pursuant to G.S. 47-30.2, the Review Officer shall not be responsible for reviewing or certifying as to any of the following requirements of this section:

(1) Subsection (b) of this section as to archival.
(2) Repealed by Session Laws 1997-309, s. 2.
(3) Subsection (e) of this section.
(4) Subdivisions (1) through (10) of subsection (f) of this section.

A plat, when certified pursuant to G.S. 47-30.2 and presented for recording, shall be recorded in the plat book or plat file and when so recorded shall be duly indexed. Reference in any instrument hereafter executed to the record of any plat herein authorized shall have the same effect as if the description of the lands as indicated on the record of the plat were set out in the instrument.

(h) Nothing in this section shall be deemed to prevent the filing of any plat prepared by a registered land surveyor but not recorded prior to the death of the registered land surveyor. However, it is the responsibility of the person presenting the map to the Review Officer pursuant to G.S. 47-30.2 to prove that the plat was so prepared. For preservation these plats may be filed without signature, notary acknowledgement or probate, in a special plat file.

(i) Nothing in this section shall be deemed to invalidate any instrument or the title thereby conveyed making reference to any recorded plat.

(j) The provisions of this section shall not apply to boundary plats of areas annexed by municipalities nor to plats of municipal boundaries, whether or not required by law to be recorded.

(k) The provisions of this section shall apply to all counties in North Carolina.

(*l*) The provisions of this section shall not apply to the registration of highway right-of-way plans provided for in G.S. 136-19.4 nor to registration of roadway corridor official maps provided in Article 2E of Chapter 136.

(m) Maps attached to deeds or other instruments and submitted for recording in that form must be no larger than 8 1/2 inches by 14 inches and comply with either this subsection or subsection (n) of this section. Such a map shall either (i) have the original signature of a registered land surveyor and the surveyor's seal as approved by the State Board of Registration for Professional Engineers and Land Surveyors, or (ii) be a copy of a map, already on file in the public records, that is certified by the custodian of the public record to be a true and accurate copy of a map bearing an original personal signature and original seal. The presence of the original personal signature and seal shall constitute a certification that the map conforms to the standards of practice for land surveying in North Carolina, as defined in the rules of the North Carolina State Board of Registration for Professional Engineers and Land Surveyors.

(n) A map that does not meet the requirements of subsection (m) of this section may be attached to a deed or other instrument submitted for recording in that form for illustrative purposes only if it meets both of the following requirements:

(1) It is no larger than 8 1/2 inches by 14 inches.
(2) It is conspicuously labelled, "THIS MAP IS NOT A CERTIFIED SURVEY AND HAS NOT BEEN REVIEWED BY A LOCAL GOVERNMENT AGENCY FOR COMPLIANCE WITH ANY APPLICA-

BLE LAND DEVELOPMENT REGULATIONS." (1911, c. 55, s. 2; C.S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249; 1953, c. 47, s. 1; 1959, c. 1235, ss. 1, 3A, 3.1; 1961, cc. 7, 111, 164, 199, 252, 660, 687, 932, 1122; 1963, c. 71, ss. 1, 2; cc. 180, 236; c. 361, s. 1; c. 403; 1965, c. 139, s. 1; 1967, c. 228, s. 2; c. 394; 1971, c. 658; 1973, cc. 76, 848, 1171; c. 1262, s. 86; 1975, c. 192; c. 200, s. 1; 1977, c. 50, s. 1; c. 221, s. 1; c. 305, s. 2; c. 771, s. 4; 1979, c. 330, s. 1; 1981, c. 138, s. 1; c. 140, s. 1; c. 479; 1983, c. 473; 1987, c. 747, s. 20; 1989, c. 727, s. 218(6); 1991, c. 268, s. 3; 1993, c. 119, ss. 1, 2; 1997-309, s. 2; 1997-443, s. 11A.119(a); 1998-228, ss. 11, 12; 1999-456, s. 59; 2000-140, s. 93.1(b); 2001-424, s. 12.2(b).)

Local Modification. — Ashe: 1979, c. 330, ss. 2, 3; Avery: 1973, c. 1050, ss. 1, 2; Cabarrus: 2002-115, s. 2; Davie, as to subsection (f)(3): 1961, c. 609; Durham: 2003-326, s. 2.1; Harnett: 2003-326, s. 2.1; Mecklinburg: 2002-115, s. 2; Moore: 2003-326, s. 2.1; New Hanover: 2003-326, s. 2.1; Onslow: 1977, c. 305, s. 1; Randolph: 2003-326, s. 2.1; Wilson: 1957, c. 1137.

Cross References. — As to validation of registration of plats prior to the 1953 amendment, see G.S. 47-108.10.

Legal Periodicals. — For comment on the 1941 amendment, see 19 N.C.L. Rev. 513 (1941).

CASE NOTES

This section was designed to regulate priorities as between two conflicting dedications, and does not affect the general principles of dedication and acceptance and the owner's right of revocation. Wittson v. Dowling, 179 N.C. 542, 103 S.E. 18 (1920).

This section was enacted in view of the decision in Sexton v. Elizabeth City, 169 N.C. 385, 86 S.E. 344 (1915), in which it was held that a purchaser in reference to a second plat who had registered his deed would take precedence over one under a former plat who had failed to have his deed registered; this on the ground that, as no statute provided for registration of plats, the date of registration of the deed would determine the matter. Wittson v. Dowling, 179 N.C. 542, 103 S.E. 18 (1920).

In order for a map to constitute notice to the town of a proposed subdivision, recordation in the office of the register of deeds is required, and that office is the proper place for such recordation. Williams v. Town of Grifton, 19 N.C. App. 462, 199 S.E.2d 288 (1973).

No Notice Will Take Place of Registration in Proper Public Office. — Ordinarily, a person may rely on the public records, and no notice, regardless of how full and formal, will take the place of registration in the proper public office. Williams v. Town of Grifton, 19 N.C. App. 462, 199 S.E.2d 288 (1973).

Certification Required. — A survey of a division of land that is described in G.S. 153A-335(2) falls under subdivision (f)(11)(d) and requires a certification of "no approval required" before the plat may be presented for recordation. Three Guys Real Estate v. Harnett County, 345 N.C. 468, 480 S.E.2d 681 (1997).

Cited in Adams v. North Carolina State Bd. of Registration, 129 N.C. App. 292, 501 S.E.2d 660 (1998).

OPINIONS OF ATTORNEY GENERAL

This section applies only to those maps or plats presented to the Register of Deeds for recording in his office. Whether or not the plat or map should be made to comply with this section and recorded depends on the purpose for which it is to be used. See opinion of Attorney General to Mr. Joe B. Freeman, Register of Deeds, Robeson County, 59 N.C.A.G. 1 (1989).

§ 47-30.1. Plats and subdivisions; alternative requirements.

In a county to which the provisions of G.S. 47-30 do not apply, any person, firm or corporation owning land may have a plat thereof recorded in the office of the register of deeds if such land or any part thereof is situated in the county, upon proof upon oath by the surveyor making such plat or under whose supervision such plat was made that the same is in all respects correct according to the best of his knowledge and belief and was prepared from an actual survey by him made, or made under his supervision, giving the date of such survey, or if the surveyor making such plat is dead, or where land has been sold and conveyed according to an unrecorded plat, upon the oath of a duly licensed surveyor that said map is in all respects correct according to the best of his knowledge and belief and that the same was actually and fully checked and verified by him, giving the date on which the same was verified and checked. (1961, c. 534, s. 1; c. 985.)

Local Modification. — Avery: 1973, c. 1050; Yadkin: 1977, c. 480.

Editor's Note. — Session Laws 1961, c. 534, s. 2, provided that any plat recorded in accordance with the provisions of G.S. 47-30.1 in a county to which the provisions of G.S. 47-30, as it read prior to amendment in 1983, did not apply, between December 31, 1959, and May 30, 1961, was in all respects validated and confirmed.

CASE NOTES

Cited in Williams v. Town of Grifton, 19 N.C. App. 462, 199 S.E.2d 288 (1973).

§ 47-30.2. Review Officer.

(a) The board of commissioners of each county shall, by resolution, designate by name one or more persons experienced in mapping or land records management as a Review Officer to review each map and plat required to be submitted for review before the map or plat is presented to the register of deeds for recording. Each person designated a Review Officer shall, if reasonably feasible, be certified as a property mapper pursuant to G.S. 147-54.4. A resolution designating a Review Officer shall be recorded in the county registry and indexed on the grantor index in the name of the Review Officer.

(b) The Review Officer shall review expeditiously each map or plat required to be submitted to the Officer before the map or plat is presented to the register of deeds for recording. The Review Officer shall certify the map or plat if it complies with all statutory requirements for recording.

Except as provided in subsection (c) of this section, the register of deeds shall not accept for recording any map or plat required to be submitted to the Review Officer unless the map or plat has the certification of the Review Officer affixed to it. A certification shall be in substantially the following form:

State of North Carolina
County of ______________

I, ______________, Review Officer of ______________ County, certify that the map or plat to which this certification is affixed meets all statutory requirements for recording.

____
Review Officer

Date ______________

(c) A map or plat must be presented to the Review Officer unless one or more of the following conditions are applicable:

(1) The certificate required by G.S. 47-30(f)(11) shows that the map or plat is a survey within the meaning of G.S. 47-30(f)(11)b. or c.
(2) The map or plat is exempt from the requirements of G.S. 47-30 pursuant to G.S. 47-30(j) or (*l*).
(3) The map is an attachment that is being recorded pursuant to G.S. 47-30(n). (1997-309, s. 3; 1998-228, s. 13.)

§ 47-31. Certified copies may be registered; used as evidence.

(a) A duly certified copy of any deed or writing required or allowed to be registered may be registered in any county without further certification pursuant to G.S. 47-14; and the registered or duly certified copy of any deed or writing that has been registered in the county where the land is situate may be given in evidence in any court of the State.

(b) Instruments registered pursuant to this section prior to July 6, 1993 that were not further certified pursuant to G.S. 47-14 at the time of registration are hereby validated. (1858-9, c. 18, s. 2; Code, s. 1253; Rev., s. 988; C. S., s. 3319; 1993, c. 288, ss. 2, 3.)

Cross References. — As to certified copies of registered instruments as evidence, see G.S. 8-18. As to court records as proof of destroyed instruments, see G.S. 98-12 and 98-13.

Editor's Note. — This section has been set out in the form above at the direction of the Revisor of Statutes.

CASE NOTES

Registration of Copies in Proper County Allowed. — This section allows certified copies of deeds erroneously registered to be recorded in the proper counties. Weston v. John L. Roper Lumber Co., 160 N.C. 263, 75 S.E. 800 (1912).

Proper Registration of Original Presumed. — It is to be assumed that the deed was properly put upon the registry until the contrary is made to appear, and nothing more is required to render the copy competent evidence when certified by the register. Starke v. Etheridge, 71 N.C. 240 (1874); Love v. Hardin, 87 N.C. 249 (1882); Strickland v. Draughan, 88 N.C. 315 (1883), appeal dismissed, 91 N.C. 103 (1884).

Use of Copy of Contract to Prove Lost Original. — For proof of the loss of a contract to convey land, a copy thereof, if shown to be correct, is admissible as secondary evidence to prove the contents of the original, though no search was made to ascertain whether the original was registered. Such a contract is valid between the parties without registration. Mauney v. Crowell, 84 N.C. 314 (1881).

Registration of Certified Copy Over 100 Years Old Even Though Mutilated. — Under this section, a certified copy of a deed over 100 years old, which showed that the original was a perfect deed of conveyance, was admissible to probate and registration, even though by reason of the mutilation of the records some lines of the conveyance showing the consideration therefor were lost; this being particularly true where an earlier certified copy of the same conveyance included the destroyed portions. Richmond Cedar Works v. Stringfellow, 236 F. 264 (E.D.N.C. 1916).

Cited in United States v. 7,405.3 Acres of Land, 97 F.2d 417 (4th Cir. 1938).

§ 47-32. Photographic copies of plats, etc.

After January 1, 1960, in all special proceedings in which a map shall be filed as a part of the papers, such map shall meet the specifications required for recording of maps in the office of the register of deeds, and the clerk of superior court may certify a copy thereof to the register of deeds of the county in which said lands lie for recording in the Map Book provided for that purpose; and the clerk of superior court may have a photographic copy of said map made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, may place said photographic copy in said book at the end of the report of the commissioner or other document referring to said map.

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1931, c. 171; 1959, c. 1235, ss. 2, 3A, 3.1; 1961, cc. 7, 111, 164, 252, 697, 932, 1122; 1963, c. 71, s. 3; c. 236; c. 361, s. 2; 1965, c. 139, s. 2; 1971, c. 1185, s. 13; 1977, c. 111; c. 221, s. 2; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 1.)

Editor's Note. — Session Laws 1981, c. 138, which deleted Cherokee in the list of counties in the second paragraph, provided in s. 2: "This act is effective upon ratification and applies to maps presented to the Cherokee County Register of Deeds or filed in a special proceeding on or after that date." The act was ratified March 27, 1981.

Session Laws 1981, c. 140, which deleted Caswell in the list of counties in the second paragraph, provided in s. 2: "This act shall become effective July 1, 1981 and shall apply to maps presented to the Caswell County Register of Deeds or filed in a special proceeding on or after that date."

§ 47-32.1. Photostatic copies of plats, etc.; alternative provisions.

In a county to which the provisions of G.S. 47-32 do not apply, the following alternative provisions shall govern photostatic copies of plats filed in special proceedings:

In all special proceedings in which a plat, map or blueprint shall be filed as a part of the papers, the clerk of the superior court may have a photostatic copy of said plat, map or blueprint made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, shall place said photostatic copy in said book at the end of the report of the commissioners or other document referring to said plat, map or blueprint. (1961, c. 535, s. 1; 1971, c. 1185, s. 14.)

Editor's Note. — Session Laws 1961, c. 535, s. 1, which added this section, renumbered former G.S. 47-32.1 as G.S. 47-32.2.

Session Laws 1961, c. 535, s. 2, provided that any plat filed as part of the papers in a special proceeding in accordance with the provisions of G.S. 47-32.1, in a county to which the provisions of G.S. 47-32 do not apply, between December 31, 1959, and May 30, 1961, was in all respects validated and confirmed.

§ 47-32.2. Violation of § 47-30 or § 47-32 a misdemeanor.

Any person, firm or corporation willfully violating the provisions of G.S. 47-30 or G.S. 47-32 shall be guilty of a Class 3 misdemeanor and upon conviction shall be subject only to a fine of not less than fifty dollars ($50.00) nor more than five hundred dollars ($500.00).

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Camden, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Vance, Warren, Washington, Watauga and Yadkin. (1959, c. 1235, ss. 3, 3A, 3.1; 1961, cc. 7, 111, 164, 252; c. 535, s. 1; cc. 687, 932, 1122; 1963, c. 236; c. 361, s. 3; 1965, c. 139, s. 3; 1977, c. 110; c. 221, s. 3; 1981, c. 138, s. 1; c. 140, s. 1; 1985, c. 32, s. 2; 1993, c. 539, s. 408; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1961, c. 535, s. 1, renumbered this section, which was originally designated G.S. 47-32.1, as G.S. 47-32.2.

Session Laws 1981, c. 138, which deleted Cherokee in the list of counties in the second paragraph, provided in s. 2: "This act is effective upon ratification and applies to maps presented to the Cherokee County Register of Deeds or filed in a special proceeding on or after that date." The act was ratified March 27, 1981.

Session Laws 1981, c. 140, which deleted Caswell in the list of counties in the second paragraph, provided in s. 2: "This act shall become effective July 1, 1981 and shall apply to maps presented to the Caswell County Register of Deeds or filed in a special proceeding on or after that date."

Legal Periodicals. — For article, "Legislative Kudzu and the New Millennium: An Opportunity for Reflection and Reform," see 23 Campbell L. Rev. 157 (2001).

§ 47-33. Certified copies of deeds made by alien property custodian may be registered.

Any copy of a deed made, or purporting to be made, by the United States alien property custodian duly certified pursuant to title twenty-eight, section six hundred sixty-one of United States Code by the department of justice of the United States, with its official seal impressed thereon, when the said certified copy reveals the fact that the execution of the original was acknowledged by the alien property custodian before a notary public of the District of Columbia, and that the official seal of the alien property custodian by recital was affixed or impressed on the original, and further reveals it to have been approved, as to form, by general counsel, and the copy also shows that the original was signed and approved by the acting chief, division of trusts, and was witnessed by two witnesses, shall, when presented to the register of deeds of any county wherein the land described therein purports to be situate, be recorded by the register of deeds of such county without other or further proof of the execution and/or delivery of the original thereof, and the same when so recorded shall be indexed and cross-indexed by the register of deeds as are deeds made by individuals upon the payment of the usual and lawful fees for the registration thereof. (1937, c. 5, s. 1.)

§ 47-34. Certified copies of deeds made by alien property custodian admissible in evidence.

The record of all such recorded copies of such instruments authorized in G.S. 47-33 shall be received in evidence in all the courts of this State and the courts of the United States in the trial of any cause pending therein, the same as though and with like effect as if the original thereof had been probated and recorded as required by the law of North Carolina, and the record in the office of register of deeds of such recorded copy of such an instrument shall be presumptive evidence that the original of said copy was executed and delivered to the vendee, or vendees therein named, and that the original thereof has been lost or unintentionally destroyed without registration, and in the absence of legal proof to the contrary said so registered copy shall be conclusive evidence that the United States alien property custodian conveyed the lands and premises described in said registered copy to the vendees therein named, as said copy reveals, and title to such land shall pass by such recorded instrument. (1937, c. 5, s. 2.)

§ 47-35. Register to fill in deeds on blank forms with lines.

Registers of deeds shall, in registering deeds and other instruments, where printed skeletons or forms are used by the register, fill all spaces left blank in such skeletons or forms by drawing or stamping a line or lines in ink through such blank spaces. (1911, c. 6, s. 1; C.S., s. 3320.)

§ 47-36. Errors in registration corrected on petition to clerk.

Every person who discovers that there is an error in the registration of his grant, conveyance, bill of sale or other instrument of writing, may prefer a petition to the clerk of the superior court of the county in which said writing is registered, in the same manner as is directed for petitioners to correct errors in grants or patents, and if on hearing the same before said clerk it appears that errors have been committed, the clerk shall order the register of the county to correct such errors and make the record conformable to the original. The petitioner must notify his grantor and every person claiming title to or having lands adjoining those mentioned in the petition, 30 days previous to preferring the same. Any person dissatisfied with the judgment may appeal to the superior court as in other cases. (1790, c. 326, ss. 2, 3, 4; R.C., c. 37, s. 28; Code, s. 1266; Rev., s. 1008; C.S., s. 3321.)

Cross References. — As to correction of grants, see G.S. 146-46 et seq.

CASE NOTES

Proceedings Exclusive. — The proceedings provided for by this section are exclusive. Hopper v. Justice, 111 N.C. 418, 16 S.E. 626 (1892).

Grantor Cannot Call upon Grantee to Correct Mistake. — Where, by the mistake or oversight of the makers of a deed, the same is incorrectly written, they have no equity to call upon the grantee to correct the mistake in the books of the register, as they have an ample remedy under this section, and a promise by the grantee to make such correction at his own expense and trouble would be nudum pactum. Oldham v. First Nat'l Bank, 85 N.C. 240 (1881).

Register May Correct Own Mistake. — The order of registration by the clerk is a continuous one, with which the register of deeds may subsequently comply upon inadvertently having omitted to copy the words it contained upon his book. Brown v. Hutchinson, 155 N.C. 205, 71 S.E. 302 (1911).

The original deed may be shown in evidence to correct an omission by the register of deeds of the signature of the justice of the peace before whom the deed was acknowledged. Brown v. Hutchinson, 155 N.C. 205, 71 S.E. 302 (1911).

§ 47-36.1. Correction of errors in recorded instruments.

Notwithstanding G.S. 47-14 and 47-17, an obvious typographical or other minor error in a deed or other instrument recorded with the register of deeds may be corrected by rerecording the original instrument with the correction clearly set out on the face of the instrument and with a statement of explanation attached. The parties who signed the original instrument or the attorney who drafted the original instrument shall initial the correction and sign the statement of explanation. If the statement of explanation is not signed by the parties who signed the original instrument, it shall state that the person signing the statement is the attorney who drafted the original instrument. The statement of explanation need not be acknowledged. Notice of the correction made pursuant to this section shall be effective from the time the instrument is rerecorded. (1985 (Reg. Sess., 1986), c. 842, s. 1; 1987, c. 360, s. 1.)

CASE NOTES

No Continuing Duty to Correct Errors. — There was no merit to plaintiff's allegations that this section creates a continuing duty to correct errors and that defendant's failure to correct errors in deeds constituted a breach of fiduciary duty. Jordan v. Crew, 125 N.C. App. 712, 482 S.E.2d 735 (1997), cert. denied, 346 N.C. 279, 487 S.E.2d 548 (1997).

Cited in Green v. Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990).

ARTICLE 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-37: Repealed by Session Laws 2005-123, s. 3, effective October 1, 2005.

§ 47-37.1. Other forms of proof.

(a) The proof and acknowledgment forms set forth in this Article are not exclusive. Without regard to whether an instrument presented for registration was signed by an individual acting in his or her own right or by an individual acting in a representative or fiduciary capacity, a notarial certificate that complies with the provisions of Part 6 of Article 1 of Chapter 10B shall be deemed a sufficient form of probate or acknowledgment for purposes of this Chapter. Use of a notarial certificate that satisfies the requirements of Part 6 of Article 1 of Chapter 10B shall not be grounds for a register of deeds to refuse to accept a record for registration.

(b) When an instrument presented for registration purports to be signed by an individual in a representative or fiduciary capacity, the acknowledgment or proof of that individual's signature may:

(1) State that the individual signed the instrument in a representative or fiduciary capacity.

(2) State that the individual who signed the instrument in a representative or fiduciary capacity had due authority to do so.

(3) Identify the represented person or the fiduciary capacity.

(c) This section relates only to the form of proof or acknowledgment. The capacity and authority of the individual who signs an instrument presented for registration are governed by other provisions of law.

(d) This section applies to proofs and acknowledgments made before, on, or after December 1, 2005. (2005-391, s. 9; 2006-59, s. 27.)

Editor's Note. — Session Laws 2005-391, s. 13, made this section effective December 1, 2005, and applicable to notarial acts and applications for notary commissions and recommissions made on or after that date.

Session Laws 2005-391, s. 12, provides: "This act shall not affect any civil or criminal litigation pending on the effective date of this act. Any act committed prior to the effective date of this act which violated any provision of the statutes repealed or amended by this act shall be subject to enforcement, prosecution, conviction, and punishment as if this act had not been enacted. Any claim arising under any provisions of the statutes repealed or amended by this act prior to the effective date of this act shall remain valid as if this act had not been enacted."

Effect of Amendments. — Session Laws 2006-59, s. 27, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, added "or fiduciary" throughout the section preceding "capacity"; deleted "(G.S. 10B-25 et. seq.)" following "Article 1 of Chapter 10B" in the second sentence of subsection (a); substituted "may" for "may, but is not required to" at the end of subsection (b); substituted "the fiduciary capacity" for "entity" in subdivision (b)(3); and added subsections (c) and (d).

§ 47-38. Acknowledgment by grantor.

When properly completed, a certificate in substantially the following form may be used and shall be sufficient under the law of this State to satisfy the requirements for a notarial certificate for one or more individuals, acting in his, her, or their own right or, whether or not so stated in the notarial certificate, in a representative or fiduciary capacity, including one or more individuals acting on behalf of an unincorporated association, as an officer or director of a corporation, as a partner of a general or limited partnership, as a manager or member of a limited liability company, as the trustee of a trust, as the personal representative of a decedent's estate, as an agent or attorney in fact for another, as the guardian of a minor or an incompetent, or as a public official. The authorization of the form in this section does not preclude the use of other forms. This section applies to notarial certificates made before, on, and after December 1, 2005.

North Carolina, ____________ County.

I (here give the name of the official and his official title), do hereby certify that (here give the name of the individual whose acknowledgment is being taken) personally appeared before me this day and acknowledged the due execution of the foregoing instrument. Witness my hand and (where an official seal is required by law) official seal this the ______ day of ______ (year).

(Official seal.)

____

(Signature of officer.)
(Title)

(Rev., s. 1002; C.S., s. 3323; 1945, c. 73, s. 13; 1977, c. 375, s. 12; 2006-59, s. 28.)

Effect of Amendments. — Session Laws 2006-59, s. 28, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, rewrote the section.

CASE NOTES

Certificates of acknowledgment will be liberally construed and will be upheld if in substantial compliance with the statute. Freeman v. Morrison, 214 N.C. 240, 199 S.E. 12 (1938).

"Acknowledgment" describes the act of personal appearance before a proper officer and there stating to him the fact of the execution of the instrument as a voluntary act. Freeman v. Morrison, 214 N.C. 240, 199 S.E. 12 (1938).

An acknowledgment taken over the telephone does not meet the statutory requirements. Southern State Bank v. Summer, 187 N.C. 762, 122 S.E. 848 (1924).

Name of Officer. — It is not necessary to the validity of the probate of a deed that the signature of the name of the officer before whom it was acknowledged should be recorded at the end, when it appears from the certificate as recorded and from the clerk's adjudication thereon that his name appeared in the first line, and that in fact he properly took the acknowledgment. Brown v. Hutchinson, 155 N.C. 205, 71 S.E. 302 (1911).

Acknowledgment in Compliance with Section. — An acknowledgment to a will, upon which the name and title of the official taking the acknowledgment and the name of the maker as well as the witness was provided, their personal appearance was ascribed by the phrase "sworn to ... before me", the date and year of the acknowledgment were provided, the notary's signature and her seal were affixed thereto, and the phrase "sworn to and subscribed before me" appeared prominently below the signatures of the maker and witness, substantially conformed to the statutory provisions of this section. In re Hess, 104 N.C. App. 75, 407 S.E.2d 594 (1991).

Cited in McClure v. Crow, 196 N.C. 657, 146 S.E. 713 (1929).

§ 47-39: Repealed by Session Laws 1977, c. 375, s. 16.

§ 47-40. Husband's acknowledgment and wife's acknowledgment before the same officer.

Where the instrument is acknowledged by both husband and wife or by other grantor before the same officer the form of acknowledgment shall be in substance as follows:

I (here give name of official and his official title), do hereby certify that (here give names of the grantors whose acknowledgment is being taken) personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument. (1899, c. 235, s. 8; 1901, c. 299; Rev., s. 1004; C.S., s. 3325; 1945, c. 73, s. 15.)

Cross References. — As to when seal of officer is necessary to probate, see G.S. 47-5.

§ **47-41:** Repealed by Session Laws 1991, c. 647, s. 3.

Cross References. — As to corporate conveyances, see now G.S. 47-41.01, 47-41.02.

Editor's Note. — Session Laws, 1991, c. 647, s. 3, which repealed this section, provides: "The provision of G.S. 47-41 shall continue to apply to all instruments executed before the effective date [October 1, 1991] of this section of this act."

§ 47-41.01. Corporate conveyances.

(a) The following forms of probate for deeds and other conveyances executed by a corporation shall be deemed sufficient, but shall not exclude other forms of probate which would be deemed sufficient in law.

(b) If the deed or other instrument is executed by an official of the corporation, signing the name of the corporation by him in his official capacity, or any other agent authorized by resolution pursuant to G.S. 47-18.3(e), is sealed with its common or corporate seal, and is attested by another person who is an attesting official of the corporation, the following form of acknowledgment is sufficient:

____
(State and county, or other
description of place where
acknowledgment is taken)
I, ____________________, ______________________________,
(Name of officer taking acknowledgment) (Official title of officer taking acknowledgment)
certify that ______________________________ personally came before
(Name of attesting official)
me this day and acknowledged that he (or she) is ____________________
(Title of attesting official)
of ____________________, a corporation, and that by authority duly
(Name of corporation)
given and as the act of the corporation, the foregoing instrument was signed in its name by its ____________________,
(Title of official)
sealed with its corporate seal, and attested by himself (or herself) as its
____
(Title of attesting official)

Witness my hand and official seal, this the __________ day of

__________,
(Month)

____
(Year)

____
(Signature of officer taking acknowledgment)
(Official seal, if officer taking
acknowledgment has one)
My commission expires ______________________________
(Date of expiration of commission as
notary public)

(c) If the deed or other instrument is executed by an official of the corporation, signing the name of the corporation in his official capacity, or any other agent authorized by resolution pursuant to G.S. 47-18.3(e) the following form of acknowledgment is sufficient:

(State and county, or other
description of place where
acknowledgment is taken)
I, ____________________ ______________________________,
(Name of officer taking acknowledgment) (Official title of officer taking acknowledgment)
certify that ____________________ personally came before
(Name of official)
me this day and acknowledged that he (or she) is ____________________
(Title of official)
of ____________________, a corporation, and that he/she, as
____________, being authorized to do so, executed the
(Title of official)
foregoing on behalf of the corporation.

Witness my hand and official seal, this the ______ day of
__________,
(Month)
____
(Year)

____
(Signature of officer taking acknowledgment)
(Official seal, if officer taking
acknowledgment has one)
My commission expires ______________________________
(Date of expiration of commission as
notary public)

(d) For purposes of this section:

(1) The words "a corporation" following the blank for the name of the corporation may be omitted when the name of the corporation ends with the word "Corporation" or "Incorporated."

(2) The words "My commission expires" and the date of expiration of the notary public's commission may be omitted except when a notary public is the officer taking the acknowledgment. The fact that these words and this date may be located in a position on the form different from the position indicated in this subsection does not by itself invalidate the form.

(3) The phrase "and official seal" and the seal itself may be omitted when the officer taking the acknowledgment has no seal or when such officer is the clerk, assistant clerk, or deputy clerk of the superior court of the county in which the deed or other instrument acknowledged is to be registered.

(4) The official of the corporation is the corporation's chairman, president, chief executive officer, a vice-president or an assistant vice-president, treasurer, or chief financial officer, or any other agent authorized by resolution pursuant to G.S. 47-18.3(e).

(5) The attesting official of the corporation is the corporation's secretary or assistant secretary, trust officer, assistant trust officer, associate trust officer, or in the case of a bank, its secretary, assistant secretary, cashier or assistant cashier.

(6) The phrase "sealed with its corporate seal" may be omitted if the seal of the corporation has not been affixed to the instrument being acknowledged.

(e) The forms of probate set forth in this section may be modified and adopted for use in the probate of deeds and other conveyances and instruments executed by entities other than corporations, including general and limited partnerships, limited liability companies, trusts, and unincorporated associations. This subsection applies to notarial certificates and forms of probate made before, on, or after December 1, 2005. (1991, c. 647, s. 4; 1995 (Reg. Sess., 1996), c. 742, s. 18; 1999-221, s. 1; 2006-59, s. 29.)

Cross References. — As to probate of deeds by examination of subscribing witness in certain cases where corporation has ceased to exist, see G.S. 47-16. As to validation of certain corporate acknowledgments, see G.S. 47-70 through 47-73.

Effect of Amendments. — Session Laws 2006-59, s. 29, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, added subsection (e).

CASE NOTES

Editor's Note. — *The cases below were decided under former G.S. 47-41 and provisions from which it was derived.*

Power of Directors to Mortgage Corporate Property. — This section appears to recognize inferentially the power of a board of directors to mortgage the corporate property. Wall v. Rothrock, 171 N.C. 388, 88 S.E. 633 (1916).

Reference to "Other Forms of Probate". — This section, in providing that it shall not exclude "other forms of probate which would be deemed sufficient in law," can only refer to forms of probate deemed sufficient by the common law, under which a certificate showing that the officer whose duty it was to affix the seal acknowledged that he did so is sufficient. National Bank v. Hill, 226 F. 102 (E.D.N.C. 1915).

Substantial Compliance Sufficient. — The probate of a deed of a corporation is sufficient if it substantially shows the facts required by this section, which expressly provides that the form prescribed "shall not exclude other forms of probate." Board of Comm'rs v. A.V. Wills & Sons, 236 F. 362 (E.D.N.C. 1916).

Where the probate of a corporation's deed for land is in substantial compliance with this section, parol evidence is competent, in an action attacking its validity, that tends to corroborate the recitations of the probate, and to further show that the president and secretary had proper authority to act therein on its behalf. Bailey v. Hassell, 184 N.C. 450, 115 S.E. 166 (1922).

While it is the better course to follow the suggested methods of this section, in the execution of a corporate chattel mortgage, there being no general law or charter provision to the contrary, it is not necessary to its validity that the witness to the probate certifies in its probate that he saw the presiding member sign it, when otherwise it complies with the requirements of the general law. Merchants' & Farmers' Bank v. Pearson, 186 N.C. 609, 120 S.E. 210 (1923).

Corporate Seal. — A corporate seal is a necessary prerequisite to a valid conveyance of real estate by a corporation. Investors Corp. v. Field Fin. Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

This section sets out the forms of probate for a deed and other conveyances executed by a corporation and reveals the necessity of having a corporate seal. Investors Corp. v. Field Fin. Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

It is not necessary to the valid probate of a deed made by a corporation that it literally follow the statutory printed forms of this section, if it substantially complies with the law regulating the probate of a conveyance of land; and where the probate shows the acknowledgment of the president and secretary, each acting in his official capacity, or as representing the corporation, who is designated as "the grantor, for the purpose therein expressed," it is sufficient; and the finding of the jury, upon evidence, that their officials were properly authorized to act for and in behalf of the corporation, and had so acted, and had used the word "seal," enclosed in scroll, that had been lawfully adopted for the purpose, makes it a valid execution and probate of the deed as an act of the corporation itself; and were it otherwise, the defects as to the "seal" would seem to be cured under the provisions of G.S. 47-72, and as to signatures of the officials by G.S. 47-73. Bailey v. Hassell, 184 N.C. 450, 115 S.E. 166 (1922).

Defective Conveyances. — When it does not appear from the probate of a corporation's deed to lands that the seal affixed is the common seal of the corporation, or that it was affixed by the proper officers of the corporation, it is not a substantial compliance with this section, and the deed is ineffectual to pass title to the lands as against creditors and purchasers. Withrell v. Murphy, 154 N.C. 82, 69 S.E. 748 (1910).

A corporation's deed is defective which fails to show by its certificate, read in connection with the deed, that the corporate officials acknowledged the instrument as the act and deed of the corporation, or that the official executing the deed in behalf of and under authority from the corporation acknowledged it to be "his" act and deed, as such. Withrell v. Murphy, 154 N.C. 82, 69 S.E. 748 (1910).

In Withrell v. Murphy, 154 N.C. 82, 69 S.E. 748 (1910), where the corporate seal had been affixed to a deed of conveyance, but the acknowledgment by the corporate officers failed to acknowledge that the seal so affixed was the seal of the corporation, the Supreme Court held that this conveyance was, therefore, ineffectual as to the corporation's auditors. Investors Corp. v. Field Fin. Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

Acknowledgement by Individuals Instead of Officers. — The probate of a deed of a corporation by the acknowledgment of individuals instead of by its officers is fatally defective, and its registration, in consequence, is a nullity. Bernhardt v. Brown, 122 N.C. 587, 29 S.E. 884 (1898).

§ 47-41.02. Other forms of probate for corporate conveyances.

(a) The following forms of probate for deeds and other conveyances executed by a corporation shall also be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law.

(b) If the instrument is executed by the president or presiding member or trustee and two other members of the corporation, and sealed with the common seal, the following form shall be sufficient:

North Carolina, ________________ County.

This ________ day of ________ A.D. ________, personally came before me (here give the name and official title of the officer who signs this certificate) A.B. (here give the name of the subscribing witness), who, being by me duly sworn, says that he knows the common seal of the (here give the name of the corporation), and is also acquainted with C.D., who is the president (or presiding member or trustee), and also with E.F. and G.H., two other members of said corporation; and that he, the said A.B., saw the said president (or presiding member or trustee) and the two said other members sign the said instrument, and saw the said president (or presiding member or trustee) affix the said common seal of said corporation thereto, and that he, the said subscribing witness, signed his name as such subscribing witness thereto in their presence. Witness my hand and (when an official seal is required by law) official seal, this ________ day of ________ (year).

(Official seal.)

____

(Signature of officer.)

(c) If the deed or other instrument is executed by the president, presiding member or trustee of the corporation, and sealed with its common seal, and attested by its secretary or assistant secretary, either of the following forms of proof and certificate thereof shall be deemed sufficient:

North Carolina, ________________ County.

This ________ day of ________, A.D. ________, personally came before me (here give name and official title of the officer who signs the certificate) A.B. (here give the name of the attesting secretary or assistant secretary), who, being by me duly sworn, says that he knows the common seal of (here give the name of the corporation), and is acquainted with C.D., who is the president of said corporation, and that he, the said A.B., is the secretary (or assistant secretary) of the said corporation, and saw the said president sign the foregoing (or annexed) instrument, and saw the said common seal of said corporation affixed to said instrument by said president (or that he, the said A.B., secretary or assistant secretary as aforesaid, affixed said seal to said instrument), and that he, the said A.B., signed his name in attestation of the execution of said instrument in the presence of said president of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the ________ day of ________ (year).

(Official seal.)

____

(Signature of officer.)

North Carolina, ________________ County.

This is to certify that on the ________ day of ________, ________, before me personally came ________ (president, vice-president, secretary or assistant secretary, as the case may be), with whom I am personally acquainted, who, being by me duly sworn, says that ________ is the president (or vice-president), and ________ is the secretary (or assistant secretary) of the ________, the corporation described in and which executed the foregoing instrument; that he knows the common seal of said corporation; that the seal affixed to the foregoing instrument is said common seal, and the name of the corporation was subscribed thereto by the said president (or vice-president), and that said president (or vice-president) and secretary (or assistant secretary) subscribed their names thereto, and said common seal was affixed, all by order of the board of directors of said corporation, and that the said instrument is the act and deed of said corporation. Witness my hand and (when an official seal is required by law) official seal, this the ________ day of ________ (year).

(Official seal.)

____

(Signature of officer.)

(d) If the deed or other instrument is executed by the signature of the president, vice-president, presiding member or trustee of the corporation, and sealed with its common seal and attested by its secretary or assistant secretary, the following form of proof and certificate thereof shall be deemed sufficient:

This ________ day of ________, A.D. ________, personally came before me (here give name and official title of officer who signs the certificate) A.B., who, being by me duly sworn, says that he is president (vice-president, presiding member or trustee) of the ________ Company, and that the seal affixed to the foregoing (or annexed) instrument in writing is the corporate seal of said company, and that said writing was signed and sealed by him in behalf of said corporation by its authority duly given. And the said A.B. acknowledged the said writing to be the act and deed of said corporation.

(Official seal.)

____

(Signature of officer.)

(e) All corporate conveyances probated and recorded prior to February 14, 1939, wherein the same was attested by the assistant secretary, instead of the secretary, and otherwise regular, are hereby validated as if attested by the secretary of the corporation.

(f) The following forms of probate for contracts in writing for the purchase of personal property by corporations providing for a lien on the property or the retention of a title thereto by the vendor as security for the purchase price or any part thereof, or chattel mortgages, chattel deeds of trust, and conditional sales of personal property executed by a corporation shall be deemed sufficient but shall not exclude other forms of probate which would be deemed sufficient in law:

North Carolina

____________________ County

I, ____________________, do hereby certify that ____________________

(Name of president, secretary or treasurer)

personally came before me this day and acknowledged that he is

______________________ of ______________________ and acknowledged,
(President, secretary (Name of corporation)
or treasurer)
on behalf of ______________________________________, the grantor, the due
(Name of corporation)
execution of the foregoing instrument.
Witness my hand and official seal, this ________ day of ________, ________
(Official seal)

____
(Title of officer)

____
(Name of state)
____
(County)
I, ____
(Name of officer taking proof) (Official title of officer taking proof)
of ______________________, certify that
(County) (Name of state)
____ personally appeared before
(Name of subscribing witness)
me, and being duly sworn, stated that in his presence

____
(Name of president, secretary or treasurer of maker)
(signed the foregoing instrument) (acknowledged the execution of the foregoing instrument.) (Strike out the words not applicable.)
Witness my hand and official seal, this __________________________ day of
________________, ________
(Month) (Year)

____
(Signature of official taking proof)

____
(Official title of official taking proof)
My commission expires ____
(Date of expiration of official's commission)

(g) All deeds and other conveyances executed on or before April 12, 1974, by the president, any vice-president, assistant vice-president, manager, comptroller, treasurer, assistant treasurer, trust officer or assistant trust officer, or chairman or vice-chairman of a corporation are hereby validated to the extent that such deeds or other conveyances were otherwise properly executed, probated, and recorded.

(h) The forms of probate set forth in this section may be modified and adopted for use in the probate of deeds and other conveyances and instruments executed by entities other than corporations, including general and limited partnership, limited liability companies, trusts, and unincorporated associations. This subsection applies to notarial certificates and forms of probate made before, on, or after December 1, 2005. (1991, c. 647, s. 5; 1991 (Reg. Sess., 1992), c. 1030, s. 14; 1999-456, s. 59; 2006-59, s. 30.)

Effect of Amendments. — Session Laws 2006-59, s. 30, effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date, added subsection (h).

§ 47-41.1. Corporate seal.

All documents, including but not limited to deeds, deeds of trust, and mortgages, required or permitted by law to be executed by corporations, shall be legally valid and binding when a legible corporate stamp which is a facsimile of its seal is used in lieu of an imprinted or embossed corporate seal. (1971, c. 340, s. 1.)

§ 47-41.2. Technical defects.

(a) Technical defects, including technical defects under G.S. 10B-68, and errors or omissions in a form of probate or other notarial certificate, shall not affect the sufficiency, validity, or enforceability of the form of probate or the notarial certificate or the related instrument or document. A register of deeds may not refuse to accept an instrument or document for registration because of technical defects, errors, or omissions in a form of probate or other notarial certificate. This subsection applies to notarial certificates and forms of probate made on or after December 1, 2005.

(b) This section does not apply to the requirements for registration contained in G.S. 47-14(a) and a register of deeds shall not accept for registration an instrument that does not comply with the requirements of G.S. 47-14(a). (2006-59, s. 31; 2006-199, s. 3.)

Editor's Note. — Session Laws 2006-59, s. 33, made this section effective October 1, 2006, and except as otherwise set forth in this act, applicable to notarial acts performed on or after that date.

Effect of Amendments. — Session Laws 2006-199, s. 3, effective July 1, 2006, added the last sentence in subsection (a).

§ 47-42. Attestation of bank conveyances by secretary or cashier.

(a) Repealed by Session Laws 2002-26, s. 1.

(b) All deeds and conveyances executed prior to February 14, 1939, by banking corporations, where the cashier of said banking corporation has attested said instruments, which deeds and conveyances are otherwise regular, are hereby validated.

(c) All deeds and conveyances executed by a banking corporation on or after October 1, 1999, that complied with G.S. 47-18.3 are hereby validated. (1939, c. 20, s. 21/2; 1957, c. 783, s. 4; 2002-26, s. 1.)

§ 47-43. Form of certificate of acknowledgment of instrument executed by attorney-in-fact.

When an instrument purports to be signed by parties acting through another by virtue of the execution of a power of attorney, the following form of certificate shall be deemed sufficient, but shall not exclude other forms which would be deemed sufficient in law:

North Carolina, ____________ County.

I (here give name of the official and his official title), do hereby certify that (here give name of attorney-in-fact), attorney-in-fact for (here give names of parties who executed the instrument through attorney-in-fact), personally appeared before me this day, and being by me duly sworn, says that he executed the foregoing and annexed instrument for and in behalf of (here give names of parties who executed the instrument through attorney-in-fact), and that his authority to execute and acknowledge said instrument is contained in an instrument duly executed, acknowledged, and recorded in the office of (here insert name of official in whose office power of attorney is recorded, and the county and state of recordation), on the (day of month, month, and year of recordation), and that this instrument was executed under and by virtue of the authority given by said instrument granting him power of attorney; that the said (here give name of attorney-in-fact) acknowledged the due execution of the foregoing and annexed instrument for the purposes therein expressed for and in behalf of the said (here give names of parties who executed the instrument through attorney-in-fact).

WITNESS my hand and official seal, this ______ day of __________, (year) ______.

(Official seal.)

____
Signature of Officer

(1941, c. 238.)

Cross References. — For amendment of this section, see G.S. 47-43.1. As to registration of power of attorney, see G.S. 47-28.

Editor's Note. — Session Laws 1949, c. 66, s. 1, provided that this section was amended by adding G.S. 47-43.1 at the end thereof. Section 2 of the act, read in conjunction with s. 4, provides that all instruments executed prior to February 11, 1949, which satisfy the requirements of the act, and are otherwise valid as to form and substance, shall be deemed sufficient and valid in law.

CASE NOTES

Cited in In re Sale of Land of Warrick, 1 N.C. App. 387, 161 S.E.2d 630 (1968).

§ 47-43.1. Execution and acknowledgment of instruments by attorneys or attorneys-in-fact.

When an instrument purports to be executed by parties acting through another by virtue of a power of attorney, it shall be sufficient if the attorney or attorney-in-fact signs such instrument either in the name of the principal by the attorney or attorney-in-fact or signs as attorney or attorney-in-fact for the principal; and if such instrument purports to be under seal, the seal of the attorney-in-fact shall be sufficient. For such instrument to be executed under seal, the power of attorney must have been executed under seal. (1949, c. 66, s. 1.)

Editor's Note. — Session Laws 1949, c. 66, s. 1, which added this section, provided that G.S. 47-43 was amended by adding this section at the end thereof. Section 2 of the act, read in conjunction with s. 4, provides that all instruments executed prior to February 11, 1949, which satisfy the requirements of the act, and are otherwise valid as to form and substance, shall be deemed sufficient and valid in law.

Legal Periodicals. — For brief comment on this section, see 27 N.C.L. Rev. 421 (1949).

§ 47-43.2. Officer's certificate upon proof of instrument by subscribing witness.

When the execution of an instrument is proved by a subscribing witness as provided by G.S. 47-12, the certificate required by G.S. 47-13.1 shall be in substantially the following form:

STATE OF ______________________________
(Name of state)
______________________________ COUNTY

I, ______________________, a ______________________
(Name of officer taking proof) (Official title of officer taking proof)
of ______________ COUNTY, ______________, certify that
(Name of state)
______________________ personally appeared before me this day,
(Name of subscribing witness)
and being duly sworn, stated that in his presence ______________________
(Name of maker)
(signed the foregoing instrument) (acknowledged the execution of the foregoing instrument.) (Strike out the words not applicable.)

WITNESS my hand and official seal, this the ________ day of ____________,
(Month)
____
(Year)

____
(Signature of officer taking proof)
____
(Official title of officer taking proof)

My commission expires ______________________
(Date of expiration of officer's commission)

Provided, however, that when instruments have been recorded upon proof of execution of the instrument by certificate of a judicial officer, showing that execution was proven by oath and examination of the subscribing witness, the date of such examination, and the signature of the officer taking the proof, such proof of execution shall be deemed sufficient on all instruments filed for registration prior to March 15, 1961. (1951, c. 379, s. 3; 1953, c. 1078, s. 3; 1955, c. 1345, s. 6; 1961, c. 237; 1999-456, s. 59.)

§ 47-43.3. Officer's certificate upon proof of instrument by proof of signature of maker.

When the execution of an instrument is proved by proof of the signature of the maker as provided by G.S. 47-12.1 or as provided by G.S. 47-13, the certificate required by G.S. 47-13.1 shall be in substantially the following form:

STATE OF ______________________
(Name of state)
______________________ COUNTY
I, ______________________, a ______________________
(Name of officer taking proof) (Official title of officer taking proof)
of ______________ COUNTY, ______________________, certify that
(Name of state)
______________________ personally appeared before me this day,
(Name of person familiar with maker's handwriting)
and being duly sworn, stated that he knows the handwriting of ______________________ and that the signature to the foregoing
(Name of maker)
instrument is the signature of ______________________
(Name of maker)

WITNESS my hand and official seal, this the ______________ day of
____________, ________
(Month) (Year)

____
(Signature of officer taking proof)
____
(Official title of officer taking proof)
My commission expires ______________________________
(Date of expiration of officer's commission)
(1951, c. 379, s. 3; 1999-456, s. 59.)

§ 47-43.4. Officer's certificate upon proof of instrument by proof of signature of subscribing witness.

When the execution of an instrument is proved by proof of the signature of a subscribing witness as provided by G.S. 47-12.1, the certificate required by G.S. 47-13.1 shall be in substantially the following form:

STATE OF ______________________________
(Name of state)
______________________________ COUNTY
I, ______________________________, a ____________________
(Name of officer taking proof) (Official title of officer taking proof)
of ____________________ COUNTY, ____________________, certify that
(Name of state)
______________________________ personally appeared before me this day,
(Name of person familiar with handwriting of subscribing witness)
and being duly sworn, stated that he knows the handwriting of
______________________________, and that the signature of
(Name of subscribing witness)
______________________________ as a subscribing witness to the
(Name of subscribing witness)
foregoing instrument is the signature of ______________________________
(Name of subscribing witness)
WITNESS my hand and official seal, this the ____________________ day of
__________, ________
(Month) (Year)

____
(Signature of officer taking proof)
____
(Official title of officer taking proof)
My commission expires ______________________________
(Date of expiration of officer's commission)
(1951, c. 379, s. 3; 1999-456, s. 59.)

§ 47-44. Clerk's certificate upon probate by justice of peace or magistrate.

When the proof or acknowledgment of any instrument is had before a justice of the peace of some other state or territory of the United States, or before a magistrate of this State, but of a county different from that in which the instrument is offered for registration, the form of certificate as to his official position and signature shall be substantially as follows:

North Carolina ____________________ County.
I, A.B. (here give name and official title of a clerk of a court of record), do hereby certify that C.D. (here give the name of the justice of the peace or magistrate taking the proof, etc.), was at the time of signing the foregoing (or

annexed) certificate an acting justice of the peace or magistrate in and for the county of ______________ and State (or territory) of ________________, and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this _____ day of _______________, A.D. ____________________________

(Official seal.)

____

(Signature of officer.)

(1899, c. 235, s. 8; Rev., s. 1006; C.S., s. 3327; 1971, c. 1185, s. 15.)

§ 47-45. Clerk's certificate upon probate by nonresident official without seal.

When the proof or acknowledgment of any instrument is had before any official of some other state, territory or country and such official has no official seal, then the certificate of such official shall be accompanied by the certificate of a clerk of a court of record of the state, territory or country in which the official taking the proof or acknowledgment resides, of the official position and signature of such official; such certificate of the clerk shall be under his hand and official seal and shall be in substance as follows:

______________ County.

I, A.B. (here give name and official title of the clerk of a court of record as provided herein), do hereby certify that C.D. (here give name of the official taking the proof, etc.) was at the time of signing the foregoing (or annexed) certificate (here give the official title of the officer taking proof, etc.) in and for the county of ______________ and state of ___________ (or other political division of the state, territory or country, as the case may be), and that his signature thereto is in his own proper handwriting.

In witness whereof, I hereunto set my hand and official seal, this _____ day of ______________, A.D. ____________________________

(Official seal.)

____

(Signature of Clerk.)

(1899, c. 235, s. 8; Rev., s. 1007; C.S., s. 3328.)

§ 47-46: Repealed by Session Laws 2005-123, s. 4, effective October 1, 2005.

§ 47-46.1. Notice of satisfaction of deed of trust, mortgage, or other instrument.

No particular phrasing is required for a notice of satisfaction pursuant to G.S. 45-37(a)(5) as it was prior to October 1, 2005, a satisfaction of a security instrument under G.S. 45-36.10, or a trustee's satisfaction under G.S. 45-36.20. The following form, when properly completed, is sufficient to satisfy the requirements (i) for a notice of satisfaction under G.S. 45-37(a)(5) as it was in effect prior to October 1, 2005, (ii) for a satisfaction under G.S. 45-36.10 if the form is signed and acknowledged by the secured creditor, and (iii) for a trustee's satisfaction under G.S. 45-36.20 if the security instrument is a deed of trust and the form is signed and acknowledged by the trustee:

North Carolina, ______________________ County.

I, ____________________ (name of trustee or mortgagee), certify that the debt or other obligation in the amount of _______________ secured by the (deed of trust)(mortgage)(other instrument) executed by ______________________ (grantor)(mortgagor), ______________________ (trustee)(leave blank if mortgage), and ______________________ (beneficiary)(mortgagee), and recorded in ________________________ County at ________________ (book and page) was satisfied on ________________________ (date of satisfaction).

____

(Signature of trustee or mortgagee)

(Acknowledgment before officer authorized to take acknowledgments)

My commission expires ________________________ (Date of expiration of official's commission).

(1987, c. 405, s. 2; c. 662, s. 4; 1989, c. 434, s. 2; 2005-123, s. 5; 2006-264, s. 82(a).)

Editor's Note. — Session Laws 2006-264, s. 82(a), which amended the introductory language to S.L. 2005-123, s. 5, was repealed by S.L. 2006-264, s. 82(b), which provided "If Senate Bill 1479, 2005 Regular Session [S.L. 2006-226], becomes law, this section is repealed."

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

§ 47-46.2. Certificate of satisfaction of deed of trust, mortgage, or other instrument.

No particular phrasing is required for a certification of satisfaction pursuant to G.S. 45-37(a)(6) as it was in effect prior to October 1, 2005, or for a satisfaction of a security instrument under G.S. 45-36.10. The following form, when properly completed, is sufficient to satisfy the requirements (i) for a certificate of satisfaction under G.S. 45-37(a)(6) as it was in effect prior to October 1, 2005, and (ii) for a satisfaction of a security instrument under G.S. 45-36.10 when signed and acknowledged by the secured creditor:

CERTIFICATE OF SATISFACTION

North Carolina, ________________________ County.

I, ________________________ (name of owner of the note or other indebtedness secured by the deed of trust or mortgage), certify that I am the owner of the indebtedness secured by the hereafter described deed of trust or mortgage and that the debt or other obligation in the amount of ________________ secured by the (deed of trust)(mortgage)(other instrument) executed by ________________________ (grantor)(mortgagor), ________________________ (trustee)(leave blank if mortgage), and ________________________ (beneficiary)(mortgagee), and recorded in ________________ County at ____________ (book and page) was satisfied on ________________________ (date of satisfaction). I request that this certificate of satisfaction be recorded and the above-referenced security instrument be canceled of record.

____

(Signature of owner of note)

[Acknowledgment before officer authorized to take acknowledgments]. (1995, c. 292, s. 3; 2005-123, s. 5; 2006-226, s. 27(a); 2006-264, s. 82(a).)

Editor's Note. — Session Laws 2006-264, s. 82(a), which amended the introductory language to S.L. 2005-123, s. 5, was repealed by S.L. 2006-264, s. 82(b), which provided "If Senate Bill 1479, 2005 Regular Session [S.L. 2006-226], becomes law, this section is repealed."

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage

Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

Effect of Amendments. — Session Laws 2005-123, s. 5, as amended by Session Laws 2006-226, s. 27, effective October 1, 2005, rewrote the introductory paragraph.

§ 47-46.3. Affidavit of lost note.

No particular phrasing is required for an affidavit of lost note pursuant to G.S. 45-36(a)(6) as it was in effect prior to October 1, 2005. The following form, when properly completed, is sufficient to satisfy the requirements for an affidavit of lost note under G.S. 45-37(a)(6) as it was in effect prior to October 1, 2005.

AFFIDAVIT OF LOST NOTE

[Name of affiant] personally appeared before me in ____________________ County, State of ____________________, and having been duly sworn (or affirmed) made the following affidavit:

1. The affiant is the owner of the note or other indebtedness secured by the deed of trust, mortgage, or other instrument executed by ________________ (grantor, mortgagor), ________________ (trustee), and ____________________ (beneficiary, mortgagee), and recorded in ________________ County at ________________ (book and page); and
2. The note or other indebtedness has been lost and after the exercise of due diligence cannot be located.
3. The affiant certifies that all indebtedness secured by the deed of trust, mortgage, or other instrument was satisfied on ________________, ________________ (date of satisfaction), and the affiant is responsible for cancellation of the same.

____
(Signature of affiant)

Sworn to (or affirmed) and subscribed before me this ________ day of ________________, ________.

[Signature and seal of notary public or other official authorized to administer oaths]. (1995, c. 292, s. 4; 1995 (Reg. Sess., 1996), c. 604, s. 2; c. 742, s. 19; 1999-456, s. 59; 2005-123, s. 6.)

Editor's Note. — This section was amended by Session Laws 1995 (Reg. Sess., 1996), c. 604, s. 2, and c. 742, s. 19, the amendments being similar. The section is set out above at the direction of the Revisor of Statutes.

Session Laws 2005-123, s. 9.1, as added by Session Laws 2006-226, s. 28, provides: "The Revisor of Statutes shall cause to be printed at the appropriate locations in the General Statutes all relevant portions of the official comments to the Uniform Residential Mortgage Satisfaction Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

Article 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-47. Defective order of registration; "same" for "this instrument".

Where instruments were admitted to registration prior to March 2, 1905, and the clerk's order for the registration used the word "same" in place of "this instrument," the said registrations are good and valid. (1905, c. 344; Rev., s. 1010; C.S., s. 3329.)

Legal Periodicals. — For article, "Toward Greater Marketability of Land Titles — Remedying the Defective Acknowledgment Syndrome," see 46 N.C.L. Rev. 56 (1967).

§ 47-48. Clerks' and registers of deeds' certificate failing to pass on all prior certificates.

When it appears that the clerk of the superior court, register of deeds, or other officer having the power to probate or certify deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a different date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates or orders, but not all of them, but has admitted the same deed or other instrument to probate or recordation, it shall be conclusively presumed that all the certificates of said deed or instrument necessary to the admission of same to probate or recordation have been passed upon, and the certificate of said clerk, register of deeds, or other probating or certifying officer shall be deemed sufficient and the probate, certification and recordation of said deed or instrument is hereby made and declared valid for all intents and purposes. The provisions of this section shall apply to all instruments recorded in any county of this State prior to April 1, 1980. (1917, c. 237; C.S., s. 3330; 1945, c. 808, s. 1; 1965, c. 1001; 1971, c. 11; 1973, c. 1402; 1987, c. 360, s. 2.)

§ 47-49. Defective certification or adjudication of clerk, etc., admitting to registration.

In all cases where, prior to January 1, 1919, instruments by law required or authorized to be registered, with certificates showing the acknowledgment or proof of execution thereof as required by the laws of the State of North Carolina, have been ordered registered by the clerk of the superior court or other officer qualified to pass upon probates and admit instruments to registration, and actually put upon the books in the office of the register of deeds as if properly proven and ordered to be registered, all such probates and registrations are hereby validated and made as good and sufficient as though such instruments had been in all respects properly proved and recorded, notwithstanding the failure of clerks or other officers qualified to pass upon the proofs or acknowledgments of instruments and to admit such instruments to registration to adjudge or certify that said instruments were duly proven, and notwithstanding the failure of such officers to adjudge or certify that the certificates of proof or acknowledgments of said instruments were correct or in due form. (1919, c. 248; C.S., s. 3331.)

Legal Periodicals. — For article, "North Carolina's Real Estate Recording Laws: The Ghost of 1885," see 28 N.C. Cent. L.J. 199 (2006).

§ 47-50. Order of registration omitted.

In all cases prior to December 31, 1992, where it appears from the records of the office of the register of deeds of any county in this State that the execution of a deed of conveyance or other instrument by law required or authorized to be registered was duly signed and acknowledged as required by the laws of the State of North Carolina, and the clerk of the superior court of such county or other officer authorized to pass upon acknowledgments and to order registration of instruments has failed either to adjudge the correctness of the acknowledgment or to order the registration thereof, or both, such registrations are hereby validated and the instrument so appearing in the office of the register of deeds of such county shall be effective to the same extent as if the clerk or other authorized officer had properly adjudged the correctness of the acknowledgment and had ordered the registration of the instrument. (1911, cc. 91, 166; 1913, c. 61; Ex. Sess. 1913, c. 73; 1915, c. 179, s. 1; C.S., s. 3332; 1941, cc. 187, 229; 1949, c. 493; 1957, c. 314; 1961, c. 79; 1981, c. 812; 1993, c. 80, s. 1.)

§ 47-50.1. Register's certificate omitted.

In all cases prior to October 1, 2004, where it appears from the records of the office of the register of deeds of any county in this State that the execution of a deed of conveyance or other instrument by law required or authorized to be registered was duly signed and acknowledged as required by the laws of this State, and the register of deeds has failed to certify the correctness of the acknowledgment as required by G.S. 47-14(a), the registrations are hereby validated and the instrument so appearing in the office of the register of deeds of that county is effective to the same extent as if the register of deeds had properly certified the correctness of the acknowledgment. (2004-199, s. 17.)

Editor's Note. — Session Laws 2004-199, s. 62, made this section effective August 17, 2004.

§ 47-51. Official deeds omitting seals.

All deeds executed prior to January 1, 1991, by any sheriff, commissioner, receiver, executor, executrix, administrator, administratrix, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; C.S., s. 3333; Ex. Sess. 1924, c. 64; 1941, c. 13; 1955, c. 467, ss. 1, 2; 1959, c. 408; 1971, c. 14; 1973, c. 1207, s. 1; 1983, c. 398, s. 2; 1985, c. 70, s. 2; 1987, c. 277, s. 2; 1989, c. 390, s. 2; 1991, c. 489, s. 2.)

§ 47-52. Defective acknowledgment on old deeds validated.

The clerk of the superior court may order registered any deed, or other conveyance of land, in all cases where the instrument and probate bears date prior to January 1, 1907, where the acknowledgment, private examination, or other proof of execution, has been taken or had before a notary public residing in the county where the land is situate, where said officer failed to affix his official seal, and where the certificate of said officer appears otherwise to be genuine. (1933, c. 439.)

§ 47-53. Probates omitting official seals, etc.

In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this State, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this State, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or if omitted, to insert his or her name in the body of the certificate, or if omitted, to sign his or her name to such certificate, if the name of such officer appears in the body of said certificate or is signed thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," or "notarial seal," or words of similar import, and no such seal appears of record or where the officer uses "notarial" in his or her certificate and signature shows that "C.S.C.," or "clerk of superior court," or similar exchange of capacity, and the word "seal" follows the signature, then all such acknowledgments, private examinations or other proofs of such deeds, mortgages, or other instruments, and the registration thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to January 1, 1991: Provided, this section does not apply to pending litigation. (Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; C.S., s. 3334; 1929, c. 8, s. 1; 1945, c. 808, s. 2; 1951, c. 1151, s. 1; 1965, c. 500; 1983, c. 398, s. 3; 1985, c. 70, s. 3; 1987, c. 277, s. 3; 1989, c. 390, s. 3; 1991, c. 489, s. 3.)

§ 47-53.1. Acknowledgment omitting seal of clerk or notary public.

Where any person has taken an acknowledgment as either a notary public or a clerk of a superior court, deputy clerk of a superior court, or assistant clerk of a superior court and has failed to affix his or her seal and this acknowledgment has been otherwise duly probated and recorded then this acknowledgment is hereby declared to be sufficient and valid. This section applies only to those deeds and other instruments acknowledged prior to January 1, 1991. (1951, c. 1151, s. 1A; 1953, c. 1307; 1963, c. 412; 1975, c. 878; 1983, c. 398, s. 4; 1985, c. 70, s. 4; 1987, c. 277, s. 4; 1989, c. 390, s. 4; 1991, c. 489, s. 4; 2004-199, s. 18.)

Cross References. — As to absence of notarial seal, see also G.S. 47-102 and 47-103.

§ 47-54. Registration by register's deputies or clerks.

All registrations of instruments heretofore made in the office of register of deeds of the several counties by the register's deputy or clerk, and signed in the name of the register of deeds by the deputy or clerk, or signed by the deputy in his own name and not in the name of the register of deeds, when such registrations are in all other respects regular, are hereby validated and declared to be of the same force and effect as if signed in the name of the register of deeds by such register. (1911, c. 184, s. 1; C.S., s. 3335; 1953, c. 849; 1963, c. 203.)

Local Modification. — Montgomery: 1955, c. 1223.

§ 47-54.1. Registration by register's assistants or deputies.

All registrations of instruments heretofore made in the office of register of deeds of the several counties by the register's assistant or deputy, and signed in the name of the register of deeds by the assistant or deputy, and initialed by the assistant or deputy, instead of being signed by them as assistant or deputy, when such registrations are in all other respects regular, are hereby validated and declared to be of the same force and effect as if signed by the assistant or deputy in the respective capacity. (1991 (Reg. Sess., 1992), c. 877, s. 1.)

§ 47-55. Before officer in wrong capacity or out of jurisdiction.

All deeds, conveyances, or other instruments permitted by law to be registered in this State, which have been probated or ordered to be registered previous to January 1, 1913, before any officer of this or any other state or country, authorized by law to take acknowledgments or to order registration, where the certificate of the probate or order of registration is sufficient in form, but appears to have been certified by the officer in some capacity other than that in which such officer was authorized to act, or appears to have been made out of the county or district authorized by law, but within the State, and where the instrument with such certificate has been recorded in the proper county, are hereby declared to have been duly proved, probated and recorded, and to be valid. (Rev., ss. 1017, 1030; 1913, c. 125, s. 1; C.S., s. 3336.)

Editor's Note. — Public Laws 1927, c. 189, s. 2, provided that all deeds, conveyances, or other instruments permitted by law to be registered in this State, which had been probated or ordered to be registered by any of the several justices of the peace appointed under Public Laws 1921, c. 237, since the first Monday in April, 1925, where the certificate of the probate was sufficient in form but appeared to have been certified by one of the several justices of the peace named in said Chapter, were declared to have been duly proved, probated and recorded, and to be valid.

CASE NOTES

Effect of Validating Acts on Vested Rights of Third Parties. — Acts validating irregular acknowledgments and probates, while good as between the parties and as to third parties from the passage of the acts, would not validate such acknowledgments and probates as to third parties whose rights had already been acquired prior to the validating statutes. Gordon v. Collett, 107 N.C. 362, 12 S.E. 332 (1890); Williams v. Kerr, 113 N.C. 306, 18 S.E. 501 (1893).

§ 47-56. Before justices of peace, where clerk's certificate or order of registration defective.

In every case where it appears from the record of the office of any register of deeds in this State that a justice of the peace in this State or any other state of the United States, has taken and certified the proof of any instrument required by the law to be registered, or the privy examination of a married woman thereto, and the deed and certificate have been registered prior to the first day of January, 1963, in the county where the lands described in the instrument are located, without a certificate or with a defective certificate of the clerk of the official character of the justice, or as to the genuineness of his signature, or without the order of registration of the clerk, or his adjudication of due probate, or with a defective adjudication thereof, such proofs, certificates and registration are hereby validated. (1907, c. 83, s. 1; C.S., s. 3337; 1951, c. 35; 1963, c. 1014.)

Local Modification. — Clay: 1933, c. 530.

§ 47-57. Probates on proof of handwriting of maker refusing to acknowledge.

All registrations of instruments, prior to February 5, 1897, permitted or required by law to be registered, which were ordered to registration upon proof of the handwriting of the grantor or maker who refused to acknowledge the execution, are hereby validated. (1897, c. 28; Rev., s. 1026; C.S., s. 3338.)

§ 47-58. Before judges of Supreme Court or superior courts or clerks before 1889.

Wherever the judges of the Supreme Court or the superior court, or the clerks or deputy clerks of the superior court, or courts of pleas and quarter sessions, mistaking their powers, have essayed previously to the first day of January, 1889, to take the probate of any instrument required or allowed by law to be registered, and the privy examination of femes covert, whose names are signed to such deeds, and have ordered said deeds to registration, and the same have been registered, all such probates, privy examinations and registrations are validated. (1871-2, c. 200, s. 1; Code, s. 1260; 1889, c. 252; 1891, c. 484; Rev., s. 1009; C.S., s. 3339.)

CASE NOTES

Constitutionality. — This curative statute is constitutional and valid if rights of third parties have not accrued, but it would not divert the title of a party acquired by a subsequent deed from the same grantor which was registered prior to the enactment of the curative statute. Gordon v. Collett, 107 N.C. 362, 12 S.E. 332 (1890).

Purpose of Section. — This section was intended to ratify and validate what had erroneously been done by officials having general or special powers of probate and registration, so that the essence of what was done should not be sacrificed to the form of doing it, and to save rights of property where no substantial departure from legal requirements appeared, but merely an irregularity which could be cured without injury to the rights of others. Weston v. John L. Roper Lumber Co., 160 N.C. 263, 75 S.E. 800 (1912).

Liberal Construction. — The statutes validating defective probates and registrations of deed are remedial, and must be liberally construed to embrace all cases fairly within their scope. Weston v. John L. Roper Lumber Co., 160 N.C. 263, 75 S.E. 800 (1912).

Scope of Original Section. — This section originally rendered valid all probates of deeds, etc., made before the officers therein named, prior to February 12, 1872; and registrations made in pursuance of such probates were held embraced within the operation of the statutes, although made after that date, but before the enactment of the Code in 1883. Tatom v. White, 95 N.C. 453 (1886).

Applicability to Defective Probates of County Courts. — Where it was argued by counsel that this section did not refer to probates taken by the county courts, but to those of the clerks of said courts, it was held that the probates of the county courts were intended to be validated. The phraseology and punctuation, as well as the grammatical construction, of the statute, lead to that conclusion. If the other meaning had been intended, the preposition "of" would have been inserted before the words "courts of pleas and quarter sessions." The section also validates registrations made upon such probates. Weston v. John L. Roper Lumber Co., 160 N.C. 263, 75 S.E. 800 (1912).

Acts of Deputy Clerks Validated. — At the time, and prior to the enactment of this section, deputy clerks could not take proof of deeds and other instruments requiring registration; but an erroneous impression prevailed then and before that time, that they and the judges of the courts had authority to do so, and in many instances they undertook to exercise such authority. To cure errors in this respect and render effectual many official acts done by honest misapprehension of the law, the legislature enacted this section. Tatom v. White, 95 N.C. 453 (1886). As to authority of deputy clerks to take probate on instruments, see § 47-1.

This section validates probates of deeds and privy examinations taken before a deputy clerk prior to January 1, 1889, and it is immaterial whether the deputy clerk, in making the probate, signed as deputy clerk or merely signed the name of the clerk thereto. Gordon v. Collett, 107 N.C. 362, 12 S.E. 332 (1890).

Intentional Breaches of Authority Not Validated. — There was no intent to give efficacy and vitality to a certificate of probate or adjudication of its correctness, where the error consisted not in misconceiving the extent of the power affirmatively conferred by law, but in disregarding a plain prohibition of the statute, and committing a breach of propriety in breaking over the barriers constructed to limit their authority. It was never intended that an officer, who exercised authority in the face of a plain statutory prohibition, should under the curative provisions of this section derive benefit from thus disregarding such legal restrictions for his own advantage or convenience. Freeman v. Person, 106 N.C. 251, 10 S.E. 1037 (1890).

Probate of Interested Officer. — This section has been considered in Freeman v. Person, 106 N.C. 251, 10 S.E. 1037 (1890), and it is there held that it cannot be construed to validate the probate of an officer in regard to a matter in which he or his wife was a party. White v. Connelly, 105 N.C. 65, 11 S.E. 177 (1890).

§ 47-59. Before clerks of inferior courts.

All probates and orders of registration made by and taken before any clerk of any inferior or criminal court prior to the twentieth day of February, 1885, and valid in form and substance, shall be valid and effectual, and all deeds, mortgages or other instruments requiring registration, registered upon such probate and order of registration, shall be valid. This section shall apply only to the counties of Ashe, Beaufort, Bertie, Buncombe, Cumberland, Duplin, Edgecombe, Granville, Greene, Halifax, Hertford, Iredell, Lenoir, Martin, Mecklenburg, New Hanover, Northampton, Robeson and Wayne. This section applies to probates and private examinations taken before the clerks of the criminal court of Buncombe prior to February second, 1893. (1885, cc. 105, 108; 1889, cc. 143, 463; Rev., ss. 1020, 1021; C.S., s. 3340.)

§ 47-60. Order of registration by judge, where clerk party.

All deeds, mortgages or other instruments which prior to the twentieth day of January, 1893, have been probated by a justice of the peace and ordered to registration by a judge of the superior court or justice of the Supreme Court, to which clerks of the superior court are parties, are hereby confirmed, and the probates and orders for registration declared to be valid. (1893, c. 3, s. 2; Rev., s. 1011; C.S., s. 3342.)

§ 47-61. Order of registration by interested clerk.

The probate and registration of all deeds, mortgages and other instruments requiring registration prior to the fifteenth day of January, 1935, to which the clerks of the superior courts are parties, or in which they have an interest, and which have been registered on the order of such clerks or their deputies, or by assistant clerks of the superior courts, on proof of acknowledgment taken before such clerks, assistant clerks, deputy clerks, justices of the peace or notaries public, be, and the same are declared valid. (1891, c. 102; 1899, c. 258; 1905, c. 427; Rev., s. 1015; 1907, c. 1003, s. 2; Ex. Sess. 1908, c. 105, s. 1; C.S., s. 3343; 1935, c. 235.)

§ 47-62. Probates before interested notaries.

The proof and acknowledgment of instruments required by law to be registered in the office of the register of deeds of a county, and all privy examinations of a feme covert to such instruments made before any notary public on or since March 11, 1907, are hereby declared valid and sufficient, notwithstanding the notary may have been interested as attorney, counsel or otherwise in such instruments. (Ex. Sess. 1908, c. 105, s. 2; C.S., s. 3344.)

Cross References. — As to acknowledgments taken by notaries interested as trustee or holding other office, see G.S. 47-95.

§ 47-63. Probates before officer of interested corporation.

In all cases when acknowledgment or proof of any conveyance has been taken before a clerk of superior court, magistrate or notary public, who was at the time a stockholder or officer in any corporation, bank or other institution which was a party to such instrument, the certificates of such clerk, magistrate, or notary public shall be held valid, and are so declared. (Rev., s. 1015; 1907, c. 1003, s. 1; C.S., s. 3345; 1971, c. 1185, s. 16.)

Cross References. — As to probate before stockholders and directors of banks, see G.S. 47-92.

CASE NOTES

The grantee in a chattel mortgage is not qualified to take the acknowledgment thereof, but a chattel mortgage to a bank will not be declared void because the acknowledgment thereof was taken by its cashier. Bank of Duplin v. Hall, 203 N.C. 570, 166 S.E. 526 (1932).

§ 47-64. Probates before officers, stockholders or directors of corporations prior to January 1, 1945.

No acknowledgment or proof of execution, including privy examination of married women, of any deed, mortgage or deed of trust to which instrument a corporation is a party, executed prior to the first day of January, 1945, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof or privy examination was an officer, stockholder, or director in said corporation; but such proofs and acknowledgments and the registration thereof, if in all other respects valid, are declared to be valid. Nor shall the registration of any such instrument ordered to be registered be held invalid by reason of the fact that the clerk or deputy clerk ordering the registration was an officer, stockholder or director in any corporation which is a party to any such instrument. (Ex. Sess. 1913, c. 41; C.S., s. 3346; 1929, c. 24, s. 1; 1943, c. 135; 1945, c. 860.)

§ 47-65. Clerk's deeds, where clerk appointed himself to sell.

All deeds made by any clerk of the superior court of any county or his deputy, prior to the first day of January, 1905, in any proceeding before him in which he has appointed himself or his deputy to make the sale of real property or other property are hereby validated. (1911, c. 146, s. 1; C.S., s. 3347.)

§ 47-66. Certificate of wife's "previous" examination.

All probates of deeds, letters of attorney or other instruments requiring registration to which married women were parties, had and taken prior to the fourteenth day of February, 1893, in which probate it appears that such married women were "previously examined" instead of "privately examined," are hereby validated and confirmed. (1893, c. 130; Rev., s. 1016; C.S., s. 3348.)

§ 47-67. Probates of husband and wife in wrong order.

All probates prior to March 6, 1893, of instruments executed by a husband and wife in which the probate as to the husband has been taken before or subsequent to the privy examination of his wife are validated. (1893, c. 293; Rev., s. 1017; C.S., s. 3349.)

Cross References. — As to order of acknowledgment being immaterial, see G.S. 39-8.

CASE NOTES

Rights of Third Parties Acquired Before Statute Cannot Be Divested. — If third parties acquired rights, as by liens, against the grantor or conveyances from him, registered before the curative act, though with notice of such defectively probated instruments, the rights of such third parties could not be divested or impaired by this curative statute. Smith v. Castrix, 27 N.C. 518 (1844); Robinson v. Willoughby, 70 N.C. 358 (1874); Gordon v. Collett, 107 N.C. 362, 12 S.E. 332 (1890); Long v. Crews, 113 N.C. 256, 18 S.E. 499 (1893); Williams v. Kerr, 113 N.C. 306, 18 S.E. 501 (1893); Quinnerly v. Quinnerly, 114 N.C. 145, 19 S.E. 99 (1894); Barrett v. Barrett, 120 N.C. 127, 26 S.E. 691 (1897).

§ 47-68. Probates of husband and wife before different officers.

Where, prior to the second day of March, 1895, the probate of a deed or other instrument, executed by husband and wife, has been taken as to the husband and the wife by different officers having the power to take probates of deeds, whether both officers reside in this State or one in this State and the other in another state, or foreign country, the said probate, in the cases mentioned, shall be valid to all intents and purposes, and all deeds and other instruments required to be registered, and which have been ordered to registration by the proper officer in this State, and upon such probate or probates, and have been registered, shall be taken and considered as duly registered, and the word "probate," as used in this section, shall include privy examination of the wife. (1895, c. 120; Rev., s. 1018; 1907, c. 34, s. 1; C.S., s. 3350.)

Cross References. — As to acknowledgment before different officers at different times and places, see G.S. 39-8.

§ 47-69. Wife free trader; no examination or husband's assent.

In all cases prior to the twenty-fourth day of September, 1913, where a married woman who was at the time a free trader by her husband's consent has executed and delivered a deed conveying her land, without her privy examination having been taken, and without the written assent of her husband other than his written assent contained in the instrument making her a free trader, such deed shall be valid and effectual to convey her land as if she had been, at the time of the execution and delivery of such deed, a feme sole. This section does not validate such deed where it would affect the title to land or property of purchasers or their grantees or assignees from such married woman and free trader subsequent to the execution of such deed. (Ex. Sess. 1913, c. 54, s. 1; C.S., s. 3351.)

CASE NOTES

Applied in Foster v. Williams, 182 N.C. 632, 109 S.E. 834 (1921).

§ 47-70. By president and attested by treasurer under corporate seal.

All deeds and conveyances for lands in this State, made by any corporation of this State, which have heretofore been proved or acknowledged before any notary public in any other state, or before any commissioner of deeds and affidavits for the State of North Carolina in any other state, and sealed with the common seal of the corporation and attested by the treasurer, are hereby ratified and declared to be good and valid deeds for all purposes. Where such deeds have been executed for the corporation by its president and attested, sealed and acknowledged or probated as aforesaid, and the acknowledgment or probate has been duly adjudged sufficient by any deputy clerk and ordered registered, the acknowledgment, probate and registration are ratified, and said deed is declared valid. Such deeds, or certified copies thereof, may be used as evidence of title to the lands therein conveyed in the trial of any suits in any of the courts of this State where the title of said lands shall come in controversy. (1905, c. 307; Rev., s. 1028; C.S., s. 3352.)

§ 47-71. By president and attested by witness before January, 1900.

Any deed or conveyance for land in this State, made prior to January 1, 1900, by the president of any corporation duly chartered under the laws of this State, and attested by a witness, is hereby declared to be a good and valid deed by such corporation for all purposes, and shall be admitted to probate and registration and shall pass title to the property therein conveyed to the grantee as fully as if said deed were executed according to provisions and forms of law in force in this State at the date of the execution of said deed. (1909, c. 859, s. 1; C.S., s. 3353.)

§ 47-71.1. Corporate seal omitted prior to January 1, 1991.

Any corporate deed, or conveyance of land in this State, made prior to January 1, 1991, which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance. (1957, c. 500, s. 1; 1963, c. 1015; 1969, c. 815; 1971, c. 61; 1973, c. 479; 1977, c. 538; 1981, c. 191, s. 1; 1983, c. 398, s. 5; 1985, c. 70, s. 5; 1987, c. 277, s. 5; 1989, c. 390, s. 5; 1991, c. 489, s. 5.)

CASE NOTES

This section only serves to accentuate the necessity of a corporate seal in order to make a corporate conveyance of real estate valid and effectual. Investors Corp. v. Field Fin. Corp., 5 N.C. App. 156, 167 S.E.2d 852 (1969).

Cited in Philbin Invs., Inc. v. Orb Enters., Ltd., 35 N.C. App. 622, 242 S.E.2d 176 (1978).

§ 47-72. Corporate name not affixed, but signed otherwise prior to January, 1973.

In all cases prior to the first day of January, 1973, where any deed conveying lands purported to be executed by a corporation, but the corporate name was in fact not affixed to said deed, but same was signed by the president and secretary of said corporation, or by the president and two members of the governing body of said corporation, and said deed has been registered in the county where the land conveyed by said deed is located, said defective execution above described shall be and the same is hereby declared to be in all respects valid, and such deed shall be deemed to be in all respects the deed of said corporation. (1919, c. 53, s. 1; C.S., s. 3354; 1927, c. 126; 1963, c. 1094; 1973, c. 118, s. 1.)

§ 47-73. Probated and registered on oath of subscribing witness.

In all cases prior to the first day of January, 1919, where any deed conveying lands was executed by a corporation, and said deed was probated and ordered registered upon the oath and examination of a subscribing witness, by the clerk of the superior court of the county in which the land conveyed by said deed is located, and said deed has been duly registered by the register of deeds of said county, such probate and order of registration shall be, and the same is hereby, declared to be in all respects valid. (1919, c. 53, s. 2; C.S., s. 3355.)

§ 47-74. Certificate alleging examination of grantor instead of witness.

Wherever any deed of conveyance registered prior to January 1, 1886, purports to have been attested by two witnesses and in the certificate of probate and acknowledgment it is stated that the execution of such deed was proven by the oath and examination of one of the grantors in said deed instead of either of the witnesses named, all such probates and certificates are hereby validated and confirmed, and any such deed shall be taken and considered as duly acknowledged and probated. (1925, c. 84.)

§ 47-75. Proof of corporate articles before officer authorized to probate.

All proofs of articles of agreement for the creation of corporations which were, prior to the eighteenth day of February, 1901, made before any officer who was at that time authorized by the law to take proofs and acknowledgments of deeds and mortgages, are ratified. (1901, c. 170; Rev., s. 1027; C.S., s. 3356.)

§ 47-76. Before officials of wrong state.

In all cases where the acknowledgment, examination and probate of any deed, mortgage, power of attorney or other instrument required or authorized to be registered has been taken before any judge, clerk of a court of record, notary public having a notarial seal, mayor of a city having a seal, or justice of the peace of a state other than the state in which the grantor, maker or subscribing witness resided at the time of the execution, acknowledgment, examination or probate thereof, and such acknowledgment, examination or probate is in other respects according to law, and such instrument has been duly ordered to registration and has been registered, then such acknowledgment, examination, probate and registration are hereby in all respects made valid and binding. This section applies to probates and acknowledgments of deputy clerks of other states when such probate and acknowledgment has been attested by the official seal of said office and adjudged sufficient and in due form of law by the clerk of the court in the state where the instrument is required to be registered. (1905, c. 505; Rev., s. 1013; C.S., s. 3357.)

§ 47-77. Before notaries and clerks in other states.

All deeds and conveyances made for lands in this State which have, previous to February 15, 1883, been proved before a notary public or clerk of a court of record, or before a court of record, not including mayor's court, of any other state, where such proof has been duly certified by such notary or clerk under his official seal, or the seal of the court, or in accordance with the act of Congress regulating the certifying of records of the courts of one state to another state, or under the seal of such courts, and such deed or conveyance, with the certificate, has been registered in the office of register of deeds in the book of records thereof for the county in which such lands were situate at the time of such registration, are declared to be validly registered, and the proof and registration is adjudged valid. All deeds and conveyances so proved, certified and registered, or certified copies of the same, may be used as evidence of title for the lands on the trial of any suit in any courts where title to the lands come into controversy. (1883, c. 129, ss. 1, 2; Code, ss. 1262, 1263; 1885, c. 11; Rev., ss. 1022, 1023; 1915, c. 213; C.S., s. 3358.)

CASE NOTES

Constitutionality. — The legislature has the constitutional right to enact statutes making valid deeds which were theretofore invalid by reason of defective probate, when no vested rights are impaired. Penland v. Barnard, 146 N.C. 378, 59 S.E. 1109 (1907).

For application of this section to deed probated in Tennessee in 1869, see Penland v. Barnard, 146 N.C. 378, 59 S.E. 1109 (1907).

§ 47-78. Acknowledgment by resident taken out-of-state.

When prior to the ninth day of March, 1895, a deed or mortgage executed by a resident of this State has been proved or acknowledged by the maker thereof before a notary public of any other state of the United States, and has been ordered to be registered by the clerk of the superior court of the county in which the land conveyed is situated, and said deed or mortgage has been registered, such registration is valid. (1895, c. 181; Rev., s. 1019; C.S., s. 3359.)

§ 47-79. Before deputy clerks of courts of other states.

Where any deed or conveyance of lands in this State, executed prior to January 1, 1923, has been acknowledged by the grantor or the privy examination of any married woman has been taken before the deputy clerk of a court of record of any other state, and the certificate of acknowledgment and privy examination is otherwise sufficient under the laws of this State, except that it appears to have been signed in the name of the clerk of said court, by the deputy clerk, and the seal of the court has been affixed thereto, and such certificate has been duly approved by the clerk of the superior court of this State in the county where the lands conveyed are situated and the instrument ordered to be recorded, such certificate and probate and the registration made thereon are validated, and the conveyance, if otherwise sufficient, is declared valid. (1913, c. 57, ss. 1, 2; C.S., s. 3360; 1951, c. 1134, s. 1.)

§ 47-80. Sister state probates without Governor's authentication.

In all cases where any deed concerning lands or any power of attorney for the conveyance of the same, or any other instrument required or allowed to be registered, has been, prior to the twenty-ninth day of January, 1901, acknowledged by the grantor therein, or proved and the private examination of any married woman, who was a party thereto, taken according to law, before any judge of a supreme, superior or circuit court of any other state or territory of the United States where the parties to such instrument resided, and the certificate of such judge as to such acknowledgment, probate or private examination, and also the certificate of the secretary of state of said state or territory instead of the Governor thereof (as required by the laws of this State then in force) that the judge, before whom the acknowledgment or probate and private examination were taken, was at the time of taking the same a judge as aforesaid, are attached to said deed, or other instrument, and the said deed or other instrument, having said certificates attached, has been exhibited before the former judge of probate, or the clerk of the superior court of the county in which the property is situated, and such acknowledgment, or probate and private examination have been adjudged by him to be sufficient and said deed or other instrument ordered to be registered and has been registered accordingly, such probate and registration shall be valid. Nothing herein contained affects the rights of third parties who are purchasers for value, without notice, from the grantor in such deed or other instrument. (1901, c. 39; Rev., s. 1014; C.S., s. 3361.)

§ 47-81. Before commissioners of deeds.

Any deed or other instrument permitted by law to be registered, and which has prior to the third day of March, 1913, been proved or acknowledged before a commissioner of deeds, is validated; and its registration is authorized and validated. (1913, c. 39, s. 2; C.S., s. 3362.)

CASE NOTES

Section Cannot Interfere with Vested Rights. — This section is remedial in character and beneficent in purpose, but it will not be permitted to impair or to interfere with the vested rights of others. Champion Fibre Co. v. Cozad, 183 N.C. 600, 112 S.E. 810 (1922).

This section cannot have the effect of impairing vested rights of purchasers at an execution sale under judgment, or those holding the land under his deed. Champion Fibre Co. v. Cozad, 183 N.C. 600, 112 S.E. 810 (1922).

§ 47-81.1. Before commissioner of oaths.

All deeds, mortgages or other instruments required to be registered, which prior to March 5, 1943, have been probated by a commissioner of oaths and ordered registered, are hereby validated and confirmed as properly probated and registered instruments. (1943, c. 471, s. 2.)

§ 47-81.2. Before army, etc., officers.

In all cases where instruments and writings have been proved or acknowledged before any officer of the army of the United States or United States marine corps having the rank of captain or higher, before any officer of the United States navy or coast guard having the rank of lieutenant, senior grade, or higher, or any officer of the United States merchant marine having the rank of lieutenant, senior grade, or higher, such proofs or acknowledgments, where valid in other respects, are hereby ratified, confirmed and declared valid. (1943, c. 159, s. 2.)

CASE NOTES

Use of Section to Validate Separation Agreement Precluded. — Where a wife's acknowledgment of a separation agreement was fatally defective under former G.S. 52-6 because there was no private examination of the wife and thus no finding as to whether the agreement was unreasonable or injurious to the wife, and because the acknowledgment was certified by a Judge Advocate in the Marine Corps who did not qualify as a "certifying officer" under former G.S. 52-6(c) since his position was not that of an "equivalent or corresponding officer" of the jurisdiction where the examination and acknowledgment were to be made, the omission of the private examination and the lack of authority on the part of the certifying officer precluded the use of curative statutes, G.S. 52-8 and this section, to validate the agreement. DeJaager v. DeJaager, 47 N.C. App. 452, 267 S.E.2d 399 (1980).

§ 47-82. Foreign probates omitting seals.

In all cases where the acknowledgment, privy examination or other proof of the execution of any instrument authorized or required to be registered has been taken by or before any ambassador, minister, consul, vice-consul, vice-consul general or commercial agent of the United States in any country beyond the limits of the United States, and such instrument has heretofore been recorded in any county in this State, but the official before whom it was taken has omitted to attach his seal of office, or it does not appear of record that such seal was attached to the instrument, or such official has certified the same as under his "official seal" or seal of his office, or words of similar import, and no such seal appears of record, then all such acknowledgments, privy examinations or other proof of such instruments, and the registration thereof, are hereby made in all respects valid, and such instruments, after the ratification hereof, shall be competent to be read in evidence. (1913, c. 69, s. 1; C.S., s. 3363.)

§ 47-83. Before consuls general.

Any deed or other instrument permitted by law to be registered, and which has prior to the thirteenth day of October, 1913, been proved or acknowledged before a "consul general," is validated; and its registration is authorized and validated. (Ex. Sess., 1913, c. 72, s. 2; C.S., s. 3364.)

§ 47-84. Before vice-consuls and vice-consuls general.

The order for registration by the clerk of the superior court and the registration thereof of all deeds of conveyance and other instruments in any county of this State prior to January 1, 1905, upon the certificate of any vice-consul or vice-consul general of the United States residing in a foreign country, certifying in due form under his name and the official seal of the United States consul or United States consul general of the same place and country where such vice-consul or vice-consul general resided and acted, that he has taken the proof or acknowledgments of the parties to such instruments, together with the privy examinations of married women parties thereto, are hereby, together with such proof and acknowledgments, privy examinations and certificates, validated. (1905, c. 451, s. 2; Rev., s. 1024; C.S., s. 3365.)

CASE NOTES

Applied in Powers v. Baker, 152 N.C. 718, 68 S.E. 203 (1910).

§ 47-85. Before masters in chancery.

All probates, acknowledgments, and private examinations of deeds and conveyances of land heretofore taken before masters in equity or masters in chancery in any other state are declared to be valid, and all registrations of such deeds or conveyances upon such probates, acknowledgments and private examinations, or any of them, are hereby declared to be sufficient. All such deeds and conveyances and registration thereof, and all certified copies of such registrations, shall be received in evidence or otherwise used in the same manner and with the same force and effect as other deeds and conveyances with probates, acknowledgments, or private examinations made in accordance with provisions of statutes of this State in force at the time and as registrations thereof and certified copies of such registrations. Nothing in this section contained shall have effect to deprive anyone of any legal rights acquired, before its passage, from the grantors in such deeds or conveyances subsequently to their execution, where the deeds or conveyances by which such rights were acquired have been duly acknowledged or probated and registered. (1911, c. 10; C.S., s. 3366.)

§ 47-85.1. Further as to acknowledgments, etc., before masters in chancery.

All probates, acknowledgments and privy examinations of deeds, mortgages and conveyances of land, which prior to January 1, 1948 have been taken before masters in equity or masters in chancery in any other state, are hereby declared to be valid, and all registrations of such deeds, mortgages or conveyances upon such probates, acknowledgments and private examinations, or any of them are hereby declared to be sufficient and valid. All such deeds and conveyances and registration thereof, and all certified copies of such registrations shall be received in evidence or otherwise used in the same manner and with the same force and effect as other deeds, mortgages and conveyances with probates, acknowledgments, or private examinations made in accordance with the provisions of statutes and laws of this State in force at the time, and as registrations thereof and certified copies of such registrations. (1953, c. 1136.)

§ 47-86. Validation of probate of deeds by clerks of courts of record of other states, where official seal is omitted.

In all cases where, prior to the first day of January, 1891, the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage, or other instrument authorized to be registered has been taken before a clerk of a court of record in another state, and such clerk has failed or neglected to affix his official seal to his certificate of such acknowledgment, privy examination, or other proof of execution, of such deed, mortgage or other instrument, or where such court had no official seal and no official seal was affixed to such certificate by reason of that fact, and such deed, mortgage, or other instrument has been ordered to registration by the clerk of the superior court of any county in this State and has been registered, the probate of any and every such deed, mortgage, or other instrument authorized to be registered shall be and hereby is to all intents and purposes validated. (1921, c. 15, ss. 1, 2; C.S., s. 3366(a).)

§ 47-87. Validation of probates by different officers of deeds by wife and husband.

In all cases where, prior to the second day of March, 1895, the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage, or other instrument, authorized to be registered, executed by husband and wife, has been taken as to the husband and wife in different states and by different officers having power to take acknowledgments, any and every such acknowledgment, privy examination of a married woman, or other proof of execution, and the probate of any and every such deed, mortgage or other instrument shall be and hereby is, to all intents and purposes validated. (1921, c. 19, ss. 1, 4; C.S., s. 3366(b).)

§ 47-88. Registration without formal order validated.

In all cases where the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage or other instrument, authorized to be registered, has been taken before a commissioner in another state appointed by the probate judge of any county of this State, under the provisions of section 20 of Chapter 35 of Battle's Revisal, during the time said Chapter remained in force and effect, and such commissioner has certified to such acknowledgment, privy examination or other proof, and has returned such deed, mortgage or other instrument to said probate judge, with his certificate endorsed thereon, and such deed, mortgage or other instrument, together with such certificate, has been registered, without any adjudication or order of registration by such probate judge, the probate and registration of any and every such deed shall be, and hereby are, to all intents and purposes validated. (1921, c. 19, ss. 2, 4; C.S., s. 3366(c).)

§ 47-89. Same subject.

In all cases where any deed, mortgage or other instrument has heretofore been acknowledged or probated in accordance with the provisions of G.S. 47-87 and 47-88, and such deed, mortgage or other instrument has been registered, without any order of registration by the probate judge or clerk of the superior court appearing thereon, the probate and registration of any and every such deed, mortgage or other instrument shall be, and hereby is, to all intents and purposes validated. (1921, c. 19, ss. 3, 4; C.S., s. 3366(d).)

§ 47-90. Validation of acknowledgments taken by notaries public holding other office.

In every case where deeds or other instruments have been acknowledged before a notary public, when the notary public, at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment taken by such notary public is hereby declared to be sufficient and valid. (1921, c. 21; C.S., s. 3366(e).)

§ 47-91. Validation of certain probates of deeds before consular agents of the United States.

In all cases where the acknowledgment, privy examination of a married woman, or other proof of the execution of any deed, mortgage or other instrument authorized or required to be registered has been taken before any consular agent of the United States, during the time Chapter 35 of Battle's Revisal remained in force and effect, and such acknowledgment, privy examination, or other proof of the execution of such deed, mortgage, or other instrument is in other respects regular and in proper form, and such deed, mortgage, or other instrument has been duly ordered to registration and registered in the proper county, the acknowledgment, probate, and registration of any and every such deed, mortgage, or other instrument is hereby validated as fully and to the same effect as though such acknowledgment, privy examination, or other proof of execution had been taken before one of the officers named in subsection five of section two of said Chapter 35 of Battle's Revisal. (1921, c. 157; C.S., s. 3366(f).)

§ 47-92. Probates before stockholders and directors of banks.

No acknowledgment or proof of execution, including privy examination of married women, of any mortgage, or deed of trust executed to secure the payment of any indebtedness to any banking corporation, taken prior to the first day of January, 1923, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof, or privy examination was a stockholder or director in such banking corporation. (1923, c. 17; C.S., s. 3366(g).)

Cross References. — As to probates before officer of interested corporation, see G.S. 47-63.

§ 47-93. Acknowledgments taken by stockholder, officer, or director of bank.

No acknowledgment or proof of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any banking corporation taken prior to the first day of January, 1924, shall be held invalid by reason of the fact that the officer taking such acknowledgment, proof, or privy examination was a stockholder, officer, or director in such banking corporation. (Ex. Sess. 1924, c. 68.)

§ 47-94. Acknowledgment and registration by officer or stockholder in building and loan or savings and loan association.

All acknowledgments and proofs of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any State or federal building and loan or savings and loan association prior to the first day of January, 1955, shall not be, nor held to be, invalid by reason of the fact that the clerk of the superior court, justice of the peace, notary public, or other officer taking such acknowledgment, proof of execution or privy examination, was an officer or stockholder in such building and loan association; but such proofs and acknowledgments of all such instruments, and the registration thereof, if in all other respects valid, are hereby declared to be valid.

Nor shall the registration of any such mortgage or deed of trust ordered to be registered by the clerk of the superior court, or by any deputy or assistant clerk of the superior court, be or held to be invalid by reason of the fact that the clerk of the superior court, or deputy, or assistant clerk of the superior court, ordering such mortgages or deeds of trust to be registered was an officer or stockholder in any State or federal building and loan or savings and loan association, whose indebtedness is secured in and by such mortgage or deed of trust. (Ex. Sess. 1924, c. 108; 1929, c. 146, s. 1; 1959, c. 489.)

§ 47-95. Acknowledgments taken by notaries interested as trustee or holding other office.

In every case where deeds and other instruments have been acknowledged and privy examination of wives had before notaries public, or justices of the peace, prior to January 1, 1975, when the notary public or justice of the peace at the time was interested as trustee in said instrument or at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment and privy examination taken by such notary public or justice of the peace is hereby declared to be sufficient and valid. (1923, c. 61; C.S., s. 3366(h); 1931, cc. 166, 438; 1939, c. 321; 1955, c. 696; 1957, c. 1270; 1959, c. 81; 1969, c. 639, s. 1; 1975, c. 320, s. 1.)

Editor's Note. — Session Laws 1975, c. 320, which substituted "January 1, 1975" for "January 1, 1969," stated that it was "the purpose and intent of this act to validate those certain acknowledgments with which G.S. 47-95 deals and which were made before January 1, 1975." Section 2 of the 1975 act provided that the act would not apply to pending litigation.

Legal Periodicals. — For suggestion that this section should be considered as an addition to G.S. 47-62, see 1 N.C.L. Rev. 302 (1923).

§ 47-96. Validation of instruments registered without probate.

In every case where it shall appear from the records in the office of the register of deeds of any county in the State that any instrument of writing required or allowed by law to be registered prior to January 1, 1869, without any acknowledgment, proof, privy examination, or probate, or upon a defective acknowledgment, proof, privy examination, or probate, the record of such instrument may, notwithstanding, be read in evidence in any of the courts of this State, if otherwise competent. (1923, c. 215, s. 1; C.S., s. 3366(i).)

Local Modification. — Cherokee, Graham: 1935, c. 92.

Legal Periodicals. — For suggestion that this section probably means that the registration must have been made prior to 1869, and that this section and G.S. 47-98 should be considered as amendments or additional sections to Chapter 8, Article 2, see 1 N.C.L. Rev. 302 (1923).

§ 47-97. Validation of corporate deed with mistake as to officer's name.

In all cases where the deed of a corporation executed before the first day of January, 1918, is properly executed, properly recorded and there is error in the probate of said corporation's deed as to the name or names of the officers in said probate, said deed shall be construed to be a deed of the same force and effect as if said probate were in every way proper. (1933, c. 412, s. 1.)

§ 47-97.1. Validation of corporate deeds containing error in acknowledgment or probate.

In all cases where the deed of a corporation executed and filed for registration prior to the fifteenth day of June, 1947, is properly executed and properly recorded and there is error in the acknowledgment or probate of said corporation's deed as to the name or names of the officer or officers named therein and error as to the title or titles of the officer or officers named therein, said deed shall be construed to be a deed of the same force and effect as if said probate or acknowledgment were in every way proper. (1951, c. 825.)

§ 47-98. Registration on defective probates beyond State.

In every case where it shall appear from the records in the office of the register of deeds of any county in this State that any instrument required or allowed by law to be registered, bearing date prior to the year 1835, executed by any person or persons residing in any of the United States, other than this State, or in any of the territories of the United States, or in the District of Columbia, has been proven or acknowledged, or the privy examination of any feme covert taken thereto, before any officer or person authorized by any of the laws of this State in force prior to the said year 1835 to take such proofs, privy examinations and acknowledgments, and the said instrument has been registered in the proper county without the certificate of the Governor of the state or territory in which such proofs, acknowledgments or privy examinations were taken, or of the Secretary of State of the United States, when such certificate or certificates were required, as to the official character of the person taking such acknowledgment, proof or privy examination, as aforesaid, and without an order of registration made by a court or judge in this State having jurisdiction to make such order, then and in all such cases such proofs, privy examinations, acknowledgments and registrations are hereby in all respects fully validated and confirmed and declared to be sufficient in law, and such instruments so registered may be read in evidence in any of the courts of this State. (1923, c. 215, ss. 2, 3; C.S., s. 3366(j).)

Legal Periodicals. — For suggestion that this section and G.S. 47-96 should be considered as amendments or additional sections to Chapter 8, Article 2, see 1 N.C.L. Rev. 302 (1923).

§ 47-99. Certificates of clerks without seal.

All certificates of acknowledgment and all verifications of pleadings, affidavits, and other instruments executed by clerks of the superior court of the State prior to March 1, 1945, and which do not bear the official seal of such clerks, are hereby validated in all cases in which the instruments bearing such acknowledgment or certification are filed or recorded in any county in the State other than the county in which the clerk executing such certificates of acknowledgment or verifications resides, and such acknowledgments and verifications are hereby made and declared to be binding, valid and effective to the same extent and in the same manner as if said official seal had been affixed. (1925, c. 248; 1945, c. 798.)

§ 47-100. Acknowledgments taken by officer who was grantor.

In all cases where a deed or deeds dated prior to the first day of January, 1980, purporting to convey lands, have been registered in the office of the register of deeds of the county where the lands conveyed in said deed or deeds are located, prior to said first day of January, 1980, and the acknowledgments or proof of execution of such deed or deeds has been taken as to some of the grantors by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment and proof of execution and probate of such deed or deeds thereon and the registration thereof as above described, shall be, and the same are hereby declared to be in all respects valid, and such deed or deeds shall be declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution had not been named as a grantor therein, or in anywise interested therein. (1929, c. 48, s. 1; 1953, c. 986; 1991 (Reg. Sess., 1992), c. 1030, s. 51.8.)

§ 47-101. Seal of acknowledging officer omitted; deeds made presumptive evidence.

In all cases where deeds appear to have been executed for land prior to January 1, 1900, and appear to have been recorded in the offices of the registers of deeds in the proper counties in this State, and the same appear to have been acknowledged before commissioners of affidavits (or deeds) of North Carolina, residing in the District of Columbia or elsewhere in the different states, or appear to have been recorded without any certificate being recorded on the record of such deed or deeds, such record or records shall be presumptive evidence of the execution of such deed or deeds by the grantor or the grantors to the grantee or grantees therein named for the lands therein described, and the record of such deed or deeds may be offered or read in evidence upon the trial or hearing of any cause in any of the courts of this State as if the same had been properly probated and recorded: Provided, however, that nothing herein contained shall prevent such record or records from being attacked for fraud, and provided further that this section shall not apply to creditors or purchasers, but as to them the same shall stand as if this section had not been passed, and shall only apply to deeds executed prior to January 1, 1900. (1929, c. 14, s. 1.)

§ 47-102. Absence of notarial seal.

Any deed executed prior to the first day of January, 1945, and duly acknowledged before a North Carolina notary public, and the probate recites "witness my hand and notarial seal," or words of similar import, and no seal was affixed to the said deed, shall be ordered registered by the clerk of the superior court of the county in which the land lies, upon presentation to him: Provided, the probate is otherwise in due form. (1935, c. 130; 1943, c. 472; 1945, c. 808, s. 3.)

Cross References. — As to absence of notarial seal from acknowledgment, see G.S. 47-53.1.

§ 47-103. Deeds probated and registered with notary's seal not affixed, validated.

Any deed conveying or affecting real estate executed prior to January 1, 1932, and ordered registered and recorded in the county in which the land lies prior to said date, from which deed and the acknowledgment and privy examination thereof the seal of the notary public taking the acknowledgment or privy examination of the grantor or grantors thereof was omitted, is hereby declared to be sufficient and valid, and the probate and registration thereof are hereby in all respects validated and confirmed to the same effect as if the seal of said notary was affixed to the acknowledgment or privy examination thereof. (1941, c. 20.)

§ 47-104. Acknowledgments of notary holding another office.

In every case where deeds or other instruments have been acknowledged before a notary public, when the notary public at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment taken by such notary public is hereby declared to be sufficient and valid. (1935, c. 133; 1937, c. 284.)

§ 47-105. Acknowledgment and private examination of married woman taken by officer who was grantor.

In all cases where a deed or deeds of mortgages or other conveyances of land dated prior to the first day of January, 1926, purporting to convey lands have been registered in the office of the register of deeds of the county where the lands conveyed in said deeds are located prior to said first day of January, 1926, and the acknowledgments or proof of execution of such deed or deeds and the private examination of any married woman who is a grantor in such deed or deeds have been taken as to some of the grantors, and the private examination of any married woman grantor in such deed has been taken by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment, proof of execution and the private examination of such married woman, evidenced by the certificate thereof on such deed and the registration thereof as above described and set forth, shall be and the same are hereby declared to be in all respects valid, and such deed or deeds or other conveyances of land are declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of execution or taking the private examination of such married woman and certifying thereto upon such deed or deeds had not been named as grantor therein and had not been interested therein in any way whatsoever. (1937, c. 91.)

§ 47-106. Certain instruments in which clerk of superior court was a party, validated.

In all cases where a deed, or other conveyance of land dated prior to the first day of January, 1918, purporting to convey land, wherein the grantor or one of the grantors therein was at the time clerk of the superior court of the county where the land purporting to be conveyed was located, was acknowledged, proof of execution, privy examination of a married woman, and, or, order of registration had and taken before a deputy clerk of the superior court of said county, and the instrument registered upon the order of said deputy clerk of the superior court in the office of the register of deeds of said county, within two years from the date of said instrument, such instrument and its probate are hereby in all respects validated and confirmed; and such instrument, together with such defective acknowledgment, proof of execution, privy examination of a married woman, order of registration, and the certificate of such deputy clerk of the superior court, and the registration thereof, are hereby declared in all respects to be valid and binding upon the parties of such instrument and their privies, and such instrument so probated and recorded together with its certificates may be read in evidence as a muniment of title, for all intents and purposes, in any of the courts of this State. (1939, c. 261.)

§ 47-107. Validation of probate and registration of certain instruments where name of grantor omitted from record.

Whenever any deed, deed of trust, conveyance or other instrument permitted by law to be registered in this State has been registered for a period of 21 years or more and a clerk of the superior court or a register of deeds has adjudged the certificate of the officer before whom the acknowledgment was taken to be in due form and correct and has ordered the instrument to be recorded, but the name of a grantor which appears in the body of the instrument and as a signer of the instrument has been omitted from the record of the certificate of the officer before whom the acknowledgment was taken, such deed, deed of trust, conveyance or other instrument shall be conclusively presumed to have been duly acknowledged, probated and recorded; provided this presumption shall not affect litigation instituted within 21 years after date of registration. (1941, c. 30; 1971, c. 825.)

§ 47-108. Acknowledgments before notaries under age.

All acts of notaries public for the State of North Carolina who were not yet 21 years of age at the time of the performance of such acts are hereby validated; and in every case where deeds or other instruments have been acknowledged before such notary public who was not yet 21 years of age at the time of taking of said acknowledgment, such acknowledgment taken before such notary public is hereby declared to be sufficient and valid. (1941, c. 233.)

§ 47-108.1. Certain corporate deeds, etc., declared validly admitted to record.

Deeds, conveyances and other instruments of writing of corporations entitled to registration, which have been heretofore duly executed in the manner required by law, by the proper officers of the corporation, and which have prior to March 8, 1943, been admitted to registration, on the acknowledgment or proof of the proper executing officer, in the manner required by law, shall be, and the same are hereby declared to be, in all respects validly admitted to record, although such officer at the date of such acknowledgment or proof had ceased to be an officer of such corporation, or such corporation at the date of such acknowledgment or proof had ceased to exist. (1943, c. 598.)

§ 47-108.2. Acknowledgments and examinations before notaries holding some other office.

In every case where deeds or other instruments have been acknowledged, and where privy examination of wives had, before a notary public, when the notary public at the time was also holding some other office, and the deed or other instrument has been otherwise duly probated and recorded, such acknowledgment taken by, and such privy examination had before such notary public is hereby declared to be sufficient and valid. (1945, c. 149.)

§ 47-108.3. Validation of acts of certain notaries public prior to November 26, 1921.

In all cases where prior to November 26, 1921, instruments by law, or otherwise, required, permitted or authorized to be registered, certified, probated, recorded or filed with certificates of notaries public showing the acknowledgments or proofs of execution thereof as required by the laws of the State of North Carolina have been registered, certified, probated, recorded or filed, such registration, certifications, probates, recordations and filings are hereby validated and made as good and sufficient as though such instruments had been in all respects properly registered, certified, probated, recorded or filed, notwithstanding there are no records in the office of the Governor of the State of North Carolina or in the office of the clerk of the superior court of the county in which such notaries public were to act that such persons acting as such notaries public had ever been appointed or subscribed written oaths or received any certificates or commissions or were qualified as notaries public at the time of the performance of the acts hereby validated. (1947, c. 102.)

§ 47-108.4. Acknowledgments, etc., of instruments of married women made since February 7, 1945.

All acknowledgments, probates and registrations of instruments wherein any married woman was a grantor, including deeds and mortgages on land, made since February 7, 1945, are hereby validated, approved and declared of full force and effect. (1947, c. 991, s. 2.)

§ 47-108.5. Validation of certain deeds executed in other states where seal omitted.

All deeds to lands in North Carolina, executed prior to January 1, 1991, without seal attached to the maker's name, which deeds were acknowledged in another state, the laws of which do not require a seal for the validity of a conveyance of real property located in that state, and which deeds have been duly recorded in this State, shall be as valid to all intents and purposes as if the same had been executed under seal. (1949, cc. 87, 296; 1959, c. 797; 1983, c. 398, s. 6; 1985, c. 70, s. 6; 1987, c. 277, s. 6; 1989, c. 390, s. 6; 1991, c. 489, s. 6.)

Legal Periodicals. — For brief comment on this section, see 27 N.C.L. Rev. 475 (1949).

§ 47-108.6. Validation of certain conveyances of foreign dissolved corporations.

In all cases when, prior to the first day of January, 1947, any dissolved foreign corporation has, prior to its dissolution, by deed of conveyance purported to convey real property in this State, and said instrument recites a consideration, is signed by the proper officers in the name of said corporation, sealed with the corporate seal and duly registered in the office of the register of deeds of the county where the land described in said instrument is located, but there is error in the attestation clause and acknowledgment in failing to identify the officers signing said deed and to recite that authority was duly given and that the same was the act of said corporation, said deed shall be construed to be a deed of the same force and effect as if said attestation clause and acknowledgment were in every way proper. (1949, c. 1212.)

Legal Periodicals. — For brief comment on this section, see 27 N.C.L. Rev. 440 (1949).

§ 47-108.7. Validation of acknowledgments, etc., by deputy clerks of superior court.

All acts heretofore performed by deputy clerks of the superior court in taking acknowledgments, examining witnesses and probating wills, deeds and other instruments required or permitted by law to be recorded are hereby validated: Provided, nothing in this section shall affect pending litigation. (1949, c. 1072.)

§ 47-108.8. Acts of registers of deeds or deputies in recording plats and maps by certain methods validated.

All acts heretofore performed by a register of deeds, or a deputy register of deeds in recording plats and maps by transcribing a correct copy thereof or permanently attaching the original to the records in a book designated "Book of Plats" is hereby validated the same as if said plats had been recorded as required by G.S. 47-30: Provided, however, that nothing herein contained shall affect pending litigation. (1949, c. 1073.)

§ 47-108.9. Validation of probate of instruments pursuant to § 47-12.

The probates of all instruments taken on and after February 7, 1945, in accordance with the provisions of G.S. 47-12, as amended by section 11 of Chapter 73 of the Session Laws of 1945 and section 1 of Chapter 991 of the Session Laws of 1947 and as further amended by sections 2 and 3 of Chapter 815 of the Session Laws of 1949, are hereby in all respects validated; provided, however, that this section shall not apply to pending litigation. (1949, c. 815, s. 3.)

§ 47-108.10. Validation of registration of plats upon probate in accordance with § 47-30.

The registration of all plats which have prior to February 6, 1953, been admitted to registration upon probate thereof, in accordance with the provisions of G.S. 47-30 as amended by section 1 of Chapter 47 of the Session Laws of 1953, is hereby validated. (1953, c. 47, s. 2.)

§ 47-108.11. Validation of recorded instruments where seals have been omitted.

In all cases of any deed, deed of trust, mortgage, lien or other instrument authorized or required to be registered in the office of the register of deeds of any county in this State where it appears of record or it appears that from said instrument, as recorded in the office of the register of deeds of any county in the State, there has been omitted from said recorded or registered instrument the word "seal," "notarial seal" and that any of said recorded or registered instruments shows or recites that the grantor or grantors "have hereunto fixed or set their hands and seals" and the signature of the grantor or grantors appears without a seal thereafter or on the recorded or registered instrument or in all cases where it appears there is an attesting clause which recites "signed, sealed and delivered in the presence of," and the signature of the grantor or grantors appears on the recorded or registered instrument without any seal appearing thereafter or of record, then all such deeds, mortgages, deeds of trust, liens or other instruments, and the registration of same in the office of the register of deeds, are hereby declared to be in all respects valid and binding and are hereby made in all respects valid and binding to the same extent as if the word "seal" or "notarial seal" had not been omitted, and the registration and recording of such instruments in the office of the register of deeds in any county in this State are hereby declared to be valid, proper, legal and binding registrations.

This section shall not apply in any respect to any instrument recorded or registered subsequent to January 1, 1999 or to pending litigation or to any such instruments now directly or indirectly involved in pending litigation. (1953, c. 996; 1959, c. 1022; 1973, c. 519; c. 1207, s. 2; 1977, c. 165; 1979, 2nd Sess., c. 1185, s. 1; 1983, c. 398, s. 7; 1985, c. 70, s. 7; 1987, c. 277, s. 7; 1989, c. 390, s. 7; 1991, c. 489, s. 7; 1995, c. 163, s. 16; 1999-456, s. 12.)

CASE NOTES

Cited in Page v. Miller, 252 N.C. 23, 113 S.E.2d 52 (1960).

§ 47-108.12. Validation of instruments acknowledged before United States commissioners.

All deeds, mortgages, or other instruments permitted or required by law to be registered, which prior to January 1, 1933, have been proved or acknowledged before a United States commissioner, or U.S. commissioner, are hereby in all respects validated as to such proof or acknowledgment, and all registrations of such deeds or conveyances, upon such probates, acknowledgments and private examinations, or any of them, are hereby declared to be sufficient and validated. (1953, c. 987.)

§ 47-108.13. Validation of certain instruments registered prior to January 1, 1934.

In all cases where prior to January 1, 1934 instruments by law required or authorized to be registered show the signatures and seal of each of the grantors therein and further show that each of such grantors has appeared before or signed such instruments in the presence of a notary public, justice of the peace or other person duly authorized to take acknowledgments, and such instruments have been ordered registered by the clerk of the superior court or other officer qualified to pass upon probate and admit instruments to registration, and actually put on the books in the office of the register of deeds, as if properly acknowledged, all such instruments and their registrations are hereby validated and made as good and sufficient as though such instruments had been in all respects properly acknowledged: Provided, that this section shall not apply to any privy examination or acknowledgment of a married woman. (1953, c. 1334.)

§ 47-108.14. Conveyances by the United States acting by and through the General Services Administration.

The United States of America, acting by and through the General Services Administration may convey lands and other property in the State of North Carolina which is transferable by deed, quitclaim deed, or other means of conveyances without the Regional Director or other duly authorized agent acting for and on behalf of the United States of America, adopting or placing a "seal," in any form, after the signature of the grantor's agent, or elsewhere on said deed, quitclaim deed, or other instrument, and the conveyances of the United States of America acting by and through the General Services Administration, and executed by its Regional Director or other duly authorized agent, although without a "seal" appearing thereon, shall be in all respects valid and binding to the same extent as if the word "seal" or some other type of seal, appeared after the signature of the grantor's agent, or elsewhere on said conveyances.

All conveyances prior to April 19, 1955, where any deed, quitclaim deed, or other instrument conveying land or other property in the State of North Carolina has been executed by the United States of America, by and through the General Services Administration, and said conveyances are authorized or required to be registered in the office of the register of deeds of any county in this State, and it appears from said instrument, or said instrument as recorded in the office of the register of deeds of any county in this State, that a seal has been omitted from said instruments, that notwithstanding the absence of a seal all such conveyances are hereby declared to be in all respects valid and binding to convey lands and property rights in the State of North Carolina to the grantees named therein, to the same extent as if the word "seal," or a seal in some other form, had appeared after the signature of the grantor's agent, or elsewhere on said conveyances, and the registration and recording of such conveyances in the office of the register of deeds in all counties in this State are hereby declared to be valid, proper, legal and binding registrations to the same extent as if such conveyances were executed under seal. (1955, c. 629, s. 1.)

§ 47-108.15. Validation of registration of instruments filed before order of registration.

All deeds, deeds of trust, mortgages, chattel mortgages, contracts and all other instruments required or permitted by law to be registered which have heretofore been accepted for filing and registration by registers of deeds on a date preceding the date of the clerk's order of registration are hereby validated, approved, confirmed and declared to be valid, proper, legal and binding registrations to the same extent as if such instruments had been accepted for filing and registration on the date of or subsequent to the date of the clerk's order of registration. (1957, c. 1430.)

§ 47-108.16. Validation of certain deeds executed by nonresident banks.

All deeds and other conveyances of land in this State executed on behalf of banks not incorporated in the State of North Carolina, by a trust officer thereof, and properly recorded on or before December 31, 1963, which deeds are otherwise regular and valid, are hereby validated. (1965, c. 610.)

§ 47-108.17. Validation of certain deeds where official capacity not designated.

In all cases where an executor, executrix, administrator, administratrix, guardian or commissioner has executed a deed, deed of trust or other instrument of conveyance permitted by law to be registered in this State and the granting clause of the instrument sets forth the official capacity of the grantor, neither the failure to redesignate the grantor's official capacity following his or her signature nor the failure to designate the official capacity of the grantor in the acknowledgment of the instrument shall invalidate the conveyance provided the instrument is otherwise properly executed. (1973, c. 1220, s. 1.)

§ 47-108.18. Registration of certain instruments containing a notarial jurat validated.

A notarial jurat constitutes an acknowledgment in due form for all plats or maps that have heretofore been accepted for filing and registration under G.S. 47-30 as amended. No plat or map heretofore accepted for filing and registration, that contains a notarial jurat instead of an acknowledgment may be held to be improperly registered solely for lack of a proper acknowledgment. (1983, c. 391.)

§ 47-108.19. Validation of certain maps and plats that cannot be copied.

All maps and plats registered before June 1, 1983, pursuant to G.S. 47-30 that met all of the requirements of that statute except that they were not on a material from which legible copies could be made or did not contain the original of the surveyor's signature and acknowledgment are declared to be valid registrations. (1983, c. 756.)

§ 47-108.20. Validation of certain recorded instruments that were not acknowledged.

All instruments recorded before June 30, 1986, that were not reexecuted and reacknowledged and that correct an obvious typographical or other minor error in a recorded instrument that was previously properly executed and acknowledged are declared to be valid instruments. (1985 (Reg. Sess., 1986), c. 842, s. 2.)

§ 47-108.21. Sales for 1930 on dates other than first Monday in June validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the year of 1930, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales are hereby approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1930. (1931, c. 160; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly G.S. 105-387. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.22. Tax sales for 1931-32 on day other than law provides and certificates validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1931 and 1932, on any day subsequent to or other than the first Monday in June of said year, are hereby approved, confirmed, validated, and declared to be proper, valid, and legal sales of such land and legally binding in all respects, and all certificates of sale made and issued upon and in accordance with such sales approved and validated to all intents and purposes with such full force and legal effect as if said sales had been held and conducted on said first Monday of June, 1931 and 1932. (1933, c. 177; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly G.S. 105-388. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.23. Tax sales for 1933-34 and certificates validated.

All sales of land for failure to pay taxes held or conducted by any sheriff or any tax collector of any county, city, town, or other municipality during the years 1933 and 1934, or on any date subsequent to or other than the date prescribed by law, and all certificates of sale executed and issued pursuant to and in accordance with such sales be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sales had been held and conducted on the date prescribed by law.

The board of county commissioners of any county or the governing board of any city, town, or other municipality may by resolution order the sheriff or tax collecting officer of the said county, city, town, or other municipality to advertise in the manner provided by law and sell all land for the taxes of any year levied by the said county, city, town, or other municipality, which land has not heretofore been legally sold for the failure to pay said taxes. The sale or sales herein authorized shall be held not later than the first Monday in September 1935, and certificates of sale shall be issued in accordance with and pursuant to said sale or sales in the same manner as if said sale or sales had been held and conducted as provided by law. Any sale held and conducted under the provisions of this paragraph and all certificates issued pursuant to such a sale shall be and the same are hereby approved, confirmed, and validated and shall have the same force and legal effect as if said sale had been held and conducted on the date prescribed by law.

All actions instituted in any county, city, town, or other municipality for the foreclosure of certificates of sale issued for the taxes of the years 1927, 1928, 1929, 1930, 1931 and 1932 subsequent to October 1, 1934, and all such actions instituted before October 1, 1935, shall be and the same are hereby approved, validated, and declared to be legally binding and of the same force and effect as if said actions were instituted prior to October 1, 1934: Provided, that this section shall not be construed to repeal any private or local act passed by the General Assembly of 1935. (1935, c. 331; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly G.S. 105-389. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.24. Notices of sale for taxes by publication validated.

All sales of real property under tax certificate foreclosures made between January 1, 1927, and March 13, 1937, where the original notice of sale was published for four successive weeks, and any notice of resale was published for two successive weeks, preceding said sales, whether the notice of sale was required to be published in a newspaper or at courthouse door, or both, shall be, and the same are in all respects validated as to publication of said notice: Provided said publication was completed as above set out within 10 days of the date of the sale.

The provisions of this section shall not apply to the Counties of Alleghany, Beaufort, Cabarrus, Camden, Carteret, Caswell, Currituck, Halifax, Harnett, Henderson, Hertford, Hyde, Iredell, Johnston, Jones, Macon, Mitchell, Moore, Nash, New Hanover, Perquimans, Pitt, Polk, Rowan, Rutherford, Scotland, Surry, Wake, Warren, Washington, and Wayne. (1937, c. 128; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly G.S. 105-390. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

§ 47-108.25. Validation of sales and resales held pursuant to § 105-374.

All sales or resales held prior to April 14, 1951, pursuant to G.S. 105-374, where the advertisement was in accordance with G.S. 1-327 and 1-328 as provided by such sections prior to their repeal, are validated to the same extent as if such advertisement were in accordance with Article 29A of Chapter 1 of the General Statutes; and all such sales, where the provisions of G.S. 45-28 as to resales, as provided by such section prior to its repeal, were followed, are validated to the same extent as if the resale procedure provided for in Article 29A of Chapter 1 of the General Statutes had been followed. (1951, c. 1036, s. 2; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly G.S. 105-391. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

Sections 1-327 and 1-328, referred to in this section, were repealed by Session Laws 1949, c. 719, s. 2. Section 45-28, referred to in this section, was repealed by Session Laws 1949, c. 720, s. 5.

§ 47-108.26. Validation of reconveyances of tax foreclosed property by county boards of commissioners.

The action of county boards of commissioners taken prior to March 20, 1951, reconveying tax foreclosed property by private sale to the former owners or other interested parties for amounts not less than such counties' interest therein is hereby ratified, confirmed, and validated. (1951, c. 300, s. 2; 1971, c. 806, s. 1; 1987, c. 777, s. 4(1).)

Editor's Note. — This section was formerly G.S. 105-392. It was recodified by Session Laws 1987, c. 777, s. 4(1), effective August 12, 1987.

Article 5.

Registration of Official Discharges from the Military and Naval Forces of the United States.

§ 47-109. Book for record of discharges in office of register of deeds; specifications.

There shall be provided, and at all times maintained, in the office of the register of deeds of each county in North Carolina a special and permanent book, in which shall be recorded official discharges from the army, navy, marine corps and other branches of the armed forces of the United States. Said book shall be securely bound, and the pages of the same shall be printed in the form of discharge papers, with sufficient blank lines for the recording of such dates as may be contained in the discharge papers offered for registration. (1921, c. 198, s. 1; C.S., s. 3366(k); 1945, c. 659, s. 2.)

§ 47-110. Registration of official discharge or certificate of lost discharge.

Upon the presentation to the register of deeds of any county of any official discharge, or official certificate of lost discharge, from the army, navy, marine corps, or any other branch of the armed forces of the United States he shall record the same without charge in the book provided for in G.S. 47-109. (1921, c. 198, s. 2; C.S., s. 3366(l); 1943, c. 599; 1945, c. 659, s. 1.)

Local Modification. — Alleghany: 1945, c. 877.

§ 47-111. Inquiry by register of deeds; oath of applicant.

If any register of deeds shall be in doubt as to whether or not any paper so presented for registration is an official discharge from the army, navy, or marine corps of the United States, or an official certificate of lost discharge, he shall have power to examine, under oath, the person so presenting such discharge, or otherwise inquire into its validity; and every register of deeds to whom a discharge or certificate of lost discharge is presented for registration shall administer to the person offering such discharge or certificate of lost discharge for registration the following oath, to be recorded with and form a part of the registration of such discharge or certificate of lost discharge:

"I, ________________, being duly sworn, depose and say that the foregoing discharge (or certificate of lost discharge) is the original discharge (or certificate of lost discharge) issued to me by the government of the United States; and that no alterations have been made therein by me, or by any person to my knowledge.

____

Subscribed and sworn to before me this ____________________________ day of ________________, ________

________________"

(1921, c. 198, s. 3; C.S., s. 3366(m); 1999-456, s. 59.)

§ 47-112. Forgery or alteration of discharge or certificate; punishment.

Any person who shall forge, or in any manner alter any discharge or certificate of lost discharge issued by the government of the United States, and offer the same for registration or secure the registration of the same under the provisions of this Article shall be guilty of a Class 1 misdemeanor. (1921, c. 198, s. 4; C.S., s. 3366(n); 1993, c. 539, s. 409; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 47-113. Certified copy of registration.

Any person desiring a certified copy of any such discharge, or certificate of lost discharge, registered under the provisions of this Article shall apply for the same to the register of deeds of the county in which such discharge or certificate of lost discharge is registered. The register of deeds shall furnish certified copies of instruments registered under this Article without charge to any member or former member of the armed forces of the United States who applies therefor. (1921, c. 198, s. 5; C.S., s. 3366(o); 1945, c. 659, s. 3; 1969, c. 80, s. 11.)

§ 47-113.1: Repealed by Session Laws 2003-248, s. 1, effective January 1, 2004.

Cross References. — For similar provisions pertaining to restriction of access to military discharge documents, see G.S. 47-113.2.

§ 47-113.2. Restricting access to military discharge documents.

(a) All military discharge documents filed on or after January 1, 2004, shall be considered a public record, but for confidential safekeeping and restricted access to such documents, these documents will be filed with the registers of deeds in this State. These documents are exempt from public inspection and access except as allowed in subsection (b) of this section.

(b) Definitions:

(1) Authorized party. — Four categories of authorized parties are recognized with respect to access to military discharge documents under subsection (d) of this section:
  a. The subject of the document.
  b. Agents and representatives of the subject authorized in writing:
    1. By the subject or subject's widow or widower in a notarized authorization,
    2. By a court to represent subject, or
    3. By the subject's executor acting on behalf of a deceased subject.
  c. Authorized agents of the Division of Veterans Affairs, the United States Department of Veterans Affairs, the Department of Defense, or a court official with an interest in assisting the subject or the deceased subject's beneficiaries to obtain a benefit.
  d. Agents or representatives of the North Carolina State Archives.

(2) Filing office. — The office where military discharge documents are recorded, registered, or filed in this State is the register of deeds.

(3) Military discharge document. — Any document that purports to represent a notice of separation from or service in any armed forces of the United States or of any state, including, but not limited to, Department of Defense Form 214 or 215, WD AGO 53, WD AGO 55, WD AGO 53-55, NAVMC 78- PD, and NAVPERS 553, or any other letter relating to the separation from the armed forces.

(c) A military discharge document shall be accepted for filing upon presentation in person.

(d) The filing officer may refuse to accept any document that is:

(1) Not submitted in person by an authorized party in accordance with subsection (b) of this section.

(2) Not an original, a carbon copy, or a photographic copy issued or certified by an agency of federal or State government.

(e) No copy of a military discharge document or any other information from such document filed after the effective date of this section shall be made available other than in accordance with subsection (b) or (h) of this section.

(f) Certified copies of a military discharge document will be made available only in accordance with subsection (e) of this section and only by individual request.

(g) Uncertified copies of a military discharge document will be made available to an authorized party in accordance with subsection (b) of this section and only by individual request.

(h) The North Carolina Association of Registers of Deeds and the Division of Veterans Affairs shall adopt before January 1, 2004, such request forms and associated rules as are required to implement the provisions of this section. All filing offices shall use the forms and comply with the rules, as adopted.

(i) Completed request forms shall be maintained in the register of deeds for a period of one year.

(j) The request forms shall not be considered public records and are subject to the same restricted access as the military discharge document.

(k) In the event images of and the index to military discharge documents filed prior to January 1, 2004, have not been commingled with other publicly available document images and their index in a filing office, the images and the index will be maintained and are subject to all the provisions of this section that apply to newly filed documents.

(*l*) The register of deeds shall, to the greatest extent possible, take appropriate protective actions in accordance with any limitations determined necessary by the register of deeds with regard to records that were filed before the effective date of this section.

(m) Subsection (d) of this section shall not apply to images of military discharge documents that have been on file for over 50 years.

(n) There shall be no fee charged for filing military discharge documents or for providing certified copies of military discharge documents provided to those who have a right to access under subsection (d) of this section. Uncertified copy of a military discharge document that becomes public record under subsection (h) of this section is subject to fee as determined in G.S. 161-10(a)(11).

(o) Filing offices shall be responsible for the cost of compliance with this section.

(p) Recording officials shall not be liable for any damages that may result from good faith compliance with the provisions of this section.

(q) The words “register of deeds” appearing in this section shall be interpreted to mean “register of deeds, assistant register of deeds, or deputy register of deeds”. (2003-248, s. 2.)

Cross References. — As to public records and archives, see G.S. 121-5.

Editor's Note. — Subsections (c1), (d), (d1), (d2), (e), (e1), (e2) and (f) through (*l*) were redesignated as (d) through (q) at the direction of the Revisor of Statutes.

§ 47-114. Payment of expenses incurred.

The county commissioners of each county are hereby authorized and empowered in their discretion to appropriate from the general fund of the county an amount sufficient to cover any additional expense incurred by the register of deeds of the county in carrying out the purposes of this Article. (1945, c. 659, s. 31/2.)

Legal Periodicals. — For article on the continuing power of attorney, see 5 Campbell L. Rev. 305 (1983).

ARTICLE 6.

Registration and Execution of Instruments Signed under a Power of Attorney.

§ 47-115. Execution in name of either principal or attorney-in-fact; indexing in names of both.

Any instrument in writing executed by an attorney-in-fact shall be good and valid as the instrument of the principal, whether or not said instrument is signed and/or acknowledged in the name of the principal by the attorney-in-fact or by the attorney-in-fact designating himself as attorney-in-fact for the principal or acknowledged in the name of the attorney-in-fact without naming the principal from which it will appear that it was the purpose of the attorney-in-fact to be acting for and on behalf of the principal mentioned or referred to in the instrument. This section shall not affect any pending litigation or the status of any matter heretofore determined by the courts. This section shall apply to all such instruments heretofore or hereafter executed. Registers of deeds shall be required to index all such instruments filed for registration both in the name of the principal or principals executing the powers of appointment and in the name of the attorney-in-fact executing the instrument: Provided, that instruments heretofore registered and indexed only in the name of the attorney-in-fact shall be valid and in all respects binding upon the principal or principals insofar as validity of registration is concerned. (1945, c. 204; 1959, c. 210.)

§ 47-115.1: Repealed by Session Laws 1983, c. 626, s. 2.

Cross References. — As to powers of attorney, see now G.S. 32A-1 et seq. As to effect of powers of attorney executed pursuant to G.S. 47-115.1 prior to October 1, 1983, see G.S. 32A-14.

ARTICLE 7.

Private Examination of Married Women Abolished.

§ 47-116: Transferred to G.S. 47-14.1 by Session Laws 1951, c. 893.

ARTICLE 8.

Memoranda of Leases and Options.

§ 47-117. Forms do not preclude use of others; adaptation of forms.

(a) The form prescribed in this Article does not exclude the use of other forms which are sufficient in law.

(b) The prescribed form may be adapted to fit the various situations in which the grantors or grantees are individuals, firms, associations, corporations, or otherwise, or combinations thereof. (1961, c. 1174.)

CASE NOTES

Cited in Lawing v. Jaynes, 285 N.C. 418, 206 S.E.2d 162 (1974).

§ 47-118. Forms of registration of lease.

(a) A lease of land or land and personal property may be registered by registering a memorandum thereof which shall set forth:

(1) The names of the parties thereto;
(2) A description of the property leased;
(3) The term of the lease, including extensions, renewals and options to purchase, if any; and

(4) Reference sufficient to identify the complete agreement between the parties.

Such a memorandum may be in substantially the following form:

MEMORANDUM OF LEASE

____

(Name and address or description of lessor or lessors)

hereby lease(s) to ____________________________________,

(Name and address or description of lessee or lessees)

for a term beginning the ________________ day of ____________,

(Month)

________, and continuing for a maximum period of ________________,

(Year)

including extensions and renewals, if any, the following property:

(Here describe the property)

(If applicable: [There exists an option to purchase with respect to this leased property, in favor of the lessee which expires the ______ day of __________,

(Month) (Year)

__________, which is set forth at large in the complete agreement between the parties].)

The provisions set forth in a written lease agreement between the parties dated the ______ day of ______, ______, are

(Month) (Year)

hereby incorporated in this memorandum.

____________________ [Seal]

(Lessor)

____________________ [Seal]

(Lessee)

(Acknowledgment as required by law.)

(b) If the provisions of the lease make it impossible or impractical to state the maximum period of the lease because of conditions, renewals and extensions, or otherwise, then the memorandum of lease shall state in detail all provisions concerning the term of the lease as fully as set forth in the written lease agreement between the parties.

(c) Registration of a memorandum of lease pursuant to subsections (a) and (b) of this section, shall have the same legal effect as if the written lease agreement had been registered in its entirety. (1961, c. 1174; 1999-456, s. 59.)

§ 47-119. Form of memorandum for option to purchase real estate.

An option to purchase real estate may be registered by registering a memorandum thereof which shall set forth:

(1) The names of the parties thereto;
(2) A description of the property which is subject to the option;
(3) The expiration date of the option;
(4) Reference sufficient to identify the complete agreement between the parties.

Such a memorandum may be in substantially the following form:

NORTH CAROLINA
________________ COUNTY

In consideration of ____________________________________,

(Set out consideration)

the receipt of which is hereby acknowledged, ______________________________
(Name and address
of person selling option)
does hereby give and grant to ______________________________
(Name and address
of person buying option)
the right and option to purchase the following property:
(Here describe property)

This option shall expire on the ________ day of ________________, ________.

The provisions set forth in a written option agreement between the parties dated the ________ day of ________________, ________, are hereby incorporated in this memorandum.

Witness our hand(s) and seal(s) this ________ day of ________, ________

________________________ (Seal)
________________________ (Seal)

(1961, c. 1174; 1999-456, s. 59.)

§ 47-120. Memorandum as notice.

Such memorandum of an option to purchase real estate, or lease as proposed by G.S. 47-118 or 47-119, when executed, acknowledged, delivered and registered as required by law, shall be as good and sufficient notice, and have the same force and effect as if the written lease or option to purchase real estate had been registered in its entirety. (1961, c. 1174.)

Chapter 47A.

Unit Ownership.

Article 1.

Unit Ownership Act.

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ARTICLE 1.

Unit Ownership Act.

§ 47A-1. Short title.

This Article shall be known as the "Unit Ownership Act." (1963, c. 685, s. 1; 1983, c. 624, s. 2.)

Editor's Note. — Session Laws 1983, c. 624, s. 1, designated G.S. 47A-1 through 47A-28 as Article 1 of this Chapter and added a new Article 2.

Legal Periodicals. — For article, "Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations," see 12 Wake Forest L. Rev. 915 (1976).

For comment on areas of dispute in condominium law, see 12 Wake Forest L. Rev. 979 (1976).

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

CASE NOTES

Cited in Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996), rev'd, 346 N.C. 170, 484 S.E.2d 527 (1997); Brookwood Unit Ownership Ass'n v. Delon, 124 N.C. App. 446, 477 S.E.2d 225 (1996).

§ 47A-2. Declaration creating unit ownership; recordation.

Unit ownership may be created by an owner or the co-owners of a building by an express declaration of their intention to submit such property to the provisions of the Article, which declaration shall be recorded in the office of the register of deeds of the county in which the property is situated. (1963, c. 685, s. 2; 1983, c. 624, s. 2.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Bogue Shores Homeowners Ass'n v. Town of Atl. Beach, 109 N.C. App. 549, 428 S.E.2d 258 (1993).

§ 47A-3. Definitions.

Unless it is plainly evident from the context that a different meaning is intended, as used herein:

(1) "Association of unit owners" means all of the unit owners acting as a group in accordance with the bylaws and declaration.

(1a) "Building" means a building, or a group of buildings, each building containing one or more units, and comprising a part of the property; provided that the property shall contain not less than two units.

(2) "Common areas and facilities," unless otherwise provided in the declaration or lawful amendments thereto, means and includes:
  a. The land on which the building stands and such other land and improvements thereon as may be specifically included in the declaration, except any portion thereof included in a unit;
  b. The foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, and entrances and exits of the building;
  c. The basements, yards, gardens, parking areas and storage spaces;
  d. The premises for the lodging of janitors or persons in charge of property;
  e. Installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning and incinerating;
  f. The elevators, tanks, pumps, motors, fans, compressors, ducts, and in general, all apparatus and installations existing for common use;
  g. Such community and commercial facilities as may be provided for in the declaration; and

h. All other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use.

(3) "Common expenses" means and includes:

a. All sums lawfully assessed against the unit owners by the association of unit owners;

b. Expenses of administration, maintenance, repair or replacement of the common areas and facilities;

c. Expenses agreed upon as common expenses by the association of unit owners;

d. Expenses declared common expenses by the provisions of this Article, or by the declaration or the bylaws;

e. Hazard insurance premiums, if required.

(4) "Common profits" means the balance of all income, rents, profits, and revenues from the common areas and facilities remaining after the deductions of the common expenses.

(5) "Condominium" means the ownership of single units in a multi-unit structure with common areas and facilities.

(6) "Declaration" means the instrument, duly recorded, by which the property is submitted to the provisions of this Article, as hereinafter provided, and such declaration as from time to time may be lawfully amended.

(7) "Limited common areas and facilities" means and includes those common areas and facilities which are agreed upon by all the unit owners to be reserved for the use of a certain number of units to the exclusion of the other units, such as special corridors, stairways and elevators, sanitary services common to the units of a particular floor, and the like.

(8) "Majority" or "majority of unit owners" means the owners of more than fifty percent (50%) of the aggregate interest in the common areas and facilities as established by the declaration assembled at a duly called meeting of the unit owners.

(9) "Person" means individual, corporation, partnership, association, trustee, or other legal entity.

(10) "Property" means and includes the land, the building, all improvements and structures thereon and all easements, rights and appurtenances belonging thereto, and all articles of personal property intended for use in connection therewith, which have been or are intended to be submitted to the provisions of this Article.

(11) "Recordation" means to file of record in the office of the county register of deeds in the county where the land is situated, in the manner provided by law for recordation of instruments affecting real estate.

(12) "Unit" or "condominium unit" means an enclosed space consisting of one or more rooms occupying all or a part of a floor or floors in a building of one or more floors or stories regardless of whether it be designed for residence, for office, for the operation of any industry or business, or for any other type of independent use and shall include such accessory spaces and areas as may be described in the declaration, such as garage space, storage space, balcony, terrace or patio, provided it has a direct exit to a thoroughfare or to a given common space leading to a thoroughfare.

(13) "Unit designation" means the number, letter, or combination thereof designating the unit in the declaration.

(14) "Unit owner" means a person, corporation, partnership, association, trust or other legal entity, or any combination thereof, who owns a unit within the building. (1963, c. 685, s. 3; 1969, c. 848; 1971, c. 418; 1983, c. 624, s. 2.)

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

Each condominium unit is a separate lot, even though unit owners may also own an undivided interest in common areas and facilities. This holding is in line with this Chapter, which treats a unit owner like any other owner of real property. Tar Landing Villas Owners' Ass'n v. Town of Atlantic Beach, 64 N.C. App. 239, 307 S.E.2d 181 (1983), cert. denied, 310 N.C. 156, 311 S.E.2d 296 (1984).

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

Developer as Unit Owner. — Neither the definition of "unit owner" nor the provisions of G.S. 47A-12 make any distinction between a developer and any other unit owner; defendant developer, as a corporation owning several units within the condominium project, qualified as a "unit owner" and was bound to contribute pro rata toward the expenses of administration and of maintenance and repair of the general common areas and facilities. Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

§ 47A-4. Property subject to Article.

This Article shall be applicable only to property, the full owner or all of the owners of which submit the same to the provisions hereof by duly executing and recording a declaration as hereinafter provided. (1963, c. 685, s. 4; 1983, c. 624, s. 2.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47A-5. Nature and incidents of unit ownership.

Unit ownership as created and defined in this Article shall vest in the holder exclusive ownership and possession with all the incidents of real property. A condominium unit in the building may be individually conveyed, leased and encumbered and may be inherited or devised by will, as if it were solely and entirely independent of the other condominium units in the building of which it forms a part. Such a unit may be held and owned by more than one person either as tenants in common or tenants by the entirety or in any other manner recognized under the laws of this State. (1963, c. 685, s. 5; 1983, c. 624, s. 2.)

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

A condominium unit is a separate tract of property, distinct from the other units within the project. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 64 N.C. App. 682, 308 S.E.2d 452 (1983), cert. denied, 310 N.C. 152, 311 S.E.2d 296 (1984).

Apportionment of Blanket Lien. — When condominium units are owned by different parties, the portion of a blanket lien applicable to each separate unit becomes material. It would be grossly inequitable to allow a blanket lien holder to enforce the entire lien against one unit of a multi-unit condominium project. Each unit shall be liable only for its proportionate share, based upon the materials and labor furnished to that unit, and its proportionate part of labor and materials furnished the common area under the contract that is the subject of the lien. W.H. Dail Plumbing, Inc. v. Roger Baker & Assocs., 64 N.C. App. 682, 308 S.E.2d

452 (1983), cert. denied, 310 N.C. 152, 311 S.E.2d 296 (1984).

Trial Court's Judgment Upholding An Ordinance Passed to Annex Property Was Reversed. — Trial court's judgment upholding an ordinance which the City of Asheville, North Carolina passed to annex property was reversed because the trial court erred when it classified common areas belonging to people who owned condominium units as commercial property, instead of residential property, and failed to recognize that the city's plan for providing services to the area the City proposed to annex did not provide statutorily required sewer service. Briggs v. City of Asheville, 159 N.C. App. 558, 583 S.E.2d 733, 2003 N.C. App. LEXIS 1534 (2003), cert. denied, 357 N.C. 657, 589 S.E.2d 886 (2003), cert. dismissed sub nom. Briggs v. City Asheville, 357 N.C. 657, 589 S.E.2d 887 (2003).

Cited in Tar Landing Villas Owners' Ass'n v. Town of Atlantic Beach, 64 N.C. App. 239, 307 S.E.2d 181 (1983).

§ 47A-6. Undivided interests in common areas and facilities; ratio fixed in declaration; conveyance with unit.

(a) Each unit owner shall be entitled to an undivided interest in the common areas and facilities in the ratio expressed in the declaration. Such ratio shall be in the approximate relation that the fair market value of the unit at the date of the declaration bears to the then aggregate fair market value of all the units having an interest in said common areas and facilities.

(b) The ratio of the undivided interest of each unit owner in the common areas and facilities as expressed in the declaration shall have a permanent character and shall not be altered except with the unanimous consent of all unit owners expressed in an amended declaration duly recorded.

(c) The undivided interest in the common areas and facilities shall not be separated from the unit to which it appertains and shall be deemed conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument. (1963, c. 685, s. 6.)

CASE NOTES

Cited in Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

§ 47A-7. Common areas and facilities not subject to partition or division.

The common areas and facilities shall remain undivided and no unit owner or any other person shall bring any action for partition or division of any part thereof, unless the property has been removed from the provisions of this Article as provided in G.S. 47A-16 and 47A-25. Any covenant to the contrary shall be null and void. This restraint against partition shall not apply to the individual condominium unit. (1963, c. 685, s. 7; 1983, c. 624, s. 2.)

Legal Periodicals. — For note on direct restraints on alienation, see 48 N.C.L. Rev. 173 (1969).

§ 47A-8. Use of common areas and facilities.

Each unit owner may use the common areas and facilities in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other unit owners. (1963, c. 685, s. 8.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-9. Maintenance, repair and improvements to common areas and facilities; access to units for repairs.

The necessary work of maintenance, repair, and replacement of the common areas and facilities and the making of any additions or improvements thereto shall be carried out only as provided herein and in the bylaws. The association of unit owners shall have the irrevocable right, to be exercised by the manager or board of directors, or other managing body as provided in the bylaws, to have access to each unit from time to time during reasonable hours as may be necessary for the maintenance, repair or replacement of any of the common areas and facilities therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to another unit or units. (1963, c. 685, s. 9.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-10. Compliance with bylaws, regulations and covenants; damages; injunctions.

Each unit owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the declaration or in the deed to his unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of unit owners or, in a proper case, by an aggrieved unit owner. (1963, c. 685, s. 10.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Incorporated condominium homeowners' association lacked standing to sue in its own name to enforce various restrictions on activity at the condominiums. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

To receive preliminary injunction, plaintiff must show likelihood of success on merits and some type of irreparable harm. This standard, however, does not require showing that injury is beyond repair, but that injury is one to which complainant should not be required to submit or other party permitted to inflict. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

Decision by trial court to issue or deny injunction will be upheld if there is ample competent evidence to support decision, even though evidence may be conflicting and appellate court could substitute its own findings. Wrightsville Winds Townhouses Homeowners' Assoc. v. Miller, 100 N.C. App. 531, 397 S.E.2d 345 (1990), cert. denied, 328 N.C. 275, 400 S.E.2d 463 (1991).

§ 47A-11. Unit owners not to jeopardize safety of property or impair easements.

No unit owner shall do any work which would jeopardize the soundness or safety of the property or impair any easement or hereditament without in every such case the unanimous consent of all the other unit owners affected being first obtained. (1963, c. 685, s. 11.)

§ 47A-12. Unit owners to contribute to common expenses; distribution of common profits.

The unit owners are bound to contribute pro rata, in the percentages computed according to G.S. 47A-6 of this Article, toward the expenses of administration and of maintenance and repair of the general common areas and facilities and, in proper cases of the limited common areas and facilities, of the building and toward any other expense lawfully agreed upon. No unit owner may exempt himself from contributing toward such expense by waiver of the use or enjoyment of the common areas and facilities or by abandonment of the unit belonging to him.

Provided, however, that the common profits of the property, if any, shall be distributed among the unit owners according to the percentage of the undivided interest in the common areas and facilities. (1963, c. 685, s. 12; 1983, c. 624, s. 2.)

CASE NOTES

Purpose. — The provisions of this section are designed to protect unit owners from shouldering a disproportionate share of the maintenance expenses for common areas when other unit owners, including the developer, attempt to unilaterally exempt themselves from contributing their pro rata share of maintenance expenses. Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

Developer as Unit Owner. — Neither the definition of "unit owner" in G.S. 47A-3 nor the provisions of this section make any distinction between a developer and any other unit owner; defendant developer, as a corporation owning several units within the condominium project, qualified as a "unit owner" and was bound to contribute pro rata toward the expenses of administration and of maintenance and repair of the general common areas and facilities. Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

Developer Not Exempt. — The legislature did not intend to allow a developer, as a unit owner, to unilaterally exempt itself from the payment of its pro rata share of the maintenance expenses for the common areas. Dunes South Homeowners Ass'n v. First Flight Bldrs., Inc., 341 N.C. 125, 459 S.E.2d 477 (1995).

§ 47A-13. Declaration creating unit ownership; contents; recordation.

The declaration creating and establishing unit ownership as provided in G.S. 47A-3 of this Article, shall be recorded in the office of the county register of deeds and shall contain the following particulars:

(1) Description of the land on which the building and improvements are or are to be located.

(2) Description of the building, stating the number of stories and basements, the number of units, and the principal materials of which it is constructed.

(3) The unit designation of each unit, and a statement of its location, approximate area, number of rooms, and immediate common area to which it has access, and any other data necessary for its proper identification.

(4) Description of the general common areas and facilities and the proportionate interest of each unit owner therein.
(5) Description of the limited common areas and facilities, if any, stating what units shall share the same and in what proportion.
(6) Statement of the purpose for which the building and each of the units are intended and restricted as to use.
(7) The name of a person to receive service of process in the cases hereinafter provided, together with the residence or the place of business of such person which shall be within the city and county in which the building is located.
(8) Any further details in connection with the property which the person executing the declaration may deem desirable to set forth consistent with this Article.
(9) The method by which the declaration may be amended, consistent with the provisions of this Article. (1963, c. 685, s. 13; 1983, c. 624, s. 2.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986); Bogue Shores Homeowners Ass'n v. Town of Atl. Beach, 109 N.C. App. 549, 428 S.E.2d 258 (1993).

§ 47A-14: Repealed by Session Laws 1981, c. 527, s. 1.

Cross References. — For present provisions as to deeds conveying units, and for validation of conveyances not complying with this section, see G.S. 47A-14.1.

§ 47A-14.1. Deeds conveying units.

(a) Any conveyance of a condominium unit executed on or after October 1, 1981, which complies with the general requirements of the laws of this State concerning conveyances of real property shall be valid.

(b) All conveyances of condominium units executed before October 1, 1981, which comply with the general requirements of the laws of this State concerning conveyances of real property shall be valid even though such conveyances failed to comply with one or more of the particulars set out in former G.S. 47A-14. (1981, c. 527, ss. 2, 3.)

§ 47A-15. Plans of building to be attached to declaration; recordation; certificate of architect or engineer.

(a) There shall be attached to the declaration, at the time it is filed for record, a full and exact copy of the plans of the building, which copy of plans shall be entered of record along with the declaration. Said plans shall show graphically all particulars of the building, including, but not limited to, the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, stating the name of the building or that it has no name, area and location of the common areas and facilities affording access to each unit, and such plans shall bear the verified statement of a registered architect or licensed professional engineer certifying that it is an accurate copy of portions of the plans of the building as filed with and approved by the municipal or other governmental subdivision having jurisdiction over the issuance of permits for the construction of buildings. If such plans do not include a verified statement by such architect or engineer that such plans fully and accurately depict the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, as built, there shall be recorded prior to the first conveyance of any unit an amendment to the declaration to which shall be attached a verified statement of a registered architect or licensed professional engineer certifying that the plans theretofore filed, or being filed simultaneously with such amendment, fully depict the layout, ceiling and floor elevations, unit numbers and dimensions of the units as built. Such plans shall be kept by the register of deeds in a separate file, indexed in the same manner as a conveyance entitled to record, numbered serially in the order of receipt, each designated "Unit Ownership," with the name of the building, if any, and each containing a reference to the book and page numbers and date of the recording of the declaration.

(b) In order to be recorded, plans filed for recording pursuant to subsection (a) shall:

(1) Be reproducible plans on cloth, linen, film or other permanent material and be submitted in that form; and

(2) Have an outside marginal size of not more than 21 inches by 30 inches nor less than eight and one-half inches by 11 inches, including one and one-half inches for binding on the left margin and a one-half inch border on each of the other sides. Where size of the buildings, or suitable scale to assure legibility require, plans may be placed on two or more sheets with appropriate match lines.

(c) The fee for recording each plan sheet submitted pursuant to subsection (a) shall be as prescribed by G.S. 161-10(a)(3). (1963, c. 685, s. 15; 1981, c. 587.)

CASE NOTES

Cited in Southland Assocs. v. Peach, 61 N.C. App. 676, 301 S.E.2d 747 (1983); Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986).

§ 47A-16. Termination of unit ownership; consent of lienholders; recordation of instruments.

(a) All of the unit owners may remove a property from the provisions of this Article by an instrument to that effect, duly recorded, provided that the holders of all liens, affecting any of the units consent thereto or agree, in either case by instruments duly recorded, that their liens be transferred to the percentage of the undivided interest of the unit owner in the property as hereinafter provided.

(b) Upon removal of the property from the provisions of this Article, the property shall be deemed to be owned as tenants in common by the unit owners. The undivided interest in the property owned as tenants in common which shall appertain to each unit owner shall be the percentage of the undivided interest previously owned by such unit owner in the common areas and facilities. (1963, c. 685, s. 16; 1983, c. 624, s. 2.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464 (1986).

§ 47A-17. Termination of unit ownership; no bar to reestablishment.

The removal provided for in G.S. 47A-16 shall in no way bar the subsequent resubmission of the property to the provisions of this Article. (1963, c. 685, s. 17; 1983, c. 624, s. 2; 2002-159, s. 10.)

§ 47A-18. Bylaws; annexed to declaration; amendments.

The administration of every property shall be governed by bylaws, a true copy of which shall be annexed to the declaration. No modification of or amendment to the bylaws shall be valid, unless set forth in an amendment to the declaration and such amendment is duly recorded. (1963, c. 685, s. 18; 1973, c. 734.)

CASE NOTES

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 47A-19. Bylaws; contents.

The bylaws shall provide for the following:

(1) Form of administration, indicating whether this shall be in charge of an administrator, manager, or of a board of directors or board of administration, independent corporate body, or otherwise, and specifying the powers, manner of removal, and, where proper, the compensation thereof.

(2) Method of calling or summoning the unit owners to assemble; what percentage, if other than a majority of unit owners, shall constitute a quorum; who is to preside over the meeting and who will keep the minute book wherein the resolutions shall be recorded.

(3) Maintenance, repair and replacement of the common areas and facilities and payments therefor, including the method of approving payment vouchers.

(4) Manner of collecting from the unit owners their share of the common expenses.

(5) Designation and removal of personnel necessary for the maintenance, repair and replacement of the common areas and facilities.

(6) Method of adopting and of amending administrative rules and regulations governing the details of the operation and use of the common areas and facilities.

(7) Such restrictions on and requirements respecting the use and maintenance of the units and the use of the common areas and facilities, not set forth in the declaration, as are designed to prevent unreasonable interference with the use of their respective units and of the common areas and facilities by the several unit owners.

(8) The percentage of votes required to amend the bylaws, and a provision that such amendment shall not become operative unless set forth in an amended declaration and duly recorded.

(9) A provision that all unit owners shall be bound to abide by any amendment upon the same being passed and duly set forth in an amended declaration, duly recorded.

(10) Other provisions as may be deemed necessary for the administration of the property consistent with this Article. (1963, c. 685, s. 19; 1983, c. 624, s. 2.)

Legal Periodicals. — For article discussing the problem of potentially unlimited liability of a condominium owner for damages resulting from incidents in the common areas of the condominium, see 50 N.C.L. Rev. 1 (1971).

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

The bylaws must contain any restrictions, not contained in the declaration, respecting use and maintenance to prevent unreasonable interference with the unit owners' property. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

§ 47A-20. Records of receipts and expenditures; availability for examination; annual audit.

The manager or board of directors, or other form of administration provided in the bylaws, as the case may be, shall keep detailed, accurate records in chronological order of the receipts and expenditures affecting the common areas and facilities, specifying and identifying the maintenance and repair expenses of the common areas and facilities and any other expense incurred. Both said book and the vouchers accrediting the entries thereupon shall be available for examination by all the unit owners, their duly authorized agents or attorneys, at convenient hours on working days that shall be set and announced for general knowledge. All books and records shall be kept in accordance with good and accepted accounting practices and an outside audit shall be made at least once a year. (1963, c. 685, s. 20.)

§ 47A-21. Units taxed separately.

Each condominium unit and its percentage of undivided interest in the common areas and facilities shall be deemed to be a parcel and shall be separately assessed and taxed by each assessing unit and special district for all types of taxes authorized by law including but not limited to special ad valorem levies and special assessments. Each unit holder shall be liable solely for the amount of taxes against his individual unit and shall not be affected by the consequences resulting from the tax delinquency of other unit holders. Neither the building, the property nor any of the common areas and facilities shall be deemed to be a parcel. (1963, c. 685, s. 21.)

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 47A-22. Liens for unpaid common expenses; recordation; priorities; foreclosure.

(a) Any sum assessed by the association of unit owners for the share of the common expenses chargeable to any unit, and remaining unpaid for a period of 30 days or longer, shall constitute a lien on such unit when filed of record in the office of the clerk of superior court of the county in which the property is located in the manner provided therefor by Article 8 of Chapter 44 of the General Statutes. Upon the same being duly filed, such lien shall be prior to all other liens except the following:

(1) Assessments, liens and charges for real estate taxes due and unpaid on the unit;

(2) All sums unpaid on deeds of trust, mortgages and other encumbrances duly of record against the unit prior to the docketing of the aforesaid lien.

(3) Materialmen's and mechanics' liens.

(b) Provided the same is duly filed in accordance with the provisions contained in subsection (a) of this section, a lien created by nonpayment of a unit owner's pro rata share of the common expenses may be foreclosed by suit by the manager or board of directors, acting on behalf of the unit owners, in like manner as a deed of trust or mortgage of real property. In any such foreclosure the unit owner shall be required to pay a reasonable rental for the unit, if so provided in the bylaws, and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect the same. The manager or board of directors, acting on behalf of the unit owners shall have power, unless prohibited by the declaration, to bid in the unit at foreclosure sale, and to acquire and hold, lease, mortgage and convey the same. A suit to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the same.

(c) Where the mortgagee of a first mortgage of record or other purchaser of a unit obtains title to the unit as a result of foreclosure of the first mortgage, such purchaser, his successors and assigns, shall not be liable for the share of the common expenses or assessments by the association of unit owners chargeable to such unit which became due prior to the acquisition of title to such unit by such purchaser. Such unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the unit owners including such purchaser, his successors and assigns. (1963, c. 685, s. 22.)

Editor's Note. — Article 8 of Chapter 44, referred to in this section, has been in large part repealed. Of the two remaining sections, G.S. 44-38 provides for filing a claim of lien where labor has been performed or materials furnished. For more recent provisions as to filing claims of statutory liens against real property, see G.S. 44A-12.

§ 47A-23. Liability of grantor and grantee of unit for unpaid common expenses.

The grantee of a unit shall be jointly and severally liable with the grantor for all unpaid assessments against the latter for his proportionate share of the common expenses up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor. However, any such grantee shall be entitled to a statement from the manager or board of directors, as the case may be, setting forth the amount of the unpaid assessments against the grantor and such grantee shall not be liable for, nor shall the unit conveyed be subject to a lien for, any unpaid assessments in excess of the amount therein set forth. (1963, c. 685, s. 23.)

§ 47A-24. Insurance on property; right to insure units.

The manager of the board of directors, or other managing body, if required by the declaration, bylaws or by a majority of the unit owners, shall have the authority to, and shall, obtain insurance for the property against loss or damage by fire and such other hazards under such terms and for such amounts as shall be required or requested. Such insurance coverage shall be written on the property in the name of such manager or of the board of directors of the association of unit owners, as trustee for each of the unit owners in the percentages established in the declaration. The trustee so named shall have the authority on behalf of the unit owners to deal with the insurer in the settlement of claims. The premiums for such insurance on the building shall be deemed common expenses. Provision for such insurance shall be without prejudice to the right of each unit owner to insure his own unit for his benefit. (1963, c. 685, s. 24.)

§ 47A-25. Damage to or destruction of property; repair or restoration; partition sale on resolution not to restore.

Except as hereinafter provided, damage to or destruction of the building shall be promptly repaired and restored by the manager or board of directors, or other managing body, using the proceeds of insurance on the building for that purpose, and unit owners shall be liable for assessment for any deficiency; provided, however, if the building shall be more than two-thirds destroyed by fire or other disaster and the owners of three-fourths of the building duly resolve not to proceed with repair or restoration, then and in that event:

(1) The property shall be deemed to be owned as tenants in common by the unit owners;

(2) The undivided interest in the property owned by the unit owners as tenants in common which shall appertain to each unit owner shall be the percentage of undivided interest previously owned by such owner in the common areas and facilities;

(3) Any liens affecting any of the units shall be deemed to be transferred in accordance with the existing priorities to the percentage of the undivided interest of the unit owner in the property as provided herein; and

(4) The property shall be subject to an action for sale for partition at the suit of any unit owner, in which event the net proceeds of sale, together with the net proceeds of insurance policies, if any, shall be considered as one fund and shall be divided among all the unit owners in proportion to their respective undivided ownership of the common areas and facilities, after first paying off, out of the respective shares of unit owners, to the extent sufficient for that purpose, all liens on the unit of each unit owner. (1963, c. 685, s. 25.)

§ 47A-26. Actions as to common interests; service of process on designated agent; exhaustion of remedies against association.

Without limiting the rights of any unit owner, actions may be brought by the manager or board of directors, in either case in the discretion of the board of directors, on behalf of two or more of the unit owners, as their respective interests may appear, with respect to any course of action relating to the common areas and facilities or more than one unit. Service of process on two or more unit owners in any action relating to the common areas and facilities or more than one unit may be made on the person designated in the declaration to receive service of process. Any individual, corporation, partnership, association, trustee, or other legal entity claiming damages for injuries without any participation by a unit owner shall first exhaust all available remedies against the association of unit owners prior to proceeding against any unit owner individually. (1963, c. 685, s. 26.)

Legal Periodicals. — For article discussing the problem of potentially unlimited liability of a condominium owner for damages resulting from incidents in the common areas of the condominium, see 50 N.C.L. Rev. 1 (1971).

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Cited in Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996), rev'd, 346 N.C. 170, 484 S.E.2d 527 (1997).

§ 47A-27. Zoning regulations governing condominium projects.

Whenever they deem it proper, the planning and zoning commission of any county or municipality may adopt supplemental rules and regulations governing a condominium project established under this Article in order to implement this program. (1963, c. 685, s. 27; 1983, c. 624, s. 2.)

§ 47A-28. Persons subject to Article, declaration and bylaws; effect of decisions of association of unit owners.

(a) All unit owners, tenants of such owners, employees of owners and tenants, or any other persons that may in any manner use the property or any part thereof submitted to the provisions of this Article, shall be subject to this Article and to the declaration and bylaws of the association of unit owners adopted pursuant to the provisions of this Article.

(b) All agreements, decisions and determinations lawfully made by the association of unit owners in accordance with the voting percentages established in the Article, declaration or bylaws, shall be deemed to be binding on all unit owners. (1963, c. 685, s. 28; 1983, c. 624, s. 2.)

CASE NOTES

Unrecorded regulations of homeowners' association, especially restrictions as intrusive as those barring minor children and pickup trucks, would appear to lie outside the enforceable scope of the statute. Laurel Park Villas Homeowners Ass'n v. Hodges, 82 N.C. App. 141, 345 S.E.2d 464, cert. denied, 318 N.C. 507, 349 S.E.2d 861 (1986).

A duly adopted declaration amendment that restricts the occupancy or leasing of units in a condominium complex is binding upon owners who bought their units before the amendment was adopted. McElveen-Hunter v. Fountain Manor Ass'n, 96 N.C. App. 627, 386 S.E.2d 435 (1989), aff'd, 328 N.C. 84, 399 S.E.2d 112 (1991).

Standing to Challenge Amendment. — Limited liability company that filed a declaratory judgment action against a homeowners association alleging tortious interference with contractual relations lacked standing; the company had no legally protected right to challenge the amendment passed by the association under G.S. 47A-28(b) barring unit owners from changing their units into timeshares, and that amendment was binding upon all unit owners.

Beachcomber Props., L.L.C. v. Station One, Inc., 169 N.C. App. 820, 611 S.E.2d 191, 2005 N.C. App. LEXIS 798 (2005).

§§ 47A-29 through 47A-33: Reserved for future codification purposes.

ARTICLE 2.

Renters in Conversion Buildings Protected.

§ 47A-34. Definitions.

The definitions set out in G.S. 47A-3 also apply to this Article. As used in this Article, unless the context requires otherwise, the term:

(1) "Conversion building" means a building that at any time before creation of the condominium was occupied wholly or partially by persons other than purchasers and persons who occupy with the consent of purchasers.

(2) "Declarant" means any person or group of persons acting in concert who, as part of a common promotional plan, offers to dispose of his or its interest in a unit not previously disposed of.

(3) "Dispose" or "disposition" means a voluntary transfer to a purchaser of any legal or equitable interest in a unit, but does not include the transfer or release of a security interest.

(4) "Offering" means any advertisement, inducement, solicitation, or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation.

(5) "Residential purposes" means use for dwelling or recreational purposes, or both. (1983, c. 624, s. 1.)

Legal Periodicals. — For comment on conversion of rental units into condominiums in light of North Carolina's new Article 2 of the Unit Ownership Act, see 20 Wake Forest L. Rev. 437 (1984).

§ 47A-35. Offering statement.

An offering statement must contain or fully and accurately disclose:

(1) The name and principal address of the declarant;

(2) A general description of the condominium including, to the extent possible, a listing of any improvements and amenities that declarant anticipates including in the condominium, and declarant's schedule of completion of construction on buildings;

(3) The terms and significant limitations of any warranties provided by the declarant; and

(4) Any other information made available to the general public in connection with the offering. (1983, c. 624, s. 1.)

§ 47A-36. Time to vacate; right of first refusal to purchase.

(a) A declarant of a condominium containing conversion buildings, and any person in the business of selling real estate for his own account who intends to offer units in such a condominium, shall provide each of the residential tenants and any residential subtenant in possession of a portion of a conversion building notice of the conversion as well as an offering statement as provided in G.S. 47A-35 no later than 90 days before the tenant or subtenant are required to vacate. The notice shall set forth generally the rights of tenants and subtenants under this section and section (b) of G.S. 47A-36. This notice shall be hand-delivered to the unit or mailed by prepaid United States mail to the tenant and subtenant at the address of the unit or any other mailing address provided by a tenant. No tenant or subtenant may be required to vacate upon less than 90 days' notice, except by reason of nonpayment of rent, waste, conduct that disturbs other tenants' peaceful enjoyment of the premises or breach of lease giving rise to the right of repossession of the unit by the declarant, and the terms of the tenancy may not be altered during that period. Failure to give notice as required by this section is a defense to an action for possession.

(b) For 30 days after the delivery of the notice described in subsection (a), the person required to give the notice shall offer to convey each unit or proposed unit occupied for residential use to the tenant who leases that unit. The tenant can accept an offer under this section by entering into an agreement to purchase within the 30-day period. The tenant shall be allowed a 30-day period after acceptance in which to complete a purchase transaction. This subsection does not apply to any unit in a conversion building if that unit will be restricted exclusively to nonresidential use or the boundaries of the converted unit do not substantially conform to the dimensions of the residential unit before conversion.

(c) If a declarant, in violation of subsection (b), conveys a unit to a purchaser, recordation of the deed conveying the unit extinguishes any right a tenant may have under subsection (b) to purchase that unit, but does not affect any other right of a tenant. (1983, c. 624, s. 1.)

§ 47A-37. Applicability.

This Article applies to condominiums of five or more units created on or after January 1, 1984. (1983, c. 624, s. 1.)

Chapter 47B.

Real Property Marketable Title Act.

Sec.
47B-1. Declaration of policy and statement of purpose.
47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.
47B-3. Exceptions.
47B-4. Preservation by notice; contents; recording; indexing.
47B-5. Extension of time for registering notice of claims which Chapter would otherwise bar.
47B-6. Registering false claim.
47B-7. Limitations of actions and recording acts.
47B-8. Definitions.
47B-9. Chapter to be liberally construed.

§ 47B-1. Declaration of policy and statement of purpose.

It is hereby declared as a matter of public policy by the General Assembly of the State of North Carolina that:

(1) Land is a basic resource of the people of the State of North Carolina and should be made freely alienable and marketable so far as is practicable.

(2) Nonpossessory interests in real property, obsolete restrictions and technical defects in titles which have been placed on the real property records at remote times in the past often constitute unreasonable restraints on the alienation and marketability of real property.

(3) Such interests and defects are prolific producers of litigation to clear and quiet titles which cause delays in real property transactions and fetter the marketability of real property.

(4) Real property transfers should be possible with economy and expediency. The status and security of recorded real property titles should be determinable from an examination of recent records only.

It is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished. (1973, c. 255, s. 1.)

Legal Periodicals. — For survey of 1976 caselaw on property, see 55 N.C.L. Rev. 1069 (1977).

For article, "The North Carolina Historic Preservation and Conservation Agreements Act: Assessment and Implications for Historic Preservation," see 11 N.C. Cent. L.J. 362 (1980).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Purpose. — This Chapter was enacted in an effort to expedite the alienation and marketability of real property. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

This Chapter does not affect the presumption in favor of the State set forth in § 146-79, relating to land controversies wherein the State is a party. Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976).

Extinguishment of Reverter Right. — Exception under G.S. 47B-3(6) to the extinguishment of rights after a 30-year period set forth in the Real Property Marketable Title Act in 1973 did not apply to the purported property interests of landowners that had property adjacent to the railroad's right of way and who claimed to have a possibility of a reverter to the right of way, and any right of reverter was properly considered as extinguished. King Assocs., LLP v. Bechtler Dev. Corp., 179 N.C. App. 88, 632 S.E.2d 243, 2006 N.C. App. LEXIS 1627 (2006).

Possession of Real Property by Town. — Town's paving of an alley, maintenance of the utilities underneath the alley, and provision of municipal services to the alley were sufficient to establish actual possession of the alley; the fact that the town accepted dedication of the alley via use and control necessarily led to the conclusion that the town was in open and actual possession of the road and its interest in the alley could not be defeated by the North Carolina Marketable Title Act, G.S. 47B-1 et seq. Kraft v. Town of Mt. Olive, — N.C. App. —, 645 S.E.2d 132, 2007 N.C. App. LEXIS 1096 (2007).

Applied in Hill v. Taylor, 174 N.C. App. 415, 621 S.E.2d 284, 2005 N.C. App. LEXIS 2474 (2005), cert. denied, — N.C. —, 629 S.E.2d 852 (2006).

Cited in Lea v. Dudley, 20 N.C. App. 702, 202 S.E.2d 799 (1974); Pugh v. Davenport, 60 N.C. App. 397, 299 S.E.2d 230 (1983); Whatley v. Whatley, 126 N.C. App. 193, 484 S.E.2d 420 (1997); Merrick v. Peterson, 143 N.C. App. 656, 548 S.E.2d 171, 2001 N.C. App. LEXIS 342 (2001).

§ 47B-2. Marketable record title to estate in real property; 30-year unbroken chain of title of record; effect of marketable title.

(a) Any person having the legal capacity to own real property in this State, who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a marketable record title to such estate in real property.

(b) A person has an estate in real property of record for 30 years or more when the public records disclose a title transaction affecting the title to the real property which has been of record for not less than 30 years purporting to create such estate either in:

(1) The person claiming such estate; or

(2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate;

with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.

(c) Subject to the matters stated in G.S. 47B-3, such marketable record title shall be free and clear of all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30-year period. All such rights, estates, interests, claims or charges, however denominated, whether such rights, estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

(d) In every action for the recovery of real property, to quiet title, or to recover damages for trespass, the establishment of a marketable record title in any person pursuant to this statute shall be prima facie evidence that such person owns title to the real property described in his record chain of title. (1973, c. 255, s. 1; c. 881; 1981, c. 682, s. 11.)

Legal Periodicals. — For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

This section makes marketable record title subject to the matters stated in § 47B-3. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

What Constitutes Marketable Title. — Under this Chapter, if a person or those under whom he claims has a record title to real property of at least 30 years duration and there is nothing of record which by a title search of that chain would show a defect in the title, such a person has a marketable title in the property. Heath v. Turner, 58 N.C. App. 708, 294 S.E.2d 392 (1982), rev'd on other grounds, 309 N.C. 483, 308 S.E.2d 244 (1983).

In order to prove title to land under the Real Property Marketable Title Act, defendant had to establish: (1) that defendant, alone or together with his predecessors in title, was vested with an estate in real property which had been of record for at least thirty years; (2) the public record showed a title transaction at least thirty years old which purported to vest title in defendant or some other person from whom, by one or more title transactions, the property had passed to defendant; and (3) that nothing appeared of record to divest defendant of the estate. Beam v. Kerlee, 120 N.C. App. 203, 461 S.E.2d 911 (1995).

Establishing Title. — In order to establish title under the Real Property Marketable Title Act, a person must establish that (1) he alone or together with his predecessors in title, was vested with an estate in real property which had been of record for at least 30 years; (2) the public record showed a title transaction at least 30 years old which purported to vest title in him or some other person from whom, by one or more title transactions, the property had passed to him; and (3) that nothing appeared of record to divest him of that estate. Haw River Land & Timber v. Lawyers Title Ins., 152 F.3d 275 (4th Cir. 1998).

Trial court erred by applying G.S. 47B-3(3) in action to quiet title and by granting a directed verdict in favor of the defendant possessor where the claimants established prima facie ownership by presenting exhibits of plats showing their respective chains of title of more than 30 years from a grantor. The fact that the defendant was in fact in possession was not enough to resolve the factual dispute as the burden shifted to the defendant to defeat the plaintiffs' claims. Hill v. Taylor, 174 N.C. App. 415, 621 S.E.2d 284, 2005 N.C. App. LEXIS 2474 (2005), cert. denied, — N.C. —, 629 S.E.2d 852 (2006).

Effect of Subsection (c). — Under subsection (c) of this section, a person is divested of his interest where it depends on a title transaction that occurred prior to the 30-year period. Heath v. Turner, 58 N.C. App. 708, 294 S.E.2d 392 (1982), rev'd on other grounds, 309 N.C. 483, 308 S.E.2d 244 (1983).

Applied in Brothers v. Howard, 57 N.C. App. 689, 292 S.E.2d 139 (1982); Harris v. Walden, 70 N.C. App. 616, 320 S.E.2d 435 (1984); Town of Winton v. Scott, 80 N.C. App. 409, 342 S.E.2d 560 (1986); Younce v. United States, 661 F. Supp. 482 (W.D.N.C. 1987); Canady v. Cliff, 93 N.C. App. 50, 376 S.E.2d 505 (1989).

Cited in Pugh v. Davenport, 60 N.C. App. 397, 299 S.E.2d 230 (1983); Pugh v. Davenport, 309 N.C. 628, 308 S.E.2d 292 (1983); Harris v. Walden, 314 N.C. 284, 333 S.E.2d 254 (1985); Snover v. Grabenstein, 106 N.C. App. 453, 417 S.E.2d 284 (1992).

§ 47B-3. Exceptions.

Such marketable record title shall not affect or extinguish the following rights:

(1) Rights, estates, interests, claims or charges disclosed by and defects inherent in the muniments of title of which such 30-year chain of record title is formed, provided, however, that a general reference in any of such muniments to rights, estates, interests, claims or charges created prior to such 30-year period shall not be sufficient to preserve them unless specific identification by reference to book and page or record be made therein to a recorded title transaction which imposed, transferred or continued such rights, estates, interests, claims or charges.

(2) Rights, estates, interests, claims or charges preserved by the filing of a proper notice in accordance with the provisions of G.S. 47B-4.

(3) Rights, estates, interests, claims or charges of any person who is in present, actual and open possession of the real property so long as such person is in such possession.

(4) Rights of any person who likewise has a marketable record title as defined in G.S. 47B-2 and who is listed as the owner of such real property on the tax books of the county in which the real property is located at the time that marketability is to be established.

(5) Rights of any owners of mineral rights.

(6) Rights-of-way of any railroad company (irrespective of nature of its title or interest therein whether fee, easement, or other quality) and all real estate other than right-of-way property of a railroad company in actual use for railroad purposes or being held or retained for prospective future use for railroad operational purposes. The use by any railroad company or the holding for future use of any part of a particular tract or parcel of right-of-way or non-right-of-way property shall preserve the interest of the railway company in the whole of such particular tract or parcel. Operational use is defined as railroad use requiring proximity and access to railroad tracts. Nothing in this section shall be construed as repealing G.S. 1-44.1.

(7) Rights, interests, or servitudes in the nature of easements, rights-of-way or terminal facilities of any railroad (company or corporation) obtained by the terms of its charter or through any other congressional or legislative grant not otherwise extinguished.

(8) Rights of any person who has an easement or interest in the nature of an easement, whether recorded or unrecorded and whether possessory or nonpossessory, when such easement or interest in the nature of an easement is for any one of the following purposes:

  a. Flowage, flooding or impounding of water, provided that the watercourse or body of water, which such easement or interest in the nature of an easement serves, continues to exist.

  b. Placing and maintaining lines, pipes, cables, conduits or other appurtenances which are either aboveground, underground or on the surface and which are useful in the operation of any water, gas, natural gas, petroleum products, or electric generation, transmission or distribution system, or any sewage collection or disposal system, or any telephone, telegraph or other communications system, or any surface water drainage or disposal system whether or not the existence of the same is clearly observable by physical evidence of its use.

  c. Conserving land or water areas pursuant to a conservation agreement or preserving a structure or site pursuant to a preservation agreement under Article 4 of Chapter 121 of the General Statutes.

(9) Rights, titles or interests of the United States to the extent that the extinguishment of such rights, titles or interest is prohibited by the laws of the United States.

(10) Rights, estates, interests, claims or charges created subsequent to the beginning of such 30-year period.

(11) Deeds of trust, mortgages and security instruments or security agreements duly recorded and not otherwise unenforceable.

(12) Rights, estates, interests, claims or charges with respect to any real property registered under the Torrens Law as provided by Chapter 43 of the General Statutes of North Carolina.

(13) Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use. Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B. (1973, c. 255, s. 1; 1995, c. 443, s. 3.)

Legal Periodicals. — For note discussing effect of exceptions to the 30-year limitation, see 52 N.C.L. Rev. 211 (1973).

For survey of 1976 caselaw on property, see 55 N.C.L. Rev. 1069 (1977).

For article, "The North Carolina Historic Preservation and Conservation Agreements Act: Assessment and Implications for Historic Preservation," see 11 N.C. Cent. L.J. 362 (1980).

For article, "The Battle to Preserve North Carolina's Estuarine Marshes: The 1985 Legislations, Private Claims to Estuarine Marshes, Denial of Permits to Fill, and the Public Trust," see 64 N.C.L. Rev. 565 (1986).

CASE NOTES

Section 47B-2 makes marketable record title subject to the matters stated in this section. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Section Serves to Protect Against Extinguishment of Certain Rights. — The exceptions listed under this section do not serve as a sword to establish title in the party claiming a marketable title under the act, but instead serve as a shield to protect from extinguishment the rights therein excepted. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Enumeration of exceptions in this section does not determine priority of one exception over the other. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

There is no requirement that a person in possession of property hold it by adverse possession in order for his title to be perfected under this Chapter. Heath v. Turner, 58 N.C. App. 708, 294 S.E.2d 392 (1982), rev'd on other grounds, 309 N.C. 483, 308 S.E.2d 244 (1983).

Effect of Defendants' Possession on Rights of Ownership. — Whatever rights the defendants have because they are in possession of property are not taken away by a competing marketable record title, but the mere fact of possession by the defendants does not alone establish their ownership of the land. Possession only protects whatever ownership the defendants already have on the date that marketability is to be determined. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Trial court erred by applying G.S. 47B-3(3) in action to quiet title and by granting a directed verdict in favor of the defendant possessor where the claimants established prima facie ownership by presenting exhibits of plats showing their respective chains of title of more than 30 years from a grantor. The fact that the defendant was in fact in possession was not enough to resolve the factual dispute as the burden shifted to the defendant to defeat the plaintiffs' claims. Hill v. Taylor, 174 N.C. App. 415, 621 S.E.2d 284, 2005 N.C. App. LEXIS 2474 (2005), cert. denied, — N.C. —, 629 S.E.2d 852 (2006).

Title Acquired by Adverse Possession Protected. — Where the defendants had acquired title to an undivided interest by adverse possession when the action was filed, their possession of the property on the date that marketability was to be determined (the date the action was filed) protected their rights as owners of the undivided interest. Thus, even if the plaintiffs had a marketable record title on that date under this Chapter, it could not affect or extinguish the defendants' title previously acquired by adverse possession because that title was an interest protected by subdivision (3) of this section. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Title Acquired by Town Through Dedication. — Town's paving of an alley, maintenance of the utilities underneath the alley, and provision of municipal services to the alley were sufficient to establish actual possession of the alley; the fact that the town accepted dedication of the alley via use and control necessarily led to the conclusion that the town was in open and actual possession of the road and its interest in the alley could not be defeated by the North Carolina Marketable Title Act, G.S. 47B-1 et seq. Kraft v. Town of Mt. Olive, — N.C. App. —, 645 S.E.2d 132, 2007 N.C. App. LEXIS 1096 (2007).

Defendants' Right as Cotenants Protected. — Possession by defendants on the crucial date would not give defendants title as to the plaintiffs' undivided interest in the property, but their right to possession of the property as cotenants, prior to partition or sale, would be protected, under the general rule that each cotenant has the right to enter upon the land and to enjoy it jointly with the other cotenants. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Reverter Interest in a Railroad Right-of-Way. — Exception under G.S. 47B-3(6) to the extinguishment of rights after a 30-year period set forth in the Real Property Marketable Title Act in 1973 did not apply to the purported property interests of landowners that had property adjacent to the railroad's right of way and who claimed to have a possibility of a reverter to the right of way. King Assocs., LLP v. Bechtler Dev. Corp., 179 N.C. App. 88, 632 S.E.2d 243, 2006 N.C. App. LEXIS 1627 (2006).

Where plaintiff and defendant both base their claims on recorded titles, each dating back more than 30 years, and defendant has been in possession for more than 30 years, plaintiff's record title does not affect defendant's marketable title. Heath v. Turner, 58 N.C. App. 708, 294 S.E.2d 392 (1982), rev'd on other grounds, 309 N.C. 483, 308 S.E.2d 244 (1983).

Subdivision (10) is similar, though not identical, to § 2(d) of the Model Marketable Title Act. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Possession Protects "Interest" or "Estate" and "Right" to Possession. — Defendants' possession of the property at the time of commencement of the lawsuit protects, as against a competing marketable title, both their "interest" or "estate" in the property, that is, the undivided interest, and their "right" to possession of the property, but does not give them any title which they do not already have. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Vested remainder is a "right," "estate," "interest" and "claim" under subdivision (10) of this section. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

The "beginning of the 30-year period" in subdivision (10) of this section is the date of the title transaction purporting to create the interest claimed by the defendants, upon which they rely as the basis for the marketability of their title, and which was the most recent title transaction as of a date 30 years prior to the time when marketability is to be determined. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Competing Title Not Extinguished If Created by Transaction Recorded After Beginning of Period. — Even though a party establishes a marketable record title to the property in question, it cannot extinguish a competing independent title if that competing title is created by a title transaction recorded after the beginning date for the establishment of the marketable record title. Heath v. Turner, 309 N.C. 483, 308 S.E.2d 244 (1983).

Applied in Taylor v. Johnston, 289 N.C. 690, 224 S.E.2d 567 (1976); Town of Winton v. Scott, 80 N.C. App. 409, 342 S.E.2d 560 (1986).

Cited in Brothers v. Howard, 57 N.C. App. 689, 292 S.E.2d 139 (1982).

§ 47B-4. Preservation by notice; contents; recording; indexing.

(a) Any person claiming a right, estate, interest or charge which would be extinguished by this Chapter may preserve the same by registering within such 30-year period a notice in writing, duly acknowledged, in the office of the register of deeds for the county in which the real property is situated, setting forth the nature of such claim, which notice shall have the effect of preserving such claim for a period of not longer than 30 years after registering the same unless again registered as required herein. No disability or lack of knowledge of any kind on the part of any person shall delay the commencement of or suspend the running of said 30-year period. Such notice may be registered by the claimant or by any other person acting on behalf of any claimant who is

(1) Under a disability;
(2) Unable to assert a claim on his behalf; or
(3) One of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(b) To be effective and to be entitled to registration, such notice shall contain an accurate and full description of all real property affected by such notice, which description shall be set forth in particular terms and not be by general reference; but if such claim is founded upon a recorded instrument, then the description in such notice may be the same as that contained in the recorded instrument. Such notice shall also contain the name of any record owner of the real property at the time the notice is registered and a statement of the claim showing the nature, description and extent of such claim. The register of deeds of each county shall accept all such notices presented to him which are duly acknowledged and certified for recordation and shall enter and record full copies thereof in the same way that deeds and other instruments are recorded, and each register of deeds shall be entitled to charge the same fees for the recording thereof as are charged for the recording of deeds. In indexing such notices in his office each register of deeds shall enter such notices under the grantee indexes of deeds under the names of persons on whose behalf such notices are executed and registered and under the grantor indexes of deeds under the names of the record owners of the possessory estates in the real property to be affected against whom the claim is to be preserved at the time of the registration. (1973, c. 255, s. 1.)

§ 47B-5. Extension of time for registering notice of claims which Chapter would otherwise bar.

If the 30-year period specified in this Chapter shall have expired prior to October 1, 1973, no right, estate, interest, claim or charge shall be barred by G.S. 47B-2 until October 1, 1976, and any right, estate, interest, claim or charge that would otherwise be barred by G.S. 47B-2 may be preserved and kept effective by the registration of a notice of claim as set forth in G.S. 47B-4 of this Chapter prior to October 1, 1976. (1973, c. 255, s. 1.)

CASE NOTES

Cited in King Assocs., LLP v. Bechtler Dev. Corp., 179 N.C. App. 88, 632 S.E.2d 243, 2006 N.C. App. LEXIS 1627 (2006).

§ 47B-6. Registering false claim.

No person shall use the privilege of registering notices hereunder for the purpose of asserting false or fictitious claims to real property; and in any action relating thereto if the court shall find that any person has intentionally registered a false or fictitious claim, the court may award to the prevailing party all costs incurred by him in such action, including a reasonable attorney's fee, and in addition thereto may award to the prevailing party treble the damages that he may have sustained as a result of the registration of such notice of claim. (1973, c. 255, s. 1.)

§ 47B-7. Limitations of actions and recording acts.

Nothing contained in this Chapter shall be construed to extend the period for the bringing of an action or for the doing of any other required act under the statutes of limitations, nor, except as herein specifically provided, to affect the operation of any statutes governing the effect of the registering or the failure to register any instrument affecting real property. (1973, c. 255, s. 1.)

§ 47B-8. Definitions.

As used in this Chapter:

(1) The term "person" denotes singular or plural, natural or corporate, private or governmental, including the State and any political subdivision or agency thereof, and a partnership, unincorporated association, or other entity capable of owning an interest in real property.

(2) The term "title transaction" means any transaction affecting title to any interest in real property, including but not limited to title by will or descent, title by tax deed, or by trustee's, referee's, commissioner's, guardian's, executor's, administrator's, or sheriff's deed, contract, lease or reservation, or judgment or order of any court, as well as warranty deed, quitclaim deed, or mortgage. (1973, c. 255, s. 1.)

CASE NOTES

Taking a vested remainder in fee by descent with possession postponed constitutes a "title transaction." Heath v. Turner, 58 N.C. App. 708, 294 S.E.2d 392 (1982), rev'd on other grounds, 309 N.C. 483, 308 S.E.2d 244 (1983).

§ 47B-9. Chapter to be liberally construed.

This Chapter shall be liberally construed to effect the legislative purpose of simplifying and facilitating real property title transactions by allowing persons to rely on a record chain of title of 30 years as described in G.S. 47B-2, subject only to such limitations as appear in G.S. 47B-3. (1973, c. 255, s. 1.)

CASE NOTES

Cited in Pugh v. Davenport, 60 N.C. App. 397, 299 S.E.2d 230 (1983).

Chapter 47C.

North Carolina Condominium Act.

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Management of the Condominium.

47C-3-101. Organization of unit owners' association.
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Article 4.

Protection of Purchasers.

47C-4-101. Applicability; waiver.
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NORTH CAROLINA COMMENT

The revision of the condominium statutes of North Carolina was based upon the Uniform Condominium Act (1980) and the specific comments that follow will indicate how the North Carolina Act differs from the Uniform Act. A need for a revision of the previous "first generation" North Carolina statute was evident because that statute did not reflect the actual day to day experience of those who have contact with the condominium form of ownership. Specifically, the previous statute did not adequately address: building condominiums in stages; the important period of transition between the developer control and control by the owners association; the relationship between the owners association and the individual owners; the termination of a condominium; and, consumer protection for purchasers. The revision provides guidelines in all of the preceding areas and provides additional guidance in areas that were addressed by the previous statute. Sections 1-110 through 1-114 (standard provisions in all Uniform Acts) were deleted as surplusage in North Carolina. Section 2-119 relating to the rights of secured creditors was also deleted as unnecessary in light of the protection accorded secured creditors under North Carolina law. Section 4-112 concerning the right of tenants to notice and to purchase units in conversion condominiums was deleted because of inconsistencies with the provisions of G.S. 47A-36 enacted in 1983. As used in this Commentary the term "Commission" refers to the North Carolina General Statutes Commission.

Editor's Note. — The Official Commentary to the Uniform Condominium Act has been printed through the permission of the National Conference of Commissioners on Uniform State Laws, and copies of the Uniform Condominium Act, with Commentary, may be ordered from them at a cost of $4.00 at 676 North St. Clair, Chicago, Illinois 60611, (312) 915-0195.

ARTICLE 1.

General Provisions.

§ 47C-1-101. Short title.

This chapter shall be known and may be cited as the North Carolina Condominium Act. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

Self-explanatory.

CASE NOTES

Cited in Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996), rev'd, 346 N.C. 170, 484 S.E.2d 527 (1997); Brookwood Unit Ownership Ass'n v. Delon, 124 N.C. App. 446, 477 S.E.2d 225 (1996).

§ 47C-1-102. Applicability.

(a) This Chapter applies to all condominiums created within this State after October 1, 1986. G.S. 47C-1-105 (Separate Titles and Taxation), 47C-1-106 (Applicability of Local Ordinances, Regulations, and Building Codes), 47C-1-107 (Eminent Domain), 47C-2-103 (Construction and Validity of Declaration and Bylaws), 47C-2-104 (Description of Units), 47C-2-121 (Merger or Consolidation of Condominiums), 47C-3-102(a)(1) through (6) and (11) through (16)(Powers of Unit Owners' Association), 47C-3-103 (Executive board members and officers), 47C-3-107.1 (Procedures for fines and suspension of condominium privileges or services), 47C-3-108 (Meetings), 47C-3-111 (Tort and Contract Liability), 47C-3-112 (Conveyance or Encumbrance of Common Elements), 47C-3-116 (Lien for Assessments), 47C-3-118 (Association Records), 47C-3-121 (American and State flags and political sign displays), and 47C-4-117 (Effect of Violation on Rights of Action; Attorney's Fees), and G.S. 47C-1-103 (Definitions), to the extent necessary in construing any of those sections, apply to all condominiums created in this State on or before October 1, 1986, unless the declaration expressly provides to the contrary. Those sections apply only with respect to events and circumstances occurring after October 1, 1986, and do not invalidate existing provisions of the declarations, bylaws, or plats or plans of those condominiums.

(b) The provisions of Chapter 47A, the Unit Ownership Act, do not apply to condominiums created after October 1, 1986 and do not invalidate any amendment to the declaration, bylaws, and plats and plans of any condominium created on or before October 1, 1986 if the amendment would be permitted by this chapter. The amendment must be adopted in conformity with the procedures and requirements specified by those instruments and by Chapter 47A, the Unit Ownership Act. If the amendment grants to any person any rights, powers, or privileges permitted by this chapter, all correlative obligations, liabilities, and restrictions in this chapter also apply to that person.

(c) This chapter does not apply to condominiums or units located outside this State, but the public offering statement provisions (G.S. 47C-4-102 through 47C-4-108) apply to all contracts for the dispositions thereof signed in this State by any party unless exempt under G.S. 47C-4-101(b). (1985 (Reg. Sess., 1986), c. 877, s. 1; 1995, c. 509, s. 135.1(h); 2002-112, s. 1; 2004-109, s. 1; 2005-422, s. 19.)

OFFICIAL COMMENT

1. The question of the extent to which a state statute should apply to particular condominiums involves two problems: first, the extent to which the statute should require or permit different results for condominiums created before and after the statute becomes effective; and second, whether the statute should impose any or all of its substantive requirements on condominiums located outside the state.

Two conflicting policies are proposed when considering the applicability of this Act to "old" and "new" condominiums located in the enacting state. On the one hand, it is desirable, for reasons of uniformity, for the Act to apply to all condominiums located in a particular state, regardless of whether the condominium was created before or after adoption of the Act in that state. To the extent that different laws apply within the same state to different condominiums, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of condominiums created under old law, and because of the requirements placed on declarants and unit owners' associations by this Act which might increase the costs of new condominiums, different markets might tend to develop for condominiums created before and after adoption of the Act.

On the other hand, to make all provisions of this Act automatically apply to "old" condominiums might violate the constitutional prohibition of impairment of contracts. In addition, aside from the constitutional issue, automatic applicability of the entire Act almost certainly would unduly alter the legitimate expectations of some present unit owners and declarants.

Accordingly, the philosophy of this section reflects a desire to maximize the uniform applicability of the Act to all condominiums in the enacting state, while avoiding the difficulties raised by automatic application of the entire Act to pre-existing condominiums.

2. In carrying out this philosophy with respect to "new" condominiums, the Act applies to all condominiums "created" within the state after the Act's effective date. This is the effect of the first sentence of subsection (a). The first sentence of subsection (b) makes clear that the provisions of old statutes expressly applicable to condominiums do *not* apply to condominiums created after the effective date of this Act.

"Creation" of a condominium pursuant to this Act occurs upon recordation of a declaration pursuant to Section 2-101; however, the definition of "condominium" in Section 1-103(7) contemplates that *de facto* condominiums may exist, if the nature of the ownership interest fits the definition, and the Act would apply to such a condominium. Any real estate project which includes individually owned units and common elements owned by the unit owners as tenants in common is therefore subject to the Act if created within the state after the Act's effective date. No intent to subject the condominium to the Act is required, and an express intention to the contrary would be invalid and ineffective.

3. The section adopts a novel three-step approach to condominiums created before the effective date of the Act. First, certain provisions of the Act automatically apply to "old" condominiums, but only prospectively, and only in a manner which does not invalidate provisions of condominium declarations and bylaws valid under "old" law. Second, "old" law remains applicable to previously created condominiums where not automatically displaced by the Act. Third, owners of "old" condominiums may amend any provisions of their declaration or bylaws, even if the amendment would not be permitted by "old" law, so long as (a) the amendment is adopted in accordance with the procedure required by "old" law and the existing declaration and bylaws, and (b) the substance of the amendment does not violate this Act.

4. Elaboration of the principles described in Comment 3 may be helpful.

First, the second sentence of subsection (a) provides that the enumerated provisions automatically apply to condominiums created under pre-existing law, even though no action is taken by the unit owners. Many of the sections which do apply should measurably increase the ability of the unit owners to effectively manage the association, and should help to encourage the marketability of condominiums created under early condominium statutes. To avoid possible constitutional challenges, these provisions, as applied to "old" condominiums, apply only to "events and circumstances occurring after the effective date of this Act"; moreover, the provisions of this Act are subject to the provisions of the instruments creating the condominium, and this Act does not invalidate those instruments.

EXAMPLE 1:

Under subsection (a), Section 4-109 (Resale Certificates) automatically applies to "old" condominiums. Accordingly, unit owners in condominiums established prior to adoption of the Act would be obligated after the Act's effective date to provide resale certificates to future purchasers of units in "old" condominiums. However, the failure of a unit owner to provide such a certificate to a purchaser who acquired the unit before the effective date of the Act would not create a cause of action in the purchaser, because the conveyance was an event occurring before the effective date of the Act.

EXAMPLE 2:

Under subsection (a), Section 3-118 (Association Records) automatically applies to "old" condominiums. As a result, a unit owners' association of an "old" condominium must maintain certain financial records, and all the records of the association "shall be made reasonably available for examination by any unit owner and his authorized agents", even if the "old" law did not require that records be kept, or access provided. If the declaration or bylaws, however, provided that unit owners could not inspect the records of the association without permission of the president of the association, the restriction in the declaration would continue to be valid and enforceable.

Second, the prior laws of the state relating to condominiums are not repealed by this Act because those laws will still apply to previously-created condominiums, except when displaced. Some states, such as Connecticut and Florida, have made certain provisions of their condominium statutes automatically applicable to pre-existing condominiums. In certain instances, this attempted retroactive application has raised serious constitutional questions, has caused doubts to arise as to the continued validity of those condominiums, and has created general confusion as to what statutory rules should be applied.

Third, the Act seeks to alleviate any undesirable consequences of "old" law, by a limited "opt-in" provision. More specifically, subsection (b) permits the owners of a pre-existing condominium to take advantage of the salutary provisions of this statute to the extent that can be accomplished consistent with the procedures for amending the condominium instruments as specified in those instruments and in the pre-existing statute.

EXAMPLE 3:

Under most "first generation" condominium statutes, unit owners have no power to relocate boundaries between adjoining units. Under Section 2-112 of this Act, unit owners have such power, unless limited by the declaration. While Section 2-112 does not automatically apply to "old" condominiums, if the unit owners of a pre-existing condominium amend their condominium instruments in the manner permitted by the old statute and their existing instruments to permit unit owners to relocate boundaries, this section would validate that amendment, even if it were invalid under old law.

5. In considering the permissible amendments under subsection (b), it is important to distinguish between the law governing the procedure for amending declarations, and the substance of the amendments themselves. An amendment to the declaration of the condominium created under "old" law, even if permissible under this Act, must nevertheless be adopted "in conformity with the procedures and requirements specified" by the original condominium

instruments, and in compliance with the old law.

EXAMPLE: 4

Suppose an "old" condominium declaration and "old" state law both provide that approval by 100% of the unit owners is required to amend the declaration, but the unit owners wish to amend the declaration to provide for only 67% of the unit owners' approval of future amendments, as permitted by Section 2-117 of this Act. The amendment would not be valid unless 100% of the unit owners approved it, because of the procedural requirement of the declaration and "old" law. Once approved, however, only 67% would be required for subsequent amendments.

6. The last sentence of subsection (b) addresses the potential problem of a declarant seeking to take undue advantage of the amendment provisions to assume a power granted by the Act without being subject to the Act's limitations on the power. The last sentence insures that, if declarants or other persons assume any of the powers and rights which the Act grants, the correlative obligations, liabilities, and restrictions of the Act also apply to that person, even if the amendment itself does not require that result.

EXAMPLE: 5

Assume that, pursuant to the provisions of the "old" law, the declarant may exercise control over the association for only 3 years from the date the condominium is created, but the control may be maintained during that period for so long as declarant owns any units. In the absence of any amendment, a provision in the declaration taking full advantage of the "old" law would be valid and enforceable. Assume further that, in the second year following creation of the condominium in question, this Act is adopted. The declarant then properly amends the declaration pursuant to the subsection (b) to extend the period of declarant control for 5 years from the date of creation. The amendment would effectively extend control for 2 additional years, because Section 3-103(d) does not limit the number of the years the declarant may specify as a control period.

Nevertheless, if the declarant, before that extended time limit has expired, conveys 75 percent of the units that may ever be a part of the condominium, or fails for 2 years to exercise development rights or offer units for sale in the ordinary course of business, the period of declarant control would terminate by virtue of the limitations in Section 3-103(d). That limitation is imposed on the declarant even if the amendment called for retaining control for so long as any units were owned by declarant, and despite the provision in the "old" law permitting such a restriction.

7. The reference in subsection (b) to "all present statutes expressly applicable to condominiums or horizontal property regimes" is intended to distinguish between a state's condominium enabling statutes and those statutes which apply not only to condominiums but to other forms of real estate, such as taxation statutes or subdivision statutes. Thus, reference to the state's condominium or horizontal property regime enabling statutes should be included here, while references to taxation, subdivision, or other statutes which are not restricted solely to condominiums should not be included.

8. In place of the words "declaration, bylaws, and plats and plans", each state should insert the appropriate terminology for those documents under the present state law, *e.g.*, "master deed, rules and regulations", etc.

9. This section does not permit a pre-existing condominium to elect to come entirely within the provisions of the Act, disregarding old law. However, the owners of a pre-existing condominium may elect to terminate the condominium under pre-existing law and create a new condominium which would be subject to all the provisions of this Act.

10. Subsection (c) reflects the fact that there are practical as well as constitutional limits regarding the extent to which a state should or may extend its jurisdiction to out-of-state transactions. A state may, of course, properly exercise its authority to protect its citizens from false or misleading information relating to condominiums located in other states but sold in that state. However, where sales contracts are executed wholly outside the enacting state and relate to condominiums located outside the state, it seems more appropriate for the courts of the jurisdiction(s) in which the condominium is located and where the transaction occurs to have jurisdiction over the transaction.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act. A reference to G.S. 47C-3-112 (Conveyance or Encumbrance of Common Elements) was added and a reference to G.S. 47C-4-109 (Resales of Units) was deleted from the list of sections made applicable to pre-existing condominiums. The addition of the reference to G.S. 47C-3-112 was made to provide an existing owners association with flexibility either in debt financing or in selling off facilities no longer desired. The deletion of the references to G.S. 47C-4-109 reflects the Commission's belief that resales of pre-existing units should be governed by the previous statute so as not to change the responsibilities of owners who bought under the previous statute and also because the Commission was unaware of abuses in the one to one relationship involved in resales.

Effect of Amendments. — Session Laws 2005-422, s. 19, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, in subsection (a), inserted references to G.S. 47C-3-103, 47C-3-108 and 47C-3-121; and substituted "Procedures for fines and suspension of condominium privileges or services" for "Charges for Late Payment, Fines" after "47C-3-107.1."

CASE NOTES

Cited in Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996), rev'd, 346 N.C. 170, 484 S.E.2d 527 (1997); Brookwood Unit Ownership Ass'n v. Delon, 124 N.C. App. 446, 477 S.E.2d 225 (1996).

§ 47C-1-103. Definitions.

In the declaration and bylaws, unless specifically provided otherwise or the context otherwise requires, and in this chapter:

(1) "Affiliate of a declarant" means any person who controls, is controlled by, or is under common control with a declarant. A person "controls" a declarant if the person (i) is a general partner, officer, director, or employer of the declarant, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent (20%) of the voting interests in the declarant, (iii) controls in any manner the election of a majority of the directors of the declarant, or (iv) has contributed more than twenty percent (20%) of the capital of the declarant. A person "is controlled by" a declarant if the declarant (i) is a general partner, officer, director, or employer of the person, (ii) directly or indirectly or acting in concert with one or more other persons, or through one or more subsidiaries, owns, controls, holds with power to vote, or holds proxies representing, more than twenty percent (20%) of the voting interests in the person, (iii) controls in any manner the election of a majority of the directors of the person, or (iv) has contributed more than twenty percent (20%) of the capital of the person. Control does not exist if the powers described in this paragraph are held solely as security for an obligation and are not exercised.

(2) "Allocated interests" means the undivided interests in the common elements, the common expense liability, and votes in the association allocated to each unit.

(3) "Association" or "unit owners' associations" means the unit owners' associations organized under G.S. 47C-3-101.

(4) "Common elements" means all portions of a condominium other than the units.

(5) "Common expenses" means expenditures made by or financial liabilities of the association, together with any allocations to reserves.

(6) "Common expense liability" means the liability for common expenses allocated to each unit pursuant to G.S. 47C-2-107.

(7) "Condominium" means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. Real estate

is not a condominium unless the undivided interests in the common elements are vested in the unit owners.

(8) "Conversion building" means a building that at any time before creation of the condominium was occupied wholly or partially by persons other than purchasers or by persons who occupy with the consent of purchasers.

(9) "Declarant" means any person or group of persons acting in concert who (i) as part of a common promotional plan offers to dispose of his or its interest in a unit not previously disposed of or (ii) reserves or succeeds to any special declarant right.

(10) "Declaration" means any instruments, however denominated, which create a condominium, and any amendments to those instruments.

(11) "Development rights" means any right or combination of rights reserved by a declarant in the declaration to add real estate to a condominium; to create units, common elements, or limited common elements within a condominium; to subdivide units or convert units into common elements; or to withdraw real estate from a condominium.

(12) "Dispose" or "disposition" means a voluntary transfer to a purchaser of any legal or equitable interest in a unit, but does not include the transfer or release of a security interest.

(13) "Executive board" means the body, regardless of name, designated in the declaration to act on behalf of the association.

(14) "Identifying number" means a symbol or address that identifies only one unit in a condominium.

(15) "Leasehold condominium" means a condominium in which all or a portion of the real estate is subject to a lease the expiration or termination of which will terminate the condominium or reduce its size.

(16) "Limited common element" means a portion of the common elements allocated by the declaration or by operation of G.S. 47C-2-102(2) or (4) for the exclusive use of one or more but fewer than all of the units.

(17) "Master association" means an organization described in G.S. 47C-2-120, whether or not it is also an association described in G.S. 47C-3-101.

(18) "Offering" means any advertisement, inducement, solicitation, or attempt to encourage any person to acquire any interest in a unit, other than as security for an obligation. An advertisement in a newspaper or other periodical of general circulation, or in any broadcast medium to the general public, of a condominium not located in this State, is not an offering if the advertisement states that an offering may be made only in compliance with the law of the jurisdiction in which the condominium is located.

(19) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity.

(20) "Purchaser" means any person, other than a declarant or a person in the business of selling real estate for his own account, who by means of a voluntary transfer acquires a legal or equitable interest in a unit other than (i) a leasehold interest (including renewal options) of less than five years, or (ii) as security for an obligation.

(21) "Real estate" means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests which by custom, usage, or law, pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels, with or without upper or lower boundaries, and spaces that may be filled with air or water.

(22) "Residential purposes" means use for dwelling or recreational purposes, or both.

(23) "Special declarant rights" means rights reserved for the benefit of a declarant to complete improvements indicated on plats and plans filed with the declaration (G.S. 47C-2-109); to exercise any development right (G.S. 47C-2-110); to maintain sales offices, management offices, signs advertising the condominium, and models (G.S. 47C-2-115); to use easements through the common elements for the purpose of making improvements within the condominium or within real estate which may be added to the condominium (G.S. 47C-2-116); to make the condominium part of a larger condominium (G.S. 47C-2-121); or to appoint or remove any officer of the association or any executive board member during any period of declarant control (G.S. 47C-3-103(d)).

(24) "Time share" means a "time share" as defined in G.S. 93A-41(9).

(25) "Unit" means a physical portion of the condominium designated for separate ownership or occupancy, the boundaries of which are described pursuant to (G.S. 47C-2-105(a)(5).

(26) "Unit owner" means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold condominium whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the condominium, but does not include a person having an interest in a unit solely as security for an obligation.

(27) "Lessee" means the party entitled to present possession of a leased unit whether lessee, sublessee or assignee. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. The first clause of this section permits the defined terms used in the Act to be defined differently in the declaration and bylaws. Regardless of how terms are used in those documents, however, terms have an unvarying meaning in the Act, and any restricted practice which depends on the definition of a term is not affected by a changed term in the documents.

EXAMPLE:

A declarant might vary the definition of "unit owner" in the declaration to exclude himself in an attempt to avoid assessments for units which he owns. The attempt would be futile, since the Act defines a declarant who owns a unit as a unit owner and defines the liabilities of a unit owner.

2. The definition of "affiliate of a declarant" (Section 1-103(1)) is similar to the definitions in 12 U.S.C. § 1730(a), which prescribes the authority of the Federal Savings and Loan Insurance Corporation to regulate the activities of savings and loan holding companies, and in 15 U.S.C. § 78(c)(18), which defines persons deemed to be associated with a broker or dealer for purposes of the federal securities laws.

The objective standards of the definition permit a ready determination of the existence of affiliate status to be made. Unlike 12 U.S.C. § 1730(a)(2)B, no power is vested in an agency to subjectively determine the existence of "control" necessary to establish affiliate status. Thus, affiliate status does not exist under the Act unless these objective criteria are met.

3. Definition (2), "allocated interests," refers to all of the interests which this Act requires the declaration to allocate. *See* Section 2-107.

4. Definitions (4) and (25), treating "common elements" and "units," should be examined in light of Section 2-102, which specifies in detail how the precise differentiation between units and common elements is to be determined in any given condominium to the extent that the declaration does not provide a different scheme. No exhaustive list of items comprising the common elements is necessary in this Act or in the declaration; as long as the boundaries between units and common elements can be ascertained with certainty, the common elements include by definition all of the real estate in the condominium not designated as part of the units.

5. Definition (7), "condominium," makes clear that, unless the ownership interest in the common elements is vested in the owners of the units, the project is not a condominium. Thus, for example, if the common elements were owned by an association in which each unit owner was a member, the project would not be a condominium. Similarly, if a declarant sold units in a building but retained title to the common areas, granting easements over them to unit owners, no condominium would have

been created. Such projects have many of the attributes of condominiums, but they are not covered by this Act.

6. Definition (8), "conversion building," is important because of the protection which the Act provides in Section 1-112 for tenants of buildings which are being converted into a condominium. The definition distinguishes between buildings which have never been occupied by any person before the time that the building is submitted to the condominium form of ownership, and buildings, whether new or old, which have been previously occupied by tenants. In the former case, because there have been no tenants in the building, the building would not be a conversion building, and no protection of tenants is necessary.

7. Definition (9), "declarant," is designed to exclude persons who may be called upon to execute the declaration in order to ratify the creation of the condominium, but who are not intended to be charged with the responsibilities imposed on declarants by this Act if that is all they do. Examples of such persons include holders of pre-existing liens and, in the case of leasehold condominiums, ground lessors. (Of course, such a person could become a declarant by subsequently succeeding to a special declarant right.) Other persons similarly protected by the narrow wording of this definition include real estate brokers, because they do not offer to dispose of their own interest in a unit. Similarly, unit owners reselling their units are not declarants because their units were "previously disposed of" when originally conveyed.

The last bracketed clause in this definition must be deleted in any state which chooses not to enact Article 5 of the Act.

8. Definition (11), "development rights," includes a panoply of sophisticated development techniques that have evolved over time throughout the United States and which have been expressly recognized (and regulated) in an increasing number of jurisdictions, beginning with Virginia in 1974.

Some of these techniques relate to the phased (or incremental) development of condominiums which the declarant hopes, but cannot be sure, will be successful enough to grow to include more land than he is initially willing to commit to the condominium. For example, a declarant may be building (or converting) a 50-unit building on Parcel A with the intention, if all goes well, to "expand" the condominium by adding an additional building on Parcel B, containing additional units, as part of the same condominium. If he reserves the right to do so, *i.e.*, to "add real estate to a condominium," he has reserved a "development right."

In certain cases, however, the declarant may desire, for a variety of reasons, to include both parcels in the condominium from the outset, even though he may subsequently be obliged to withdraw all or part of one parcel. Assume, for example, that in the example just given the declarant intends to build an underground parking garage that will extend into both parcels. If the project is a success, his documentation will be simpler if both parcels were included in the condominium from the beginning. If his hopes are not realized, however, and it becomes necessary to withdraw all or part of Parcel B from the condominium and devote it to some other use, he may do so if he has reserved such a development right "to withdraw real estate from a condominium." The portion of the garage which extends into Parcel B may be left in the condominium (separated from the remainder of Parcel B by a horizontal boundary), or the garage may be divided between Parcels A and B with appropriate cross-easement agreements.

The right "to create units, common elements, or limited common elements" is frequently useful in commercial or mixed-use condominiums where the declarant needs to retain a high degree of flexibility to meet the space requirements of prospective purchasers who may not approach him until the condominium has already been created. For example, an entire floor of a high-rise building may be intended for commercial buyers, but the declarant may not know in advance whether one purchasers will want to buy the whole floor as a single units [unit] or whether several purchasers will want the floor divided into several units, separated by common element walls and served by a limited common element corridor. This development right is sometimes useful even in purely residential condominiums, especially those designed to appeal to affluent buyers. Similarly, the development rights "to subdivide units or convert units into common elements" is most often of value in commercial condominiums, but can occasionally be useful in certain kinds of residential condominiums as well.

9. Definition (12), "dispose" or "disposition," includes voluntary transfers to purchasers of any interest in a unit, other than as security for an obligation. Consequently, the grant of a mortgage or other security interest is not a "disposition," nor is any transfer of any interest to a person who is excluded from the definition of "purchaser," *infra*. However, the term includes more than conveyances and would, for example, cover contracts of sale.

10. Definition (15), "leasehold condominium," should be distinguished from land which is leased to a condominium but not subjected to the condominium regime. A leasehold condominium means, by definition, real estate which has been subjected to the condominium form of ownership. In such a case, units located on the leasehold real estate are typically leased for long terms. At the expiration of such a lease, the condominium unit or the real estate under-

lying the unit would be removed from the condominium if the lease were not extended or renewed. On the other hand, real estate may not be subjected to condominium ownership, but may be leased directly to the association or to one or more unit owners for a term of years.

This distinction is very significant. Under Section 3-105, the unit owners' association is empowered, following expiration of the period of declarant control, to cancel any lease of recreational or parking areas or facilities to which it is a party, regardless of who the lessor is. The association also has the power to cancel any lease for any land if the declarant or an affiliate of the declarant is a party to that lease. If the leased real estate, however, is subjected by the declarant to condominium form of ownership, that lease may not be cancelled unless it is unconscionable or unless the real estate was submitted to the condominium regime for the purpose of avoiding the right to terminate the lease. *See* Section 3-105.

While the subjective test of declarant's "purpose" may not always be clear, the rights of the association to cancel a lease depend upon the test. Thus, for example, a declarant who wishes to lease a swimming pool to the unit owners would have a choice of subjecting the pool for, say, a term of 20 years to the condominium form of ownership as a common element. At the end of the term, the lease would terminate and the real estate containing the pool would be automatically removed from the condominium unless there were a right to renew the lease. During the 20-year term, the lease would not be cancellable, regardless of the terms, unless it were found to be unconscionable under Section 1-112, or cancellable because submitted for the purpose of avoiding the right to cancel. On the other hand, if the pool were not submitted to the condominium form of ownership and was leased directly to the association for a 20-year term, the association could cancel that lease 90 days after the period of declarant control expired, even if, for example, 18 years remained of the term.

In either case, the terms of the lease would have to be disclosed in the public offering statement.

11. Definition (20), "purchaser," includes a person who acquires any interest in a unit, even as a tenant, if his tenancy entitles him to occupy the premises for more than 20 years. This would include a tenant who holds a lease of a unit in a fee simple condominium for one year, if the lease entitles the tenant to renew the lease for more than 4 additional years. Excluded from the definition, however, are mortgagees, declarants, and people in the business of selling real estate for their account. Persons excluded from the definition of "purchaser" do not receive certain benefits under Article 4, such as the right to a public offering statement (Section 4-102(c)) and the right to rescind (Section 4-108).

12. Definition (21), "real estate," is very broad, and is very similar to the definition of "real estate" in Section 1-201(16) of the Uniform Land Transactions Act.

Although often thought of in two-dimensional terms, real estate is a three-dimensional concept and the third dimension is unusually important in the condominium context. Where real estate is described in only two dimensions (length and width), it is correctly assumed that the property extends indefinitely above the earth's surface and downwards toward a point in the center of the planet. In most condominiums, however, as in so-called "air rights" projects, ownership does not extend *ab solo usque ad coelum,* because units are stacked on top of units or units and common elements are interstratified. In such cases the upper and lower boundaries must be identified with the same precision as the other boundaries.

13. Definition (23), "special declarant rights," seeks to isolate those rights reserved for the benefit of a declarant which are unique to the declarant and not shared in common with other unit owners. The list, while short, encompasses virtually every significant right which a declarant might seek in the course of creating or expanding a condominium.

Any person who possesses a special declarant right would be a "declarant", including any who succeed under Section 3-104 to any of those rights. Thus, the concept of special declarant rights triggers the imposition of obligations on those who possess the rights. Under Section 3-104, those obligations vary significantly, depending upon the particular special declarant rights possessed by a particular declarant. These circumstances are described more fully in the comments to Section 3-104.

14. Definition (24), "time share," is based on Section 1-102(14) and (18) of the Uniform Law Commissioners' Model Real Estate Time-Share Act.

15. Definition (25), "unit," describes a tangible, physical part of the project, rather than a right in, or claim to, a tangible physical part of the property. Therefore, for example, a "time-share" arrangement in which a unit is sold to 12 different persons each of whom has the right to occupy the unit for one month does not create 12 new units—there are, rather, 12 owners of the unit. (Under the section on voting (Section 2-110), a majority of the time-share owners of a unit are entitled to cast the votes assigned to that unit.)

While a separately described part of the project is not a unit unless it is designed for, and is subject to, separate ownership by persons other than the association, the association developer can hold or acquire units unless otherwise provided in the declaration. *See,* also, Comment 4.

16. Definition (26), "unit owners," contemplates that a seller under a land installment contract would remain the unit owner until the contract is fulfilled. As between the seller and the buyer, various rights and responsibilities might be assigned to the buyer by the contract itself, but the association would continue to look to the seller (for payment of any arrears in common expense assessments, for example) as long as the seller holds title.

The definition makes it clear that declarants, so long as they own units in the condominium, are unit owners and are therefore subject to all of the obligations imposed on other unit owners, including the obligation to pay common expense assessments against those units. This provision is designed to resolve ambiguities on this point which have arisen under several existing state statutes.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act. The North Carolina Act adds a definition of "lessee" which may be helpful in establishing voting rights of persons who have short term possessory rights, see G.S. 47C-3-110(c). The period of twenty years was changed to five years in the definition of purchaser to make that definition more inclusive. The definition of "time share" was amended to refer to the North Carolina Timeshare Act. The reference to master associations in the definition of special declarant rights was omitted.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

Cited in Richland Run Homeowners Ass'n v. CHC Durham Corp., 123 N.C. App. 345, 473 S.E.2d 649 (1996), rev'd, 346 N.C. 170, 484 S.E.2d 527 (1997).

§ 47C-1-104. Variation; power of attorney or proxy to declarant.

(a) Except as specifically provided in specific sections of this chapter, the provisions of this chapter may not be varied by the declaration or bylaws.

(b) The provisions of this chapter may not be varied by agreement; however, after breach of a provision of this chapter, rights created hereunder may be knowingly waived in writing.

(c) If a declarant, in good faith, has attempted to comply with the requirements of this chapter and has substantially complied with the chapter, nonmaterial errors or omissions shall not be actionable.

(d) Notwithstanding any other provision of this chapter, a declarant may not act under a power of attorney or proxy or use any other device to evade the limitations or prohibitions of this chapter, the declaration, or the bylaws. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. The Act is generally designed to provide great flexibility in the creation of condominiums and, to that end, the Act permits the parties to vary many of its provisions. In many instances, however, provisions of the Act may not be varied, because of the need to protect purchasers, lenders, and declarants. Accordingly, this section adopts the approach of prohibiting variation by agreement except in those cases where it is expressly permitted by the terms of the Act itself.

2. One of the consumer protections in this Act is the requirement for consent by specified percentages of unit owners to particular actions or changes in the declaration. In order to prevent declarants from evading these requirements by obtaining powers of attorney from all unit owners, or in some other fashion control-

ling the votes of unit owners, this section forbids the use by a declarant of any device to evade the limitations or prohibitions of the Act or of the declaration.

3. The following sections permit variation:

Section 1-102. [Applicability.] Pre-existing condominiums may elect to conform to the Act.

Section 1-103. [Definitions.] All definitions used in the declaration bylaws may be varied in the declaration, but not in interpretation of the Act.

Section 1-107. [Eminent Domain.] The formulas for reallocation upon taking a part of a unit, and for allocation of proceeds attributable to limited common elements, may be varied.

Section 2-102. [Unit Boundaries.] The declaration may vary the distinctions as to what constitutes the units and common elements.

Section 2-105. [Contents of Declaration.] A declarant may add any information he desires to the required content of the declaration.

Section 2-107. [Allocation of Common Element Interests, Votes, and Common Expense Liabilities.] A declarant may allocate the interests in any way desired, subject to certain limitations.

Section 2-108. [Limited Common Elements.] The Act permits reallocation of limited common elements unless prohibited by the declaration.

Section 2-109. [Plats and Plans.] There is a presumption regarding horizontal boundaries of units, unless the declaration provides otherwise.

Section 2-111. [Alterations Within Units.] Subject to the provisions of the declaration, unit owners may make alterations and improvements to units.

Section 2-112. [Relocation of Boundaries Between Adjoining Units.] Subject to the provisions of the declaration, boundaries between adjoining units may be relocated by affected unit owners.

Section 2-113. [Subdivision of Units.] If the declaration expressly so permits, a unit may be subdivided into two or more units.

Section 2-115. [Use for Sales Purposes.] The declarant may maintain sales offices, management offices, and model units only if the declaration so provides. Unless the declaration provides otherwise, the declarant may maintain advertising on the common elements.

Section 2-116. [Easement to Facilitate Exercise of Special Declarant Rights.] Subject to the provisions of the declaration, the declarant has an easement for these purposes.

Section 2-117. [Amendment of Declaration.] The declaration of a non-residential condominium may specify less than a two-thirds vote to amend the declaration. Any declaration may require a larger majority.

Section 2-118. [Termination of Condominium.] The declaration may specify a majority larger than 80 percent to terminate and, in a non-residential condominium, a smaller majority. The declarant may require that the units be sold following termination even though none of them have horizontal boundaries.

Section 2-120. [Master Associations.] The declaration may provide for some of the powers of the Executive Board to be exercised by a master association.

Section 3-102. [Powers of the Association.] The declaration may limit the right of the association to exercise any of the listed powers, except in a manner which discriminates in favor of a declarant. The declaration may authorize the association to assign its rights to future income.

Section 3-103. [Executive Board Members and Officers.] Except as limited by the declaration or bylaws, the Executive Board may act for the association.

Section 3-106. [Bylaws.] Subject to the provisions of the declaration, the bylaws may contain any matter in addition to that required by the Act.

Section 3-107. [Upkeep of the Condominium.] Except to the extent otherwise provided by the declaration, maintenance responsibilities are set forth in this section, and income from real estate subject to development rights inures to the declarant.

Section 3-108. [Meetings.] The bylaws may provide for special meetings at the call of less than 20 percent of the Executive Board or the unit owners.

Section 3-109. [Quorums.] This section permits statutory quorum requirements to be varied by the bylaws.

Section 3-110. [Voting; Proxies.] A majority in interest of the multiple owners of a single unit determine how that unit's vote is to be cast unless the declaration provides otherwise. The declaration may require that lessees vote on specified matters.

Section 3-113. [Insurance.] The declaration may vary the provisions of this section in non-residential condominiums, and may require additional insurance in any condominium.

Section 3-114. [Surplus Funds.] Unless otherwise provided in the declaration, surplus funds are paid or credited to unit owners in proportion to common expense liability.

Section 3-115. [Assessments for Common Expenses.] To the extent otherwise provided in the declaration, common expenses for limited common elements must be assessed against the the units to which they are assigned, common expenses benefiting fewer than all the units must be assessed only against the units benefited, insurance costs must be assessed in proportion to risk, and utility costs must be assessed in proportion to usage.

Section 4-101. [Applicability; Waiver.] All of Article 4 is modifiable or waivable by agreement in a condominium restricted to non-residential use.

Section 4-115. [Warranties.] Implied warranties of quality may be excluded or modified by agreement.

Section 4-116. [Statute of Limitations on Warranties.] The 6-year limitation may be modified by agreement of the parties.

4. The second sentence of the section is an important limitation upon the rights of a declarant. It is the practice in many jurisdiction [jurisdictions] today, particularly jurisdictions which do not permit expansion of a condominium by statute, for a declarant to secure powers of attorney from all unit purchasers permitting the declarant unilaterally to expand the condominium by "unanimous consent" to include new units and to reallocate common element interests, common expense liability, and votes. With such powers of attorney, many declarants have purported to comply with the typical provision of "first generation" condominium statutes requiring unanimous consent for amendments of the declaration concerning such matters.

Section 2-117 requires unanimous consent to make certain amendments to the declaration and bylaws. If a declarant were permitted to use powers of attorney to accomplish such changes, the substantial protection which Section 2-117(d) provides to unit owners would be illusory. Section 1-104 prohibits the declarant from using powers of attorney for such purposes.

5. While freedom of contract is a principle of this Act, and variation by agreement is accordingly widely available, freedom of contract does not extend so far as to permit parties to disclaim obligations of good faith, *see* Section 1-113, or to enter into contracts which are unconscionable when viewed as a whole, or which contain unconscionable terms. *See* Section 1-112. This section derives from Section 1-102(3) of the Uniform Commercial Code.

NORTH CAROLINA COMMENT

The revision would allow a knowing written waiver of rights created under the act, but only after the fact, to address the Commission's concern about the absolute statement in the Uniform Act that "rights conferred by this Act may not be waived." The section also provides that good faith nonmaterial errors are not actionable against a declarant who is in substantial compliance.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-1-105. Separate titles and taxation.

(a) If there is any unit owner other than a declarant, each unit that has been created, together with its interest in the common elements, constitutes for all purposes a separate parcel of real estate.

(b) If there is any unit owner other than a declarant, each unit must be separately taxed and assessed, and no separate tax or assessment may be rendered against any common elements for which a declarant has reserved no developmental rights.

(c) Any portion of the common elements for which the declarant has reserved any developmental right must be separately taxed and assessed against the declarant, and the declarant alone is liable for payment of those taxes.

(d) If there is no unit owner other than a declarant, the real estate comprising the condominium may be taxed and assessed in any manner provided by law. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. A condominium may be created, by the recordation of a declaration, long before the first unit is conveyed. This happens frequently with existing rental apartment projects which are converted into condominiums. Subsection (d) spares the local taxing authorities from having to assess each unit separately until such time as the declarant begins conveying units, although separate assessment from the date the condominium is created may be permitted under other law. *See* subsection (d). When separate tax assessments become mandatory under this section, the assessment for each unit must include the value of that unit's common element interest, and no separate tax bill on the common elements is to be rendered to the association or the unit owners collectively. Any common elements subject to development rights, however, are separately taxed to the declarant.

2. Even if real estate subject to development rights is a part of the condominium and lawfully "owned" by the unit owners in common, it is in fact an asset of the declarant, and must not be taxed and assessed against unit owners. Under subsection (c), the declarant is exclusively liable for those taxes.

3. If there is any question in a particular state that a unit occupied as a residential dwelling is not entitled to treatment as any other residential single-family detached dwelling under the homestead statutes, this section should be modified to insure that units are similarly treated.

4. Unlike the law of New York and perhaps other states, this section imposes no limitation on the power of a jurisdiction to tax the condominium unit based on its fair market value. In most jurisdictions, experience has shown that the conversion of an apartment building to the condominium form of ownership greatly increases the fair market value of that building. Accordingly, a jurisdiction under this Act may impose real estate taxes on condominium units which reflect the fair market value of those units in the same way that the jurisdiction taxes other forms of real estate.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-1-106. Applicability of local ordinances, regulations, and building codes.

A zoning, subdivision, or building code or other real estate use law, ordinance, or regulation may not prohibit the condominium form of ownership or impose any requirement upon a condominium which it would not impose upon a substantially similar development under a different form of ownership. Otherwise, no provision of this chapter invalidates or modifies any provision of any zoning, subdivision, or building code or other real estate use law, ordinance, or regulation. No local ordinance or regulation may require the recordation of a declaration prior to the date required by this chapter. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. The first sentence of this section prohibits discrimination against condominiums by local law-making authorities. Thus, if a local law, ordinance, or regulation imposes a requirement which cannot be met if property is subdivided as a condominium but which would not be violated if all of the property constituting the condominium were owned by a single owner, this section makes it unlawful to apply that requirement or restriction to the condominium. For example, in the case of a high-rise apartment building, if a local requirement imposing a minimum number of parking spaces per apartment would not prevent a rental apartment building from being built, this Act would override any requirement that might impose a

higher number of spaces per apartment merely by virtue of the same building being owned as a condominium.

2. The second sentence makes clear that, except for the prohibition on discrimination against condominiums, the Act has no effect on real estate use laws. For example, a particular piece of real estate submitted to the condominium form of ownership might be of such size that all of the real estate is required to support a proposed density of units or to satisfy minimum setback requirements. Under this Act, part of the submitted real estate might be subject to a development right entitling the declarant to withdraw it from the condominium but the mere reservation of this right would not constitute a subdivision of the parcel into separate ownership. If a declarant or foreclosing lender at a later time sought to exercise the option to withdraw the real estate, however, withdrawal would constitute a subdivision and would be illegal if the effect of withdrawal would be to violate setback requirements, or to exceed the density of units permitted on the remaining parcel.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, the phrase "substantially similar" was substituted for "physically identical" in order to prevent discrimination against condominiums based merely upon the form of ownership of a condominium where there is only a minor difference in physical form. The last sentence was added to prevent a practice in certain municipalities of requiring premature filing of the declaration at a time when the information required to be in the declaration cannot be known.

§ 47C-1-107. Eminent domain.

(a) If a unit is acquired by eminent domain, or if part of a unit is acquired by eminent domain leaving the unit owner with a remnant which may not practically or lawfully be used for any purpose permitted by the declaration, the award must compensate the unit owner for his unit and its interest in the common elements, whether or not any common elements are acquired. Unless the condemnor acquires the right to use the unit's interest in common elements, that unit's allocated interests are automatically reallocated to the remaining units in proportion to the respective allocated interests of those units before the taking exclusive of the unit taken, and the association shall promptly prepare, execute, and record an amendment to the declaration reflecting the reallocations. Any remnant of a unit remaining after part of a unit is taken under this subsection is thereafter a common element.

(b) Except as provided in subsection (a), if part of a unit is acquired by eminent domain, the award must compensate the unit owner for the reduction in value of the unit and of its interest in the common elements, whether or not any common elements are acquired. Upon acquisition, unless the decree otherwise provides, (1) that unit's allocated interests are reduced in proportion to the reduction in the size of the unit, or on any other basis specified in the declaration, and (2) the portion of the allocated interests divested from the partially acquired unit is automatically reallocated to that unit and the remaining units in proportion to the respective allocated interests of those units before the taking, with the partially acquired unit participating in the reallocation on the basis of its reduced allocated interests.

(c) If part of the common elements is acquired by eminent domain, the portion of the award not payable to unit owners under subsection (a) must be paid to the association. Unless the declaration provides otherwise, any portion of the award attributable to the acquisition of a limited common element must be apportioned among the owners of the units to which that limited common element was allocated at the time of acquisition.

(d) The court decree shall be recorded in every county in which any portion of the condominium is located. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. The provisions of this statute are not intended to supplant the usual rules of eminent domain but merely to supplement the rules to address the unique problems which eminent domain raises in the context of a *condominium*. Nevertheless, because the law of eminent domain differs widely among the various states, the law of each state should be reviewed to ensure that the eminent domain code and this section are properly integrated.

2. When a unit is taken or partially taken by eminent domain, this section provides for a recalculation of the allocated interests of all units.

EXAMPLE 1:

Suppose that all allocated interests in a 9-unit condominium were originally allocated to the units on the basis of size. If eight of the units are equal in size and one is twice as large as the others, the allocated interests would be 20% for the largest unit and 10% for each of the other eight units.

Suppose that one of the smaller units is taken out of the condominium by a condemning authority. Subsection (a) provides that the allocated interests would automatically shift, at the time of the taking, so that the larger unit would have $22\frac{2}{9}\%$ while each of the small units would have $11\frac{1}{9}\%$.

EXAMPLE 2:

Suppose, in Example 1, that the condemnation only reduced the size of one of the smaller units by 50%, leaving the remaining half of the unit usable. Subsection (b) provides that the allocated interests would automatically shift to $5\frac{5}{19}\%$ for the partially taken unit, $21\frac{1}{19}\%$ for the largest unit, and $10\frac{10}{19}\%$ for each of the other units. Note that the fact that the partially taken unit was reduced to half its former size does *not* mean that its allocated interests are only half as large as before the taking. Rather, that unit participates in the reallocation in proportion to its reduced size. That is why the partially taken unit's reallocated interests are $5\frac{5}{19}\%$ rather than 5%.

3. An important issue raised by this section is whether or not a governmental body acquiring a unit by eminent domain has a right to also take that unit's allocated interests and thereby assume membership in the association by virtue of its power of eminent domain. While there is no question that a governmental body may acquire any real property by eminent domain, there is no case law on the question of whether or not the governmental body may take a condominium unit as a part of the condominium or must take the unit and have the unit excluded from the condominium.

Subsection (a) merely requires that the taking body compensate the unit owner for all of his unit and its interest in the common element, whether or not the common element interest is acquired. The Act also requires that the allocated interests are automatically reallocated upon taking to the remaining units unless the decree provides otherwise. Whether or not the decree may constitutionally provide otherwise in the case of a particular taking (for example, by allocating the common element interest, votes, and common expense liability to the government) is an unanswered question.

4. In the circumstances of a taking of part of a unit, it is important to have some objective test by which to measure the portion of allocated interest to be reallocated. Subsection (b) sets forth a formula based on relative size, but permits the declaration to vary that formula to some other more appropriate formula in a particular circumstance. This right to vary the formula in the declaration is important, since it is clear that the formula set forth in the statute may in some instances result in gross inequities.

EXAMPLE 1:

Suppose, in a commercial condominium consisting of four units, each unit consists of a factory and parking lot, and that the declaration provides that each unit's common expense liability, including utilities, is equal. Suppose further that the area of the factory building and parking lot in unit #1 are equal, and that 1/2 the parking lot is taken by eminent domain, leaving the factory and 1/2 the lot intact. Under the formula set out in the statute, unit #1's common expense liability would be reduced even though its utilities might not be reduced at all, thus resulting in a windfall for the unit owner.

EXAMPLE 2:

Suppose that a condominium contains ten units, each of which is allocated at $\frac{1}{10}$ undivided interest in the common elements. Suppose further that a taking by eminent domain reduces the size of one of the units by 50%. In such case, the common element interest of all the units will be reallocated so that the partially-taken unit has a $\frac{1}{19}$ undivided interest in the common elements and the remaining 9 units each a $\frac{2}{19}$ undivided interest in the common elements. Thus, the partially-taken unit has a common element interest equal to 1/2 of the common element interest allocated to each of the other units. Note that this is not equivalent to the partially-taken unit having a 5% undivided interest and the remaining 9 units each having a 10% undivided interest.

5. Even before the amendment formally acknowledging the reallocation of percentages

required by this section is recorded, the reallocation is deemed to have occurred simultaneously with the taking. This rule is necessary to avoid the hiatus that otherwise could occur between the taking and reallocation of interests, votes, and liabilities.

6. Subsection (c) provides that, if part of the common elements is acquired, the award is paid to the association. This would not normally be the rule in the absence of such a provision.

NORTH CAROLINA COMMENT

This section is not significantly different, however, the revision contains changes intended to clarify the language and intent of the Uniform Act.

§ 47C-1-108. Supplemental general principles of law applicable.

The principles of law and equity supplement the provisions of this chapter, except to the extent inconsistent with this chapter. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This Act displaces existing law relating to condominiums and other law only as stated by specific sections and by reasonable implication therefrom. Moreover, unless specifically displaced by this statute, common law rights are retained. The listing given in this section is merely an illustration: no listing could be exhaustive.

2. The bracketed language concerning unincorporated associations should be deleted in the event the enacting state requires incorporation of a unit owners' association. *See* the parallel language contained in Section 3-101.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, the Commission removed an incomplete listing of specific areas of the law in order to avoid the application of the doctrine, *inclusio unius est exclusio alterius.*

§ 47C-1-109. Inconsistent time share provisions.

The provisions of this Chapter shall apply, so far as appropriate, to every time share program or project created within this State after October 1, 1986, except to the extent that specific statutory provisions in Chapter 93A are inconsistent with this Chapter, in which case the provisions of Chapter 93A shall prevail. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

NORTH CAROLINA COMMENT

This section was added to the North Carolina Act for purposes of clarification.

ARTICLE 2.

Creation, Alteration, and Termination of Condominiums.

§ 47C-2-101. Execution and recordation of declaration.

(a) A declaration creating a condominium shall be executed in the same manner as a deed, shall be recorded in every county in which any portion of the condominium is located, and shall be indexed in the Grantee index in the name of the condominium and in the Grantor index in the name of each person executing the declaration.

(b) A declaration or an amendment to a declaration adding units to a condominium, may not be recorded unless all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed in accordance with the plans, as evidenced by a recorded certificate of completion executed by an architect licensed under the provisions of Chapter 83 [83A] of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. A condominium is created pursuant to this Act only by recording a declaration. As with any instrument affecting real estate, the declaration must be recorded in every recording district in which any portion of the condominium is located and must be indexed in the manner described in subsection (a). Specific indexing rules are suggested in brackets and should be used in those states where this result would not otherwise occur. For example, the declaration commonly has not been indexed in the grantee's index in the name of the condominium. Moreover, when multiple persons execute the declaration, the declaration has often been indexed solely in the name of the declarant and not in the name, for example, of lenders and other persons who might have executed the declaration. Because it is important that the names of the association and all persons executing the declaration appear in the index in order to locate all instruments in the land records, that language is not included in brackets.

2. In Section 1-103, the Act defines the term "Declaration" as any instruments, however denominated, which create a condominium, and any amendments to those instruments. "Condominium," in turn, is defined as "real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions." It is important to emphasize that other covenants, conditions or restrictions applicable to the real estate in the condominium might be recorded before or after the instruments are recorded which divide the real estate into units and common elements, thereby creating the condominium.

Until the actual recordation of the document which accomplished that result, however, the condominium has not been created.

3. A condominium has not been lawfully created unless the requirements of this section have been complied with. Nevertheless, a project which meets the definition of "condominium" in Section 1-103(7) is subject to this Act even if this or other sections of the Act have not been complied with.

4. Mortgagees and other lienholders need not execute the declaration, and foreclosure of a mortgage or other lien will not, of itself, terminate the condominium. However, if that lien is prior to the declaration itself, the lienholder may exclude that real estate from the condominium. *See* Sections 2-118(i) and (j). Moreover, the declarant may wish to obtain agreements from mortgagees or other lienholders that they will give partial releases permitting lien-free conveyance of the condominium units. *See* Section 4-111(a).

5. Except when development proceeds pursuant to Section 5-103, this Act contemplates that two different stages of construction must be reached before (1) a condominium may be created or (2) a unit in the condominium may be conveyed. These stages are described, respectively, in subsection (b) and Section 4-120. The purpose of imposing these requirements is to insure that a purchaser will in fact take title to a unit which may be used for its intended purpose.

If the condominium were said to consist from the beginning of a certain number of units, even though some of those units had not yet been completed or even begun, serious problems would arise if the remaining units were never constructed and if no obligation to complete the construction could be enforced against any solvent person. If the insolvent owner of the unbuilt units failed to pay his common expense assessments for example, the unit owners' association might be left with no remedy except a lien of doubtful value against mere cubicles of air space. Moreover, votes in the unit owners' association could be assigned to units, and those votes could be cast, even though the units were never built. The Act therefore requires that significant construction take place before units are assigned an interest in the common elements, a vote in the association, and a share of the common expense liabilities, and before units are conveyed. This requirement of substantial completion [or the alternative bonding procedure and other assurances required by Section 5-103] reduces the possibility that a failure to complete will upset the expectations of purchasers or otherwise harm their interests in case the declarant becomes insolvent and no solvent person has the obligation to complete the unit.

6. Section 2-101(b) requires that "all structural components and mechanical systems of all buildings containing or comprising any units" which will be created by recording a declaration, must be substantially completed in accordance with the plans. The intent of subsection (b) is that if any buildings are depicted on the plats and plans which are required by Section 2-109, and these buildings contain or comprise spaces which become units by virtue of recording the declaration, the structural components and mechanical systems of these buildings must be substantially complete before the declaration is recorded. This is required even though the plats and plans recorded pursuant to Section 2-109 depict only the boundaries of the buildings and the units created in those buildings, and not the structural components or mechanical systems (which need not be shown). If the boundaries of units are not depicted, of course, then no units are created. If the declarant fails to comply with this section, title is not affected. *See* Comment 8, below.

The concept of "structural components and mechanical systems" is one commonly understood in the construction field and this comment is not intended as a comprehensive list of those components. For example, however, the term "structural components" is generally understood to include those portions of a building necessary to keep any part of the building from collapsing, and to maintain the building in a weathertight condition. This would include the foundations, bearing walls and columns, exterior walls, roof, floors and similar components. It would clearly not include such components as interior non-bearing partitions, surface finishes, interior doors, carpeting, and the like. Similarly, typical examples of "mechanical systems" include the plumbing, heating, air conditioning and other like systems. Whether or not "electrical systems" are included within the meaning of the term depends on local practice.

7. Section 4-120, requires that, before an individual unit is conveyed, the unit must be "substantially completed." "Substantial completion" is a well understood term in the construction industry. For example, the American Institute of Architects Document A201, General Conditions of the Contract for Construction (1976 Ed.) at para. 8.1.3, states:

> The Date of Substantial Completion of the Work . . . is the date certified by the Architect when construction is sufficiently complete, in accordance with the Contract Documents (that is, the owner-contractor agreement, the conditions of the contract, and the specifications and all addenda and modifications), so the Owner can occupy or utilize the Work . . . for the use for which it is intended.

This standard is also one often used by building officials in issuing certificates of occupancy. It does not suggest that the unit is "entirely completed" as that term is understood in the construction industry; lesser details, such as sticking doors, leaking windows, or some decorative items, might still remain, and the Act contemplates that they need not be completed prior to lawful conveyance.

8. Section 2-101(b) and 4-120 require that completion certificates be recorded, or local certificates of occupancy be issued, as evidence of the fact that the required levels of construction have been met. In the case of "substantial completion," issuance of "a certificate of occupancy authorized by law," as is commonly required by local ordinance or state building codes, will suffice. Once the certificates have been recorded, or issued, as the case may be, good title to the units may be conveyed in reliance on the record. It is possible, of course, that the declarant may have failed to complete the required levels of construction; the architect, surveyor or engineer (whichever is appropriate in a particular jurisdiction) may have filed a false certificate. Such acts would create a cause of action in the purchaser under Section 4-115, but would not affect the validity of the purchasers' title to the condominium.

9. The requirement of "substantial completion" does not mean that the declarant must complete all buildings in which all possible units would be located before creating the condominium. If only some of the buildings in which units which may ultimately be located have been "structurally" completed, the declarant may create a condominium in which he reserves particular development rights (Section 2-105(a)(8)). In such a project, only the completed units might be treated as units from the outset, and the development rights would be reserved to create additional units, either by adding additional real estate and units to the condominium, by creating new units on common elements, or by subdividing units previously created. The optional units may never be completed or added to the condominium; however, this will not affect the integrity of the condominium as originally created.

10. Requiring "substantial completion" of the structural components and mechanical systems in the buildings containing or comprising the units in a condominium may encourage creation of more phased condominiums under

Section 2-105 in projects which once were in fact built in phases, but under a single nonexpandable declaration. Experience in the several states where significantly more rigorous requirements are imposed by statute, however, has shown that this does not create a difficult situation either for the developer or the lender. Moreover, it appears likely that the size of the initial phase of a multi-building project will be dictated largely by economics, as occurs in most jurisdictions today, rather than this Act. Finally, many lenders and developers are increasingly sensitive to the secondary mortgage market requirements particularly those of the Federal National Mortgage Association (FNMA) and the Federal Home Loan Mortgage Corporation (FHLMC). Experience indicates that the pre-sale requirements imposed by FNMA and FHLMC frequently dictate that multi-building condominium projects be structured on a phased or expandable condominium basis.

11. The requirement of completion would be irrelevant in some types of condominiums, such as campsite condominiums or some subdivision condominiums where the units might consist of unimproved lots, and the airspace above them, within which each purchaser would be free to construct or not construct a residence. Any residence actually constructed would ordinarily become a part of the "unit" by the doctrine of fixtures, but nothing in this Act would require any residence to be built before the lots could be treated as units.

12. The term "independent" architect, surveyor or engineer in subsection (b) and elsewhere in the Act distinguishes any such professional person who acts as an independent contractor in his relationship to the declarant or lender.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, the introductory language at the beginning of subsection (a) was changed to eliminate ambiguous language which may have been erroneously interpreted to indicate that the application of the act was optional. As noted in the official commentary to the Uniform Act "a project which meets the definition of 'condominium' in Section 1-103(7) is subject to this Act even if this or other sections of the Act have not been complied with."

Editor's Note. — Chapter 83, referred to in this section, was rewritten by Session Laws 1979, c. 871, s. 1 and has been recodified as Chapter 83A.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-102. Unit boundaries.

Except as provided by the declaration:

(1) If walls, floors or ceilings are designated as boundaries of a unit, then all lath, furring, wallboard, plasterboard, plaster, paneling, tiles, wallpaper, paint, finished flooring and any other materials constituting any part of the finished flooring, and any other materials constituting any part of the finished surfaces thereof are a part of the unit; and all other portions of such walls, floors, or ceilings are a part of the common elements.

(2) If any chute, flue, duct, wire, conduit, bearing wall, bearing column, or any other fixture lies partially within and partially outside the designated boundaries of a unit, any portion thereof serving only that unit is a limited common element allocated exclusively to that unit,

and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements.

(3) Subject to the provisions of paragraph (2), all spaces, interior partitions, and other fixtures and improvements within the boundaries of a unit are a part of the unit.

(4) Any shutters, awnings, window boxes, doorsteps, stoops, decks, porches, balconies, patios, and all exterior doors and windows or other fixtures designed to serve a single unit but located outside the unit's boundaries are limited common elements allocated exclusively to that unit. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. It is important for title purposes and other reasons to have a clear guide as to precisely which parts of a condominium constitute the units and which parts constitute the common elements. This section fills the gap left when the declaration merely defines unit boundaries in terms of floor, ceilings, and perimetric walls.

The provisions of this section may be varied, of course, to the extent that the declarant wishes to modify the details for a particular condominium.

For example, in a townhouse project structured as a condominium, it may be desirable that the boundaries of the unit constitute the exterior surfaces of the roof and exterior walls, with the center line of the party walls constituting the perimetric boundaries of the units in that plane, and the undersurface of the bottom slab dividing the unit itself from the underlying land. Alternatively, the boundaries of the units at the party walls might be extended to include actual division of underlying land itself. In those cases it would not be appropriate for walls, floors and ceilings to be designated as boundaries, and the declaration would describe the boundaries in the above manner. The differentiations made clear here, in conjunction with the provisions of Section 3-107, will assist in minimizing disputes which have historically arisen in association administration with respect to liability for repair of such things as pipes, porches and other components of a building which unit owners may expect the association to pay for and which the association may wish to have repaired by unit owners. Problems which may arise as a result of negligence in the use of components—such as stoops and pipes—are resolved by Section 3-107, which imposes liability on the unit owner who causes damage to common elements, or under the broader provisions of Section 3-115(e), which permits the association to assess common expenses "caused by the misconduct of any unit owner" exclusively against that owner. This would include, of course, not only damages to common elements, but fines or unusual service fees, such as clean-up costs, incurred as a result of the unit owner's misuse of common elements.

2. The differentiation between components constituting common elements and components which are part of the units is particularly important in light of Section 3-107(a), which (subject to the exceptions therein mentioned) makes the association responsible for upkeep of common elements and each unit owner individually responsible for upkeep of his unit.

3. The differentiation between unit components and common element components may or may not be important for insurance purposes under this Act. While the common elements in a project must always be insured, the units themselves need not be insured by the association unless the project contains units divided by horizontal boundaries; *see* Section 3-113(b). In a "high rise" configuration, however, Section 3-113(a) contemplates that both will normally be insured by the association (exclusive of improvements and betterments in individual units) and that the cost of such insurance will be a common expense. That common expense may be allocated, however, on the basis of risk if the declaration so requires. *See* Section 3-115(c)(3).

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-103. Construction and validity of declaration and bylaws.

(a) All provisions of the declaration and bylaws are severable.

(b) The rule against perpetuities may not be applied to defeat any provision of the declaration, bylaws, or rules and regulations adopted pursuant to G.S. 47C-3-102(a)(1).

(c) In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this chapter.

(d) Title to a unit and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this chapter. Whether a substantial failure to comply with this chapter impairs marketability shall be determined by the law of this State relating to marketability. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. Subsection (b) does not totally invalidate the rule against perpetuities as applied to condominiums. The language does provide that the rule against perpetuities is ineffective as to documents which would govern the condominium during the entire life of the project, regardless of how long that should be. With respect to deeds or devises of units, however, the policies underlying the rule against perpetuities continue to have validity and remain applicable under this Act.

2. In considering the effect of failures to comply with this Act on title matters, subsection (d) refers only to defects in the declaration—which includes the plats and plans—because the declaration is the instrument which creates and defines the units and common elements. No reference is made to other instruments, such as bylaws, because these instruments have no impact on title, whether or not recorded. However, in all cases of violations of the Act, a failure of the bylaws—or any other instrument—to comply with the Act, would entitle any affected persons to appropriate relief under Section 4-117.

3. No special prohibition against racial or other forms of discrimination is included in this Act because the provisions of generally applicable federal and state law apply as much to condominiums as to other forms of real estate.

4. Some examples may help to clarify what sorts of defects in the declaration are to be regarded as "insubstantial" within the meaning of the first sentence of subsection (d).

Suppose the declaration allocates common element interests to all the units, but fails to indicate the formula for the allocation as required by Section 2-107. This would be a substantial defect if the assigned interests were unequal, but if all units were assigned identical interests it would be possible to infer that the basis of allocation was equality—and the failure of the declaration to say so would be an insubstantial defect. Were this to happen in a condominium where the right to add new units is reserved, however, it should be noted that a subsequent amendment to the declaration adding new units could not use any formula other than equality for reallocating the common element interests unless a different formula were specified pursuant to Section 2-107(b).

Other examples of insubstantial defects that might occur include failure of the declaration to include the word "condominium" in the name of the project, as required by Section 2-105(1), or failure of the plats and plans to comply satisfactorily with the requirement of Section 2-109(a) that they be "clear and legible," so long as they can at least be deciphered by persons with proper expertise. Failure to organize the unit owners' association at the time specified in Section 3-101 would not be a defect in the declaration at all, and would not affect the validity or marketability of titles in the condominium. It would, however, be a violation of this Act, and create a claim for relief under Section 4-117.

5. Each state has case or statutory law dealing with marketability of titles, and the question of whether substantial failures of the declaration to comply with the Act affect marketability of title should be determined by that law and not by this Act.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-104. Description of units.

A description of a condominium unit which sets forth the name of the condominium, the recording data for the declaration, and the identifying number of the unit or which otherwise complies with the general requirements of the laws of this State concerning description of real property is sufficient legal description of that unit and all rights, obligations, and interests appurtenant to that unit which were created by the declaration or bylaws. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. The intent of this section is that no description of a unit in a deed, lease, deed of trust, mortgage, or any other instrument or document shall be subject to challenge for failure to meet any common law or other requirements so long as the requirements of this section are satisfied, and so long as the declaration itself, together with the plats and plans which are a part of the declaration, provides a legally sufficient description.

2. The last sentence makes clear that an instrument which does meet those requirements includes all interest appurtenant to the unit. As a result, it will not be necessary under this Act to continue the practice, common in some jurisdictions, of describing the common element interests, or limited common elements, that are appurtenant to a unit in the instrument conveying title to that unit.

NORTH CAROLINA COMMENT

This section was redrafted to authorize a legal description which complies with the general requirements of the laws of North Carolina.

§ 47C-2-105. Contents of declaration.

(a) The declaration for a condominium must contain:

(1) The name of the condominium, which must include the word “condominium” or be followed by the words “a condominium”, and the name of the association;

(2) The name of every county in which any part of the condominium is situated;

(3) A legally sufficient description of the real estate included in the condominium;

(4) A statement of the maximum number of units which the declarant reserves the right to create;

(5) A description (by reference to the plats or plans described in G.S. 47C-2-109) of the boundaries of each unit created by the declaration, including the unit’s identifying number;

(6) A description of any limited common elements, other than those specified in subsections 47C-2-102(2) and (4), as provided in G.S. 47C-2-109(b)(7);

(7) A description of any real estate (except real estate subject to development rights) which may be allocated subsequently as limited common elements, other than limited common elements specified in subsections 47C-2-102(2) and (4), together with a statement that they may be so allocated;

(8) A description of any development rights and other special declarant rights reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;

(9) If any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect,

together with (i) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right or a statement that no assurances are made in those regards, and (ii) a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;

(10) Any other conditions or limitations under which the rights described in paragraph (8) may be exercised or will lapse;

(11) An allocation to each unit of the allocated interests in the manner described in G.S. 47C-2-107;

(12) Any restrictions on use, occupancy, or alienation of the units;

(13) The recording data for recorded easements and licenses appurtenant to or included in the condominium or to which any portion of the condominium is or may become subject by virtue of a reservation in the declaration; and

(14) All matters required by G.S. 47C-2-106, 47C-2-107, 47C-2-108, 47C-2-109, 47C-2-115, 47C-2-116, and 47C-3-103(d).

(b) The declaration may contain any other matters the declarant deems appropriate. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. Many statutes and other regulatory schemes in the multi-owner project field do not separate the functions of a recorded declaration and unrecorded public offering statements or disclosure documents. As a result, many of the developer's representations and assurances concerning his future plans must appear in the declaration as well as the public offering statement, even though they may have nothing to do with the legal structure or title of the project. *See* e.g., Section 47-70, Conn.Gen.Stat. (1980). This results in duplicative requirements and unnecessarily complex declarations.

This Act seeks functionally to distinguish between the declaration and the public offering statement. It requires the declaration to contain only those matters which affect the legal structure or title of the condominium. This includes the reserved powers of the declarant to exercise development rights within the condominium. A narrative description of those rights, however, and the possible consequences flowing from their exercise, are required to be disclosed only in the public offering statement and not in the declaration.

2. This section requires a statement of the name of the association for the condominium as well as the name of the condominium itself, in order that the declaration may be indexed in the name of the association. *See* Section 2-101.

3. The Act requires that the declaration for a condominium situated in two or more recording districts be recorded in each of those districts. While the bracketed language refers to the "county" as the recording district in which the declaration is to be recorded, it would be appropriate in states where recording is done at the city, town, or parish level to amend the bracketed language accordingly.

4. Paragraph (a)(5) requires the declarant to state the largest number of units he reserves the right to build. Unlike many current condominium statutes, this Act imposes no time limit, measured by an absolute number of years, at the expiration of which the declarant must relinquish control of the association. Instead, declarant control ends when 75% of the maximum number of units which may be created by the declarant have been sold, or at the end of a 2-year period during which development is not proceeding. *See* Section 3-103(d). The flexibility afforded by this section may be important to a declarant as he responds to unanticipated future changes in his market.

In theory, a declarant might overstate the maximum number of units in an attempt to artificially extend the period of declarant control, since the time might never come when a declarant had sold 75% of that number of units. As a practical matter, however, such a practice would not likely achieve long-term control.

EXAMPLE:

A declarant reserves the right to build 100 units, even though zoning would permit only 75 units on the site, and the declarant actually plans on building only 50 units. As a result of the reservation, the declarant would not lose control of the association under the 75% rule stated in Section 3-103(d)(i) even when all 50 units had been built and sold, because that percentage applies to all potential units, not units actually built. *See* Section 3-103(d)(i).

However, there are practical constraints on the declarant's decision in this matter. Substantial exaggeration of the future density of the development might tend to impede sales of units in that project. Moreover, such a statement might also produce negative governmental reaction to proposals which might require local approval.

Even if the declarant did overstate the number of units to retain control, however, other limitations imposed by Section 3-103(d) will require turnover at an appropriate time. In the example, once the declarant had exercised the right to add the last of the 50 units which he intends to build, the 2-year period imposed by Section 3-103(d)(ii) and (iii) would begin to run, and the declarant would lose the right to control the association 2 years from the time the last units were added, even though he had reserved the right to add more units.

5. Paragraph (a)(5) requires that the boundaries of each unit created by the declaration be identified. The words "created by the declaration" emphasize that in an expandable project, new units may be created in the future by amendments to the declaration. Until those new units are actually added to the project by amending the declaration, however, they are not units within the meaning of that defined term, and they need not be described.

6. Section 2-102 makes it possible in many projects to satisfy paragraph (a)(5) of this section by merely providing the identifying number of the units and stating that each unit is bounded by its ceiling, floor, and walls. The plats and plans will show where those ceilings, floors, and perimetric walls are located, and Section 2-102 provides all other details, except to the extent the declaration may make additional or contradictory specifications because of the unique nature of the project.

7. Paragraph (a)(6) makes clear that the limited common elements described in Section 2-102(2) and (4) need not be described in the declaration. These limited common elements are typically porches, balconies, patios, or other amenities which may be included in a project. Such improvements are treated by the Act as limited common elements, rather than either common elements or parts of units, in order to minimize the attention which the documents need to give them, and to secure the result that would be desired in the usual case. Thus, if these improvements remain limited common elements, and no special provisions concerning them are included in the declaration, they may be used only by the units to which they are physically attached; maintenance of those improvements must be paid for by the association; and such improvements need not be specially referred to in the declaration. Porches, balconies and patios must be shown on the plats and plans (*see* Section 2-109(b)(10)), but other limited common elements described in Section 2-102(2) and (4) need not be shown.

8. Paragraph (a)(7) contemplates that the common elements in the project may be allocated as limited common elements at some future time, either by the declarant or the association. For example, a swimming pool might serve an entire project during early phases of development. At the outset, that pool might be a common element which all the unit owners may use. At a later time, with more units and additional pools built in subsequent phases, either the declarant or the association might determine that the first pool should become a limited common element reserved for the use only of units in the first phase, while the other pools should be reserved exclusively for units in the subsequent phases. Such a potential allocation should be described in the declaration pursuant to this section.

9. Paragraph (a)(8) requires the declaration to describe all development rights and other special declarant rights which the declarant reserves. The declaration must describe the real estate to which each right applies, and state the time limit within which each of those rights must be exercised. The Act imposes no maximum time limit for the exercise of those rights, and the particular language of a declaration will vary from project to project depending on the requirements of each project. This Act contemplates that those rights may be exercised after the period of declarant control terminates.

10. Plats and plans are made a part of the declaration for legal purposes by Section 2-110, and their content may in part provide some of the information required by this section.

11. Paragraph (a)(14) is a cross-reference to other sections of the Act which require the declaration to contain particular matters. Some of these sections, such as 2-107 on the allocations of allocated interests or 2-109 on plats and plans, will affect all projects. Others, such as 2-106 on leasehold condominiums, will apply only to particular kinds of projects.

12. Subsection (b) contemplates that, in addition to the content required by subsection (a), other matters may also be included in the declaration if the declarant or lender feel they are appropriate to the particular project. In particular, the draftsman should carefully consider any desired provisions which would vary any of the many sections of the Act where variation is permitted, including such matters as expanding or restricting the association's powers. A list of sections which may be varied appears in the comment to Section 1-104.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-106. Leasehold condominiums.

(a) Any lease, or a memorandum thereof, the expiration or termination of which may terminate the condominium or reduce its size shall be recorded. Every lessor of those leases must sign the declaration, and the declaration shall state:

(1) Where the complete lease may be inspected;
(2) The date on which the lease is scheduled to expire;
(3) A legally sufficient description of the real estate subject to the lease;
(4) Any right of the unit owners to redeem the reversion and the manner whereby those rights may be exercised or a statement that they do not have those rights;
(5) Any right of the unit owners to remove any improvements after the expiration or termination of the lease or a statement that they do not have those rights; and
(6) Any rights of the unit owners to renew the lease and the conditions of any renewal or a statement that they do not have those rights.

(b) After the declaration for a leasehold condominium is recorded, neither the lessor nor his successor in interest may terminate the leasehold interest of a unit owner who, after demand, makes timely payment of his share of the rent determined in proportion to his common element interest and otherwise complies with all covenants which, if violated, would entitle the lessor to terminate the lease. A unit owner's leasehold interest is not affected by failure of any other person to pay rent or fulfill any other covenant under the lease.

(c) Acquisition of the leasehold interest of any unit owner by the owner of the reversion or remainder does not merge the leasehold and fee simple interests unless the leasehold interests of all unit owners subject to that reversion or remainder are acquired.

(d) If the expiration or termination of a lease decreases the number of units in a condominium, the allocated interests shall be reallocated in accordance with G.S. 47C-1-107(a) as though those units had been taken by eminent domain. Reallocations shall be confirmed by an amendment to the declaration prepared, executed, and recorded by the association. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. Subsection (a) requires that the lessor of any lease, which upon termination will terminate the condominium or reduce its size, must sign the declaration. This requirement insures

that the lessor has consented to use of his land as a condominium.

2. Subsection (a)(1) provides alternative bracketed language which should be considered by each state based on its practice. In any state where the recording acts do not specify the essential terms which must be included in a memorandum of lease, either this section should be supplemented to specify the essential terms or else the bracketed language relating to such memoranda should be deleted.

3. This section sets out requirements concerning leasehold condominiums which are not typically contained in the statutes of most states. In particular, it requires that the declaration describe the rights of the unit owners, or state that they have no rights concerning a variety of significant matters. The section also contains a number of other consumer protection provisions. However, in contrast to the result under some states' laws, unit owners have no statutory right to renewal of a lease upon termination.

4. The most significant matter of consumer protection in this section is subsection (b), which provides that unit owners who pay their share of the rent of the underlying lease may not be deprived of their enjoyment of the leasehold premises.

Subsection (b) is intended to protect the "unit owner" regardless of whether he is a lessee, sublessee, or even further down in a chain of transfer of leasehold interests. Thus, for example, if the "unit owner" is a sublessee, the term "lessor (or) his successor in interest" includes not only the lessor, but also the lessee.

Subsection (b) further protects the unit owner by assuring that he will not share with his fellow unit owners any collective obligations toward their common lessor. All obligations are instead fractionalized so that no unit owner can be made liable or otherwise penalized for a default by any of his fellows. Thus, a default by the association in payment of the rent due the lessor, in a case where the lease of common elements ran to the association, would not permit the lessor to terminate continued use of those common elements by those unit owners who then pay their share of the rent.

5. Subsection (d) considers the problems created when termination of a lease reduces the size of a condominium. In the event that some units are thereby withdrawn from the condominium, reallocation of the allocated interests would be required; the section describes how that reallocation would occur.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, the words "after demand" were added to subsection (b) to require that demand be made to the unit owners to ensure their notification of the lessor's termination attempt.

§ 47C-2-107. Allocation of common element, interests, votes, and common expense liabilities.

(a) The declaration shall allocate a fraction or percentage of undivided interests in the common elements and in the common expenses of the association and a portion of the votes in the association to each unit and state the formulas used to establish those allocations. Those allocations may not discriminate in favor of units owned by the declarant.

(b) If units may be added to or withdrawn from the condominium, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the condominium after the addition or withdrawal.

(c) The declaration may provide: (i) that different allocations of votes shall be made to the units on particular matters specified in the declaration; (ii) for cumulative voting only for the purpose of electing members of the executive board; and (iii) for class voting on specified issues affecting the class if necessary to protect valid interests of the class. A declarant may not utilize cumulative or class voting for the purpose of evading any limitation imposed on declarants by this chapter nor may units constitute a class because they are owned by a declarant.

(d) Except for minor variations due to rounding, the sum of the undivided interests in the common elements and common expense liabilities allocated at any time to all the units must each equal one if stated as fractions or one hundred percent (100%) if stated as percentages. If the declaration allocates to each of the units a fraction or percentage of ownership of the common elements that results in an actual total of such fractions or percentages that is greater or less than the actual whole of such ownership, each unit's ownership of the common elements shall be automatically reallocated so that each unit is allocated the same fraction or percentage of ownership of the actual whole as that unit had of the actual total that was greater or less than the actual whole. The declarant or the association shall file an amendment to the declaration reflecting such reallocation which amendment need not be executed by any other party.

(e) The common elements are not subject to partition, and any purported conveyance, encumbrance, judicial sale, or other voluntary or involuntary transfer of an undivided interest in the common elements made without the unit to which that interest is allocated is void. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. Most existing condominium statutes require a single common basis, usually related to the "value" of the units, to be used in the allocation of common element interests, votes in the association, and common expense liabilities. This Act departs radically from such requirements by permitting each of these allocations to be made on different bases, and by permitting allocations which are unrelated to value.

Thus, all three allocations might be made equally among all units, or in proportion to the relative size of each unit, or on the basis of any other formula the declarant may select, regardless of the values of those units. Moreover, "size" might be used, for example, in allocating common expenses and common element interests, while equality is used in allocating votes in the association. This section does not require that the formulas used by the declarant be justified, but it does require that the formulas be explained. The sole restriction on the formulas to be used in these allocations is that they not discriminate in favor of the units owned by the declarant. Otherwise, each of the separate allocations may be made on any basis which the declarant chooses, and none of the allocations need be tied to any other allocation.

2. While the flexibility permitted in allocations is broader than that permitted by any present statutes, it is likely that the traditional bases for allocation will continue to be used, and that the allocations for all allocated interests will often be based on the same formulas. Most commonly, those bases include size, equality, or value of units. Each of these is discussed below.

3. If size is chosen as a basis of allocation, the declarant must choose between reliance on area or volume, and the choice must be indicated in the declaration. The declarant might further refine the formula by, for example, excluding unheated areas from the calculation or by partially discounting such areas by means of a ratio. Again, the declarant must indicate the choices he has made and explain the formulas he has chosen.

4. Most existing condominium statutes require that "value" be used as the basis of all allocations. Under this Act a declarant is free to select such a basis if he wishes to do so. For example, he might designate the "par value" of each unit as a stated number of dollars or points. However, the formula used to develop the par values of the various units would have to be explained in the declaration. For example, the declaration for a high-rise condominium might disclose that the par value of each unit is based on the relative area of each unit on the lower floors, but increases by specified percentages at designated higher levels. The formula for determining area in this example could be further refined in the manner suggested in Comment 2, above, and any other factors (such as the direction in which a unit faces) could also be given weight so long as the weight given to each factor is explained in the declaration.

5. The purpose of subsection (b) is to afford some advance disclosure to purchasers of units in the first phase of a flexible condominium of how common element interests, votes and common expense liabilities will be reallocated if additional units are added.

6. Subsection (e) means what it says when it states that a lien or encumbrance on a common element interest without the unit to which that common element interest is allocated is void. Thus, consider the case of a flexible condominium in which there are 50 units in the first phase, each of which initially has a 2 percent undivided interest in the common elements. The declarant borrows money by mortgaging additional real estate. When the declarant expands the condominium by adding phase 2 containing an additional 50 units, he reallocates the common element interests in

the manner described in his original declaration, to give each of the 100 units a 1 percent undivided interest in the common elements in both phases of the condominium. At this point, the construction lender cannot have a lien on the undivided interest of phase 1 owners in the common elements of phase 2 because of the wording of the statute. Thus, the most that the construction lender can have is a lien on the phase 2 units together with their common element interests. The mortgage documents may be written to reflect the fact that upon the addition of phase 2 of the condominium, the lien on the additional real estate will be converted into a lien on the phase 2 units and on the common element interest as they pertain to those units in both phase 1 and phase 2; however, *see* Comment to Section 2-110.

Unless the lender also requires phase 2 to be designated as withdrawable real estate, the phase 2 portion may not be foreclosed upon other than as condominium units and the construction lender may not dispose of phase 2 other than as units which are a part of the condominium. In the event that phase 2 is designated as withdrawable land, then the construction lender may force withdrawal of phase 2 and dispose of it as he wishes, subject to the provisions of the declaration. If one unit in phase 2, however, has been sold to anyone other than the declarant, then phase 2 ceases to be withdrawable land by operation of Section 2-110(d)(2).

7. If a unit owned only by the declarant—as opposed to the same unit if owned by another person—may be subdivided into 2 or more units but cannot be converted in whole or in part into common elements, it is still a unit that may be subdivided or converted into 2 or more units or common elements, within the meaning of the definition of development rights, and is not governed by Section 2-113 (Subdivision of Units).

8. Subsection (c) represents a significant departure from practice in most states concerning the allocation of votes. The usual rule is that a single allocation of votes is made to each unit, and that allocation applies to all matters on which those votes may be cast. This section recognizes that the increasingly complex nature of some projects requires different allocation on particular questions. It may be appropriate, for example, in a project where common expense liabilities, or questions concerning rules and regulations, affect different units differently.

EXAMPLE:

In a mixed commercial and residential project, the declaration might provide that each unit owner would have an equal vote for the election of the Board of Directors. However, on matters concerning ratification of the common expense budget, where the commercial unit owners paid a much larger share than their proportion of the total units, the vote of commercial unit owners would be increased to 3 times the number of votes the residential owners held. Alternatively, of course, it might be possible to treat this question as a class voting matter, but the draftsman is provided flexibility in this section to choose the most appropriate solution.

9. This section recognizes that there may be certain instances in which class voting in the association would be desirable. For example, in a mixed-use condominium consisting of both residential and commercial units, there may be certain kinds of issues upon which the residential or commercial unit owners should have a special voice, and the device described in Comment 9 was not desired. To prevent abuse of class voting by the declarant, subsection (c) permits class voting only with respect to specified issues directly affecting the designated class and only insofar as necessary to protect valid interests of the designated class.

EXAMPLE:

Owners of town house units, in a single project consisting of both town house and high-rise buildings, might properly constitute a separate class for purposes of voting on expenditures affecting just the town house units, but they might not be permitted to vote by class on rules for the use of facilities used by all the units.

The subsection further provides that the declarant may not use the class voting device for the purpose of evading any limitation imposed on declarants by this Act (e.g., to maintain declarant control beyond the period permitted by Section 3-103).

10. The last clause of subsection (c) prohibits a practice common in the planned community or other non-condominium multi-ownership projects, where units owned by declarant constitute a separate class of units for voting and other purposes. Upon transfer of title, those units lose these more favorable voting rights. This section makes clear that the votes and other attributes of ownership of a unit may not change by virtue of the identity of the owner. In those circumstances which such classes were legitimately intended to address, principally control of the association, the Act provides other, more balanced devices for declarant control. *See* Section 3-103(d).

NORTH CAROLINA COMMENT

This section does not differ significantly from the Uniform Act except for the second and third sentences of subsection (d) which provides for a mathematical reallocation to ensure that the undivided shares in the common elements, stated as fractions or percentages, in the aggregate, equal either one or one hundred.

§ 47C-2-108. Limited common elements.

(a) Except for the limited common elements described in subsections 47C-2-102(2) and (4), the declaration shall specify to which unit or units each limited common element is allocated. That allocation may not be altered without the unanimous consent of the unit owners whose units are affected.

(b) Except as the declaration otherwise provides, a limited common element may be reallocated by an amendment to the declaration executed by all the unit owners between or among whose units the reallocations is made. The persons executing the amendment shall provide a copy thereof to the association, which shall record it. The amendment shall be recorded in the same manner as a deed in the names of the parties and the condominium.

(c) A common element not previously allocated as a limited common element may not be so allocated except by unanimous consent or pursuant to provisions in the declaration made in accordance with G.S. 47C-2-105(a)(7). All such allocations shall be made by amendments to the declaration and shall become effective in accordance with G.S. 47C-2-117(c). (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. Like all other common elements, limited common elements are owned in common by all unit owners. The use of a limited common element, however, is reserved to less than all of the unit owners. Unless the declaration provides otherwise, the association is responsible for the upkeep of a limited common element and the cost of such upkeep is assessed against all the units. *See* Sections 3-107(a) and 3-115(c)(1). This might include the costs of repainting all shutters, or balconies, for example, which are limited common elements pursuant to Section 2-102(4). Accordingly, there may be occasions where, to meet the expectations of owners and to have costs borne directly by those who benefit from those amenities, the declaration might provide that the costs will be borne, not by all unit owners as part of their common expense assessments, but only by the owners to which the limited common elements are assigned.

2. Even common elements which are not "limited" within the meaning of this Act may nevertheless be restricted by the unit owners' association pursuant to the powers set forth in Section 3-102(6) and (10), unless that power is limited in the declaration. For example, the association might assign reserved parking spaces to designated unit owners, or even to persons who are not unit owners. Such a parking space would differ from a limited common element in that its use would be merely a personal right of the person to whom it is assigned and this section would not have to be complied with to allocate it or to reallocate it.

3. Because a mortgage or deed of trust may restrict the borrower's right to transfer the use of a limited common element without the lender's consent, the terms of the encumbrance should be examined to determine whether the lender's consent or release is needed to transfer that right of use to another person.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, minor changes were made for clarification and subsection (c) was amended to authorize a common element to be changed into a limited common element by unanimous consent of all the unit owners.

§ 47C-2-109. Plats and plans.

(a) The declarant shall file with the register of deeds in each county where the condominium is located the condominium's plat or plan prepared in accordance with this section. The plat or plan shall be considered a part of the declaration but shall be recorded separately, and the declaration shall refer by number to the file where such plat or plan is recorded. Each plat or plan shall be kept by the register of deeds in a separate file, indexed in the same manner as a conveyance entitled to be recorded, numbered serially in the order of receipt, and designated "Condominium" with the name of the building, if any, and shall contain a reference to the book and page numbers and date of the recording of the declaration. Each plat or plan must contain a certification by an architect licensed under the provisions of Chapter 83 [83A] of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes that it contains all of the information required by this section.

(b) Each plat or plan or combination thereof must show:

(1) The name and a survey or general schematic map of the entire condominium;

(2) The location and dimensions of all real estate not subject to development rights or subject only to the development right to withdraw and the location and dimensions of all existing improvements within that real estate;

(3) The location and dimensions of any real estate subject to development rights, labeled to identify the rights applicable to each parcel;

(4) The extent of any encroachments by or upon any portion of the condominium;

(5) The location and dimensions of all easements having specific location and dimensions and serving or burdening any portion of the condominium;

(6) The verified statement of an architect licensed under the provisions of Chapter 83A of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes certifying that such plats or plans fully and accurately depict the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, as built;

(6a) The certificate by a registered land surveyor licensed under the provisions of Chapter 89C of the General Statutes stating that the plats or plans accurately depict the legal boundaries and the physical location of the units and other improvements relative to those boundaries;

(7) The locations and dimensions of limited common elements; however, parking spaces and the limited common elements described in subsections 47C-2-102(2) and (4) need not be shown, except for decks, stoops, porches, balconies, and patios;

(8) A legally sufficient description of any real estate in which the unit owners will own only an estate for years, labeled as "leasehold real estate";

(9) The distance between noncontiguous parcels of real estate comprising the condominium;

(10) Any unit in which the declarant has reserved the right to create additional units or common elements.

(c) A plat may also show the intended location and dimensions of any contemplated improvement to be constructed anywhere within the condominium. Any contemplated improvement shown must be labeled either "MUST BE BUILT" or "NEED NOT BE BUILT".

(d) Upon exercising any development right, the declarant shall record either new plats and plans necessary to conform to the requirements of subsections (a), (b), and (c) or new certifications of plats and plans previously recorded if those plats and plans otherwise conform to the requirements of those subsections.

(e) In order to be recorded, plats or plans filed shall:

(1) Be reproducible plats or plans on cloth, linen, film, or other permanent material and be submitted in that form; and

(2) Have an outside marginal size of not more than 21 inches by 30 inches nor less than eight and one-half inches by 11 inches, including one and one-half inches for binding on the left margin and a one-half inch border on each of the other sides. Where size of the buildings or suitable scale to assure legibility require, plats or plans may be placed on two or more sheets with appropriate match lines.

(f) The fee for recording each plat or plan sheet submitted shall be as prescribed by G.S. 161-10(a)(3). (1985 (Reg. Sess., 1986), c. 877, s. 1; 1987, c. 282, s. 8; 1989, c. 571.)

OFFICIAL COMMENT

1. The terms "plat" or "plan" have been given a variety of meanings by custom and usage in the various jurisdictions. Under this Act, it is important to recognize that a "plat" need not mean a "survey" of the entire real estate constituting a project at the time the initial plat is recorded, although, through amendments to the plat as development proceeds, it ultimately becomes a survey of the entire project.

As to "plan," the Act does not use that term to mean the actual building plans used for construction of the project. Instead, the required content of the plans in this Act is described in subsection (d). Essentially, the plans constitute a boundary survey of each unit. Typically, the walls will be the vertical ("up and down" or "perimetric") boundaries, and the floors and ceilings will be the horizontal boundaries. Importantly, these boundaries need not be physically measured, but may instead be projected from the plat or from actual building construction plans. Thus, the plans under this Act are not conceived to be "as built" plans.

2. Subsection (c) permits, but does not require, the plats to show the location of contemplated improvements. Since construction of contemplated improvements by a declarant involves the exercise of development rights, a declarant may not create any improvement within real estate where no development rights have been reserved, unless the plats actually show that proposed improvement or unless the association (which the declarant may control) makes the improvement pursuant to Section 3-102(7). Should the association attempt that improvement, in the face of unit owner's objections, it may involve risk of challenge. Within land subject to development rights, of course, construction may take place in accordance with the reserved rights, even if no contemplated improvements are shown on the plats. As to the declarant's obligation to complete an improvement that is shown, *see* Section 4-118(a).

3. As noted in the Comments to Section 2-101, a condominium unit may consist of unenclosed ground and/or airspace, with no "building" involved. If this were true of all units in a particular condominium, the provisions of Section 2-109 relating to plans (but not plats) would be inapplicable.

4. In detailing the required contents of the plats, two different types of legal description are contemplated. First, in subsection (b)(1), the plat must show at least a general schematic map of the entire project. While this may be by survey, the Act recognizes that a survey may be unduly expensive or impractical in a large project, and accordingly permits a general schematic map of the entire project at the commencement of development. With respect to those portions of the project, however, where no future development may take place, the flexibility of a general schematic map is not necessary. At the same time, it becomes important for title purposes to be able to identify precisely that portion of the project which is essentially completed. Accordingly, as development ceases in particular phases, subsection (b)(2) contemplates that the locations and dimensions of that real estate will be identified. As this process continues, all of the real estate originally shown in a general schematic map will have been surveyed, and the location and dimensions of that real estate identified, at the expiration of development rights. In addition, subsection (2) contemplates that existing improvements must be shown within real estate where no further development will take place. This does not mean the units which may

be within each building, but it does mean the external physical dimensions of the buildings themselves. As implied by subsection (11), the nature of "existing improvements" required to be surveyed under subsection (2) should be determined by local practices in the particular state.

5. Subsection (b)(3) requires that the real estate which is subject to development rights must be identified with a legally sufficient description, that is, either a metes and bounds description, or reference to the deeds of that real estate. Since different portions of the real estate may be subject to differing development rights—for example, only a portion of the total real estate may be added as well as withdrawn from the project—the plat must identify the rights applicable to each portion of that real estate. The same reasoning applies to the legally sufficient description of easements affecting the condominium and any leasehold real estate.

6. Subsection (f) describes the amendments to the plats and plans which must be made as development rights are exercised. This section requires that the plats and plans be amended at each stage of development to reflect actual progress to date. If an original schematic map was initially recorded as required by subsection (b)(1), the survey required by (b)(2) would also constitute the amendments required by subsection (f).

7. The terms "horizontal" and "vertical" are now commonly understood in condominium parlance to refer, respectively, to "upper and lower" and "lateral or perimetric." Thus, Section 2-102 contemplates that the perimetric walls may be designated as the "vertical" boundaries of a unit and the floor and ceiling as its "horizontal" boundaries. That is the sense in which the words "horizontal" and "vertical" are to be understood in this section and throughout this Act.

8. Sections 4-118 and 4-119 reveal the effect of labeling an improvement "MUST BE BUILT" or "NEED NOT BE BUILT," as required by subsection (b)(3).

NORTH CAROLINA COMMENT

Subsection (a) was amended to make it clear that even though the plan or plat is filed with the declaration, it is to be recorded separately and to clearly provide that the declaration will be recorded in the deed books, but the plan or plat will be recorded in either the plat books or a special set of books for condominiums, eliminating any presumption that plans or plats are to be recorded in the deed books along with the declarations. The language for the second and third sentences was taken from the previous statute. The term "surveyor" was deleted from the list of professionals authorized to certify the plats or plans.

Subsection (b) was amended to delete the phrase "legally sufficient" before "description" as unnecessary and to require that the plan or plat contain the same description for horizontal and vertical units. Additionally, subdivision (b)(10) was taken from (d)(3) of the Uniform Act. Subsections (e) and (f) were brought forward from the previous statute.

Editor's Note. — Chapter 83, referred to in this section, was rewritten by Session Laws 1979, c. 871, s. 1 and has been recodified as Chapter 83A.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-110. Exercise of development rights.

(a) To exercise any development right reserved under G.S. 47C-2-105(a)(8), the declarant shall record an amendment to the declaration (G.S. 47C-2-117) and comply with G.S. 47C-2-109. The declarant is the unit owner of any units thereby created. The amendment to the declaration must assign an identifying number to each new unit created and, except in the case of subdivision or conversion of units described in subsection (c), reallocate the allocated interests among all units. The amendment must describe any common elements and any limited common elements thereby created and, in the case of limited common elements, designate the unit to which each is allocated to the extent required by G.S. 47C-2-108 (Limited Common Elements).

(b) Development rights may be reserved within any real estate added to the condominium if the amendment adding that real estate includes all matters required by, and is in compliance with, G.S. 47C-2-105 and, if a leasehold condominium, G.S. 47C-2-106 and also if the plats and plans include all matters required by G.S. 47C-2-109. This provision does not extend the limit on the exercise of developmental rights imposed by the declaration pursuant to G.S. 47C-2-105(a)(8).

(c) When a declarant exercises a development right to subdivide or convert a unit previously created into additional units, common elements, or both:

(1) If the declarant converts the unit entirely to common elements, the amendment to the declaration must reallocate all the allocated interests of that unit among the other units as if that unit had been taken by eminent domain; or

(2) If the declarant subdivides the unit into two or more units, whether or not any part of the unit is converted into common elements, the amendment to the declaration must reallocate all the allocated interests of the unit among the units created by the subdivision in any reasonable manner prescribed by the declarant.

(d) If the declaration provides pursuant to G.S. 47C-2-105(a)(8) that all or a portion of the real estate is subject to the development right of withdrawal:

(1) If all the real estate is subject to withdrawal, and the declaration does not describe separate portions of real estate subject to that right, no part of the real estate may be withdrawn after a unit has been conveyed to a purchaser; and

(2) If a portion or portions are subject to withdrawal, no part of a portion may be withdrawn after a unit in that portion has been conveyed to a purchaser. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section generally describes the method by which any development right may be exercised. Importantly, while new development rights may be reserved within new real estate which is added to the condominium, the original time limits on the exercise of these rights which the declarant must include in the original declaration may not be extended. Thus, the development process may continue only within the self-determined constraints originally described by the declarant.

2. The reservation and exercise of development rights is and must be closely co-ordinated with financing for the project. As a result, lender review and control of that process is common, and the financing documents should reflect the proposed development process.

A typical construction loan mortgage on a portion of a phased condominium might provide that as soon as new units are built on new land to be added (or, if the portion is also designated withdrawable land, as soon thereafter as anyone other than the declarant becomes the unit owner of a unit in the withdrawable land) the mortgage on that land converts into a mortgage on all of the units located within that portion, together with their respective common element interests. The common element interest of those units will, of course, extend to the common elements in other sections of the condominium. However, failure of a construction loan mortgage to so provide is inconsequential, because conveyance of the units in that phase to the lender or to a purchaser at a foreclosure sale would automatically transfer all of those units' common element interests, as a result of the requirements of Sections 2-108(d) and 2-111(a).

3. A lender who holds a mortgage lien on one portion of a condominium may not cause that portion to be withdrawn from the condominium unless the portion constitutes withdrawable real estate in which there is no unit owner other than the declarant. Even then, the amendment effectuating the withdrawal must be executed by the declarant. Consequently, unless the lender wishes to become a declarant subsequent to foreclosure or a deed in lieu of

foreclosure in order to execute the amendment, or forecloses in order to require an amendment from the association under Section 2-118(i), a lender might require that the signed amendment be deposited in escrow at the time the loan is made in order to protect against a recalcitrant borrower.

4. As indicated in the Comments to Sections 1-103(24) and 1-106, the withdrawal of real estate from a condominium may constitute a subdivision of land under the applicable subdivision ordinance. Under most subdivision ordinances, the owner of the real estate is regarded as the "subdivider." In the event of a withdrawal under this section, however, the declarant is in fact the subdivider because of his unique interest in and control over the real estate, even though the real estate, for title purposes, is a common element until withdrawn. Accordingly, he would bear the cost of compliance with any subdivision ordinance required to withdraw a part of the real estate from the condominium.

5. Subsection (c) deals with special problems surrounding allocated interests when the declarant subdivides or converts units which were originally created in the declaration into additional units, common elements or both. This development right permits the declarant to defer a final decision as to the size of certain units by permitting the subdivision of larger interior spaces into smaller units. The declarant may thus "build to suit" for purchasers' needs or to meet changing market demand. The concept is called "convertible space" in several existing state statutes.

For example, a declarant of a 5-story office building condominium may have purchasers committed at the time of the filing of the condominium declaration but a lack of purchasers for the upper 2 floors. In such a circumstance, the declarant could designate the upper 2 floors as a unit, reserving to himself the right to subdivide or convert that unit into additional units, common elements or a combination of units and common elements as needed to suit the requirements of ultimate purchasers.

If, at a later time, a purchaser wishes to purchase half of one floor as a unit, the declarant could exercise the development right to subdivide his 2-floor unit into 2 or more units. He may also wish to reserve a portion of the divided floor as a corridor which will constitute common elements. In that case, he would proceed pursuant to this subsection to reallocate the allocated interests among the units in the manner described in this section.

Alternatively, the declarant may ultimately decide that the entire 2 floors should be turned over to the unit owners' association not as a unit but as common elements to be used perhaps as a cafeteria serving the balance of the building, or for retail space to be rented by the association. In that case, should he choose to make the entire 2 floors common elements, the provisions of paragraph (c)(1) would apply.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

OPINIONS OF ATTORNEY GENERAL

Incorporation of Plans by Reference. — When recording new plats and plans for units newly added to an expandable condominium, the developer-declarant may incorporate the previously recorded condominium plans by reference if an architect or engineer certifies that the previously recorded plans accurately depict the newly added units as built. See opinion of Attorney General to Mr. Robert H. Bartelt, Assistant County Attorney for Cumberland County, 58 N.C.A.G. 5 (1988).

§ 47C-2-111. Alterations of units.

Subject to the provisions of the declaration and other provisions of law, a unit owner:

(1) May make any improvements or alterations to his unit that do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium;

(2) May not change the appearance of the common elements or the exterior appearance of a unit or any other portion of the condominium without permission of the association; and

(3) May, after acquiring an adjoining unit, remove or alter any intervening partition or create apertures therein, even if the partition is a common element, if those acts do not impair the structural integrity or mechanical systems or lessen the support of any portion of the condominium. Removal of partitions or creation of apertures under this paragraph is not an alteration of boundaries. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section deals with permissible alterations of the interior of a unit, and impermissible alterations of the exterior of a unit and the common elements, in ways which reflect common practice. The stated rules, of course, may be varied by the declaration where desired.

2. Subsection (3) deals in a unique manner with the problem of creating access between adjoining units owned by the same person. The subsection provides a specific rule which would permit a door, stairwell, or removal of a partition wall between those units, so long as structural integrity is not impaired. That alteration would not be an alteration of boundaries, but would be an exception to the basic rule stated in subsection (2).

3. In considering permissible alteration of the interior of a unit, an example may be useful. A nail driven by a unit owner to hang a picture might enter a portion of the wall designated as part of the common elements, but this section would not be violated because structural integrity would not be impaired. Moreover, no trespass would be committed because each unit owner, as a part owner of the common elements, has a right to utilize them subject only to such restrictions as may be created by the Act, the declaration, bylaws, and the unit owners' association pursuant to Section 3-102.

4. Removal of a partition or the creation of an aperture between adjoining units would permit the units to be used as one, but they would not become one unit. They would continue to be separate units within the meaning of Section 1-104 and would continue to be treated separately for the purposes of this Act.

5. In addition to the restrictions placed on unit owners by this section, the declaration or bylaws may restrict a unit owner from altering the interior appearance of his unit. Although this might be an undue restriction if imposed upon the primary residence of a unit owner, it may be appropriate in the case of time-share or other condominiums.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, subdivision (3) was amended to delete references to the acquisition of an adjoining part of an adjoining unit because of confusion that would arise from maintaining the same allocated interest and because it is unlikely that the situation will occur.

§ 47C-2-112. Relocation of boundaries between adjoining units.

(a) Subject to the provisions of the declaration and other provisions of law, the boundaries between adjoining units may be relocated upon application to the association by the owners of those units. Any such application to the association must be in such form and contain such data as may be reasonably required by the association and be accompanied by a plat prepared by an architect licensed under the provisions of Chapter 83 [83A] of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes detailing the relocation of the boundaries between the affected units. If the owners of the adjoining units have specified a reallocation between their units of their allocated interests, the application must state the proposed reallocations. Unless the executive board determines within 30 days that the reallocations are unreasonable, the association, at the expense of the owners filing the application, shall prepare and record an amendment to the declaration that identifies the units involved, states the reallocations, is executed by those unit owners and the association, contains words of conveyance, and is indexed in the name of the grantor and the grantee by the register of deeds.

(b) The association, at the expense of the unit owners filing the application, shall prepare and record plats or plans necessary to show the altered boundaries between adjoining units and their dimensions and identifying numbers. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section changes the effect of most current condominium statutes, under which the boundaries between units may not be altered without unanimous or nearly unanimous consent of the unit owners. As the section makes clear, this result may be varied by restrictions in the declaration.

2. This section contemplates that, upon relocation of the unit boundaries, no reallocation of allocated interests will occur if none is specified in the application. If a reallocation is specified but the executive board deems it unreasonable, then the applicants have the choice of resubmitting the application with a reallocation more acceptable to the board, or going to court to challenge the board's finding as unreasonable.

NORTH CAROLINA COMMENT

Subsection (a) was amended by adding the second sentence which requires that any application must be in such form and contain such data as may be reasonably required by the association and be accompanied by a plat prepared by a registered engineer or surveyor. The requirement allows the association to make a more informed decision on the application. The third sentence was amended to read "the association, at the expense of the owners filing the application, shall prepare and record. . . ." in order to require the applicant to bear the expense of preparation and recordation of the amendment to the declaration.

Subsection (b) was amended by adding the same language regarding expenses to this subsection requiring that plats or plans reflect the altered boundaries.

Editor's Note. — Chapter 83, referred to in this section, was rewritten by Session Laws 1979, c. 871, s. 1 and has been recodified as Chapter 83A.

§ 47C-2-113. Subdivision of units.

(a) If the declaration expressly so permits, a unit may be subdivided into two or more units. Subject to the provisions of the declaration and other provisions of law, upon application of a unit owner to subdivide a unit, the association, at the expense of the unit owner, shall prepare, execute, and record an amendment to the declaration, including the plats and plans, subdividing that unit.

(b) The amendment to the declaration must be executed by the owner of the unit to be subdivided, assign an identifying number to each unit created, and reallocate the allocated interests formerly allocated to the subdivided unit to the new units in any reasonable manner prescribed by the owner of the subdivided unit. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section provides for subdivision of units by unit owners, thereby creating more and smaller units than were originally created. The underlying policy of this section is that the original development plan of the project must be followed, and the expectations of unit owners realized. Accordingly, unless subdivision of the units is expressly permitted by the original declaration, a unit may not be subdivided into 2 or more units unless the declaration is

amended to permit it. A subdivision itself is accomplished by an amendment to the declaration.

2. At the same time, situations will often occur where future subdivision is appropriate, and this section permits the declaration to provide for it. Most state statutes do not presently provide for subdivision of units.

An analogous concept in the context of development rights is subdivision of units by a declarant. The development right is described in Section 2-110.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, language was added to ensure that the appropriate unit owners bear the administrative costs.

§ 47C-2-114. Easement for encroachments.

(a) To the extent that any unit or common element encroaches on any other unit or common element, a valid easement for the encroachment exists. The easement does not relieve a unit owner of liability in case of his willful misconduct nor relieve a declarant or any other person of liability for failure to adhere to the plats and plans.

(b) With respect to all condominiums created prior to October 1, 1986, the provisions of subsection (a) of this section shall be deemed to apply to such condominiums, unless an action asserting otherwise shall have been brought within six months from October 1, 1986. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

Two approaches are presented here as alternatives, since uniformity on this issue is not essential, and various states have adopted one approach or the other. Both theories recognize the fact that the actual physical boundaries may differ somewhat from what is shown on the plats and plans, and the practical effect of both is the same.

The easement approach of Alternative A [adopted in North Carolina as subsection (a)] creates easements for whatever discrepancies may arise, while the "monuments as boundaries" approach of Alternative B would make the title lines move to follow movement of the physical boundaries caused by such discrepancies or subsequent settling or shifting.

NORTH CAROLINA COMMENT

Subsection (a) of this section is identical to Alternate A of the Uniform Act. Subsection (b) provides a six month period within which the owner of a condominium unit in existence before the effective date of the act may challenge the easement described in subsection (a).

Legal Periodicals. — For casenote: "Brevorka v. Wolfe Construction, Inc.: Did I Just Waive My Rights to the Implied Warranty of Workmanlike Construction?," see 26 N.C. Cent. L.J. 59 (2003).

§ 47C-2-115. Use for sales purposes.

A declarant may maintain sales offices, management offices, and models in units or on common elements in the condominium only if the declaration so provides and specifies the rights of a declarant with regard to the number, size, location, and relocation thereof. Any sales office, management office, or model not designated a unit by the declaration is a common element, and if a declarant ceases to be a unit owner, he ceases to have any rights with regard thereto unless it is removed promptly from the condominium in accordance with a right to remove reserved in the declaration. Subject to any limitations in the declaration, a declarant may maintain signs on the common elements advertising the condominium. The provisions of this section are subject to the provisions of other State law and to local ordinances. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section prescribes the circumstances under which portions of the condominium—either units or common elements—may be used for sales offices, management offices, or models. The basic requirement is that the declarant must describe his rights to maintain such offices in the declaration. There are no limitations on that right, so that either units owned by the declarant or other persons, or the common elements themselves, may be used for that purpose. Typical common element uses might include a sales booth in the lobby of the building, or a trailer or temporary building located outside the buildings on the grounds of the property.

2. In addition, this section contains a permissive provision permitting advertising on the common elements. The declarant may choose to limit his rights in terms of the size, location, or other matters affecting the advertising. The Act, however, imposes no limitation. At the same time, the last sentence of the section recognizes that state or local zoning or other laws may limit advertising, both in terms of size and content of the advertising, or the use of the units or common elements for such purposes. This section makes it clear that local law would apply in those cases.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

Legal Periodicals. — For casenote: "Brevorka v. Wolfe Construction, Inc.: Did I Just Waive My Rights to the Implied Warranty of Workmanlike Construction?," see 26 N.C. Cent. L.J. 59 (2003).

§ 47C-2-116. Easement to facilitate exercise of special declarant rights.

Subject to the provisions of the declaration, a declarant has such easements through the common elements as may be reasonably necessary for the purpose of discharging a declarant's obligations or exercising special declarant rights whether arising under this Chapter or reserved in the declaration. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section grants to declarant an easement across the common elements, subject to any self-imposed restrictions on that easement contained in the declaration. At the same time, the easement is not an easement for all purposes and under all circumstances, but only a grant of such rights as may be reasonably necessary for the purpose of exercising the declarant's rights. Thus, for example, if other access were equally available to the land where new units are being created, which did not require the declarant's construction equipment to pass and repass over the common elements in a manner which significantly inconvenienced the unit owners, a court might apply the "reasonably necessary" test contained in this section to consider limitations on the declarant's easement. The rights granted by this section may be enlarged by a specific reservation in the declaration.

2. The declarant is also required to repair and restore any portion of the condominium used for the easement granted under this section. *See* Section 4-119(b).

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-117. Amendment of declaration.

(a) Except in cases of amendments that may be executed by a declarant under G.S. 47C-2-109(d) or 47C-2-110, the association under G.S. 47C-1-107, 47C-1-106(d) [47C-2-106(d)], 47C-2-112(a), or 47C-2-113, or certain unit owners under G.S. 47C-2-108(b), 47C-2-112(a), 47C-2-113(b), or 47C-2-118(b), and except as limited by subsection (d), the declaration may be amended only by affirmative vote of or a written agreement signed by, unit owners of units to which at least sixty-seven percent (67%) of the votes in the association are allocated or any larger majority the declaration specifies. The declaration may specify a smaller number only if all of the units are restricted exclusively to nonresidential use.

(b) No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year after the amendment is recorded.

(c) Every amendment to the declaration must be recorded in every county in which any portion of the condominium is located and is effective only upon recordation. An amendment shall be indexed in the Grantee's index in the name of the condominium and the association and in the Grantor's index in the name of the parties executing the amendment.

(d) Except to the extent expressly permitted or required by other provisions of this Chapter, no amendment may create or increase special declarant rights, increase the number of units, or change the boundaries of any unit, the allocated interest of a unit, or the uses to which any unit is restricted, in the absence of unanimous consent of the unit owners.

(e) Amendments to the declaration required by this Chapter to be recorded by the association shall be prepared, executed, recorded, and certified on behalf of the association by any officer of the association designated for that purpose or, in the absence of designation, by the president of the association. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section recognizes that the declaration, as the perpetual governing instrument for the condominium, may be amended by various parties at various times in the life of the project. The basic rule, stated in subsection (a), is that the declaration, including the plats and plans, may only be amended by vote of 67% of the unit owners. The section permits a larger percentage to be required by the declaration, and also recognizes that, in an entirely nonresidential condominium, a smaller percentage might be appropriate.

In addition to that basic rule, subsection (a) lists those other instances where the declaration may be amended by the declarant alone without association approval, or by the association acting through its board of directors.

2. Section 1-104 does not permit the declarant to use any device, such as powers of attorney executed by purchasers at closings, to circumvent subsection (d)'s requirement of unanimous consent. This section does not supplant any requirements of common law or of other statutes with respect to conveyancing if title to real property is to be affected.

3. Subsection (e) describes the mechanics by which amendments recorded by the association are filed, and resolves a number of matters often neglected by bylaws.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

Editor's Note. — Subsection (d) of G.S. 47C-1-106, referred to in subsection (a) of this section, does not exist. It appears that a reference to G.S. 47C-2-106(d) was intended.

§ 47C-2-118. Termination of condominium.

(a) Except in the case of a taking of all the units by eminent domain (G.S. 47C-1-107), a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent (80%) of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the units in the condominium are restricted exclusively to nonresidential uses.

(b) An agreement to terminate must be evidenced by the execution of a termination agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The termination agreement must specify a date after which the agreement will be void unless recorded before that date. A termination agreement and all ratifications thereof must be recorded in every county in which a portion of the condominium is situated, and is effective only upon recordation.

(c) In the case of a condominium containing only units having horizontal boundaries described in the declaration, a termination agreement may provide that all the common elements and units of the condominium shall be sold following termination. If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement must set forth the minimum terms of the sale.

(d) In the case of a condominium containing any units not having horizontal boundaries described in the declaration, a termination agreement may provide for sale of the common elements, but may not require that the units be sold following termination, unless the declaration as originally recorded provided otherwise or unless all the unit owners consent to the sale.

(e) The association, on behalf of the unit owners, may contract for the sale of real estate in the condominium, but the contract is not binding on the unit owners until approved pursuant to subsections (a) and (b). If any real estate in the condominium is to be sold following termination, title to that real estate, upon termination, vests in the association as trustee for the holders of all interests in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale must be distributed to unit owners and lienholders as their interests may appear, in proportion to the respective interests of unit owners as provided in subsection (h). Unless otherwise specified in the termination agreement, as long as the association holds title to the real estate, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit. During the period of that occupancy, each unit owner and his successors in interest remain liable for all assessments and other obligations imposed on unit owners by this Chapter or the declaration.

(f) If the real estate constituting the condominium is not to be sold following termination, title to the common elements and, in a condominium containing only units having horizontal boundaries described in the declaration, title to all the real estate in the condominium, vests in the unit owners upon termination as tenants in common in proportion to their respective interests as provided in subsection (h), and liens on the units shift accordingly. While the tenancy in common exists, each unit owner and his successors in interest have an exclusive right to occupancy of the portion of the real estate that formerly constituted his unit.

(g) Following termination of the condominium, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for unit owners and holders of liens on the units as their interests may appear. Following termination, creditors of the association holding liens on the units, which were recorded before termination, may enforce those liens in the same manner as any lienholder. All other creditors of the association are to be treated as if they had perfected liens on the units immediately before termination.

(h) The respective interests of unit owners referred to in subsections (e), (f) and (g) are as follows:

(1) Except as provided in paragraph (2), the respective interests of unit owners are the fair market value of their units, limited common elements, and common element interests immediately before the termination, as determined by one or more independent appraisers selected by the association. The decision of the independent appraisers shall be distributed to the unit owners and becomes final unless disapproved within 30 days after distribution by unit owners of units to which twenty-five percent (25%) of the votes in the association are allocated. The proportion of any unit owner's interest to that of all unit owners is determined by dividing the fair market value of that unit owner's unit and common element interest by the total fair market values of all the units and common elements.

(2) If any unit or any limited common element is destroyed to the extent that an appraisal of the fair market value thereof prior to destruction cannot be made, the interests of all unit owners are their respective common element interests immediately before the termination.

(i) Except as provided in subsection (j), foreclosure or enforcement of a lien or encumbrance against the entire condominium does not of itself terminate the condominium, and foreclosure or enforcement of a lien or encumbrance against a portion of the condominium, other than withdrawable real estate, does not withdraw that portion from the condominium. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the condominium, but the person taking title thereto has the right to require from the association, upon request, an amendment excluding the real estate from the condominium.

(j) If a lien or encumbrance against a portion of the real estate comprising the condominium has priority over the declaration, and the lien or encumbrance has not been released, the parties foreclosing the lien or encumbrance may upon foreclosure, record an instrument excluding the real estate subject to that lien or encumbrance from the condominium. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. While few condominiums have yet been terminated under present state law, a number of problems are certain to arise upon termination which have not been adequately addressed by most of those statutes. These include such matters as the percentage of unit owners which should be required for termination; the time frame within which written consents from all unit owners must be secured; the manner in which common elements and units should be disposed of following termination, both in the case of sale and non-sale of all of the real estate; the circumstances under which sale of units may be imposed on dissenting owners; the powers held by the Board of Directors on behalf of the association to negotiate a sales agree-

ment; the practical consequences to the project from the time the unit owners approve the termination until the transfer of title and occupancy actually occurs; the impact of termination on liens on the units and common elements; distribution of sales proceeds; the effect of foreclosure or enforcement of liens against the entire condominium with respect to the validity of the project; and other matters.

2. Recognizing that unanimous consent from all unit owners would be impossible to secure as a practical matter on a project of any size, subsection (a) states a general rule that 80% consent of the unit owners would be required for termination of a project. The declaration may require a larger percentage of the unit owners and, in a non-residential project, it may also require a smaller percentage. Pursuant to Section 2-119 (Rights of Secured Lenders), lenders may require that the declaration specify a larger percentage of unit owner consent or, more typically, will require the consent of a percentage of the lenders before the project may be terminated.

3. As a result of subsection (d), unless the declaration requires unanimous consent for termination, the declarant may be able to terminate the condominium despite the unanimous opposition of other unit owners if the declarant owns units to which the requisite number of votes are allocated. Such a result might occur, for example, should a declarant be unable to continue sales in a project where some sales have been made.

4. Subsection (a) describes the procedure for execution of the termination agreement. It recognizes that not all unit owners will be able to execute the same instrument, and permits execution or ratification of the master termination agreement. Since the transfer of an interest in real estate is being accomplished by the agreements, each of the ratifications must be executed in the same manner as a deed. Importantly, the agreement must specify the time within which it will be effective; otherwise, the project might be indefinitely in "limbo" if ratifications had been signed by some, but not all, required unit owners, and the signing unit owners fail to revoke their agreements. Importantly, the agreement becomes effective only when it is recorded.

5. · Subsections (c) and (d) deal with the question of when all the real estate in the condominium, or the common elements, may be sold without unanimous consent of the unit owners. The section reaches a different result based on the physical configuration of the project.

Subsection (c) states that if a condominium contains only units having horizontal boundaries—a typical high rise building—the unit owners may be required to sell their units upon termination despite objection. Under subsection (d), however, if the project contains any units which do not have horizontal boundaries—for example, a single family home project where some of the units include title to *land* and could theoretically continue apart from a condominium as a title matter—then the termination agreement may not force dissenting unit owners to sell their units unless the declaration as originally recorded provided otherwise. Obviously, of course, if all the unit owners consent to the sale of the units, sale of the entire development would be possible.

6. Subsection (e) describes the powers of the association during the pendency of the termination proceedings. It empowers the association to negotiate for the sale, but makes the validity of any contract dependent on unit owner approval. This section also makes clear that, upon termination, title to the real estate shall be held by the association, so that the association may convey title without the necessity of each unit owner signing the deed. Finally, this section makes clear that, until the association delivers title to the condominium property, the project will continue to operate as it had prior to the termination, thus insuring that the practical necessities of operation of the real estate will not be impaired.

7. Subsection (f) contemplates the possibility that a condominium might be terminated but the real estate not sold. While this is not likely to be the usual case, it is important to provide for the possibility.

8. A complex series of creditors' rights questions may arise upon termination. Those questions involve competing claims of first mortgage holders on individual units, other secured and unsecured creditors of individual unit owners, judgment creditors of the association, creditors of the association to whom a security interest in the common elements has been granted, and unsecured creditors of the association. Subsection (g) attempts to establish general rules with respect to these competing claims, but leaves to state law the resolution of the priorities of those competing claims.

The examples which follow illustrate the relative effects of several provisions set out in the Act, based on application of an assumed state lien priority rule of "first in time, first in right." In those instances, particularly involving mechanics' liens, where state law often establishes priorities at variance with that rule, that result is also indicated.

EXAMPLE 1:

HYPOTHETICAL FOR EXAMPLES 1A-1H: A condominium consists of 5 detached single family homes on 5 individually owned lots, together with a 6th lot which is undeveloped but intended for future construction of a swimming pool serving all units. The development is served by a private road. Lot 6 and the private road are common elements owned on an undivided interest basis by the unit owners.

The declaration provides that: (1) upon termination, all units and the common elements must be sold; (2) the association is permitted to encumber Lot 6, and to grant a security interest in that lot for any purpose; and (3) common element interest votes and common expense liabilities are allocated equally among the units. For purposes of the example, we have assumed that the documents do not require the consent of first mortgage holders before the unit owners may vote to terminate.

The 5 units were originally sold at equal prices of $50,000. Common expenses in the project are $100 per unit, per month, and are used for a variety of purposes, including insurance and upkeep of the units and common elements. At the time the units were conveyed, each of them was released from all liens affecting the condominium which were senior to the declaration.

A shopping center developer has offered $380,000 for the purchase of the entire condominium. The association's members unanimously vote in favor of termination, and otherwise comply with Section 2-118. The appraisal required by Section 2-118(h) shows that the units are still of equal value.

EXAMPLE 1A:

At the time of termination, the 5 units were financed as follows:

Unit 1: The owner's first mortgage had an unpaid balance of $50,000.

Unit 2: The owner's first mortgage had an unpaid balance of $40,000.

Unit 3: The owner's first mortgage had an unpaid balance of $25,000.

Units 4 and 5: The owners paid cash, and there is no mortgage on either unit.

In addition, all common expenses had been paid when due. The other assets of the association, including reserves, bank account, and all other personal property, total $20,000.

Under the Act (Section 2-118(e)), the association, following sale, holds the proceeds of sale together with the assets of the association, "as trustee for the holders of all interests in the units." In these circumstances, the interests of each party in the total value of $400,000 would be as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Owners	30,000	40,000	55,000	80,000	80,000

EXAMPLE 1B:

The facts stated in Example 1A remain true. However, at termination, Unit 1 has failed to pay its common expenses for 12 months. In these circumstances, the interests of each party would be as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due Owners	28,000	40,000	55,000	80,000	80,000

In this example, both the lenders and the association are fully paid because the sales proceeds exceed the liens on the units. Note, however, that 6 months of the unpaid assessments prime the first mortgage pursuant to Section 3-116(b). Thus, if the sales proceeds had been only $50,000 per unit, rather than $80,000, the results with respect to Unit 1 would have been as follows:

Sales Proceeds	$50,000
6-Month Assessment Due Association	600
Balance	$49,400
Paid to 1st Mortgage Holder	$49,400
Loss to 1st Mortgage Lender	(600)
Loss to Association	(600)

Of course, the association has, and the lender may have, a claim against the unit owner, personally, for the unpaid sums due them. Importantly, however, neither the other unit owners nor their units are subject to any liability for those claims.

Because the lien of the first mortgage holder, at termination or foreclosure, is junior to the first 6 months of unpaid assessments due the association, lenders may protect themselves under the Act by requiring the escrow of 6 months' common expense assessments, as they often do for real property taxes.

EXAMPLE 1C:

The facts stated in Example 1B remain true. However, after all the units were initially sold, but before termination, 80% of the unit owners agree to build a swimming pool on Lot 6. The association contracts with XYZ Pool Company to build the pool for $100,000. XYZ does not take a security interest in the common elements, as it might have done under Section 3-112, and does not act to perfect any available mechanics' lien under state law. The pool is properly completed. When the association fails to pay, XYZ sues the association, secures a judgment, and properly perfects its judgment pursuant to Section 3-111 (Tort and Contract Liability). As provided in Section 3-111, liens resulting from judgments against the association are governed by Section 3-117. At the time of termination, XYZ has not been paid, and its claim amounts to $100,000.

Section 3-117(a) provides that a "judgment for money against the association," if perfected as a lien on real property under state law, "is a lien in favor of the judgment lienholder against all of the units." However, the last sentence also provides that the judgment is not a lien on the common elements. Accordingly, XYZ holds a $20,000 lien on each of the units as of the date the lien is perfected. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Due Owners	8,800	20,000	35,000	60,000	60,000

EXAMPLE 1D:

All facts stated in example 1C remain true, except that XYZ Pool Company, at the time it contracts to build the pool, takes a security interest in Lot 6, pursuant to Section 3-112, and that security interest includes a release of that real estate, upon default, from all restrictions imposed on the real estate by the declaration. At termination, XYZ has not instituted any action against the association to enforce its claim.

In these circumstances, XYZ, as a secured creditor with respect to Lot 6, holds an interest superior to the declaration, and would have the right to exclude that real estate from the project. Any sale of the entire condominium would be subject to the superior interest of XYZ. For that reason, in the normal circumstances, the association would not be able to secure a release of that lien unless XYZ were paid in full from the proceeds of the sale, which would have the effect of reducing the value of the sale to $280,000. Note that this has the economic effect of placing the XYZ claim, at termination, ahead of prior first mortgages. For this reason, first mortgage holders will typically require their consent before common elements may be subjected to a lien.

EXAMPLE 1E:

The facts stated in Example 1C remain true so that XYZ holds only a perfected judgment lien, not a security interest in the common elements.

After the XYZ lien was perfected, a $50,000 uninsured judgment is entered against the owner of Unit 4, resulting from his personal business. The lien is perfected, and rests only against Unit 4. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
Due Owners	8,800	20,000	35,000	10,000	60,000

EXAMPLE 1F:

The facts stated in Example 1E remain true. After the swimming pool is built, a neighbor's child falls into the untended and unfenced pool, and is injured. The child sues the association. One month after the personal judgment against Unit 4 is perfected, the child secures a judgment against the association for $100,000 more than the association's insurance. Under state law, the tort judgment, when perfected, constitutes a lien only from the date judgment is entered, and does not enjoy a higher priority. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due XYZ	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
Tort Lien	8,800	20,000	20,000	10,000	20,000
Due Owners	-0-	-0-	15,000	-0-	40,000

Note that the child's lien realizes only $78,800; the estate is not entitled to participate in the proceeds available to Units 3 and 5 to satisfy the unmet claims against Units 1 and 4, because those units are liable only for their pro rata share of the claim, which is the same amount any of those units would have had to pay prior to termination in order to secure a partial release. Thus, if Unit 5, prior to termination, had secured a partial release for $20,000 from the estate, the result would be the same.

Note also that the value of the common elements is not segregated from the values of the units, since the sales' values of the units reflect all of the value of the real estate. Similarly, note that, after termination, the tort claimant is not entitled to reach or segregate the personal property of the corporation, valued before termination at $20,000, even though he could have reached the bank account or other assets prior to termination. Any other rule would create enormous complexity, would impose arbitrary losses on creditors out of priority, and would tend to shift economic losses to unit owners who had paid their share of claims.

EXAMPLE 1G:

The facts stated in Example 1F remain true. After the Unit 4 personal lien is perfected, but, one week before the tort judgment against the association is perfected, P Paving Company begins repaving the private road. Work is completed one week after the tort judgment is perfected. The association fails to pay P $50,000 upon completion as agreed, and P immediately records its mechanics' lien. Under state law, a mechanics' lien, if recorded within 60 days of the time work is completed, holds priority as of the day work began. State law does not, however, grant the mechanics' lien priority over any liens perfected before work began. P Paving sues on its lien, and secures a judgment. In these circumstances, the interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Due Association (Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
Due 1st Mortgage Holders	50,000	40,000	25,000	-0-	-0-
Due Association (Not Priming 1st Mortgage)	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	20,000	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	10,000
Tort Lien	-0-	10,000	20,000	-0-	20,000
Due Owners	-0-	-0-	5,000	-0-	30,000

Note that, just as in the case of the tort lien, when Unit 1 could not contribute its share of the mechanics' lien, the remaining units were not liable for the balance.

In the example, the common expense lien arises before P Paving lien had arisen. If the common expense lien arose after the P Paving lien, we would be faced with circular liens, where: (a) the P Paving lien would prime the common expense lien; (b) 6 months of the common expense lien would prime the mortgage; and (c) the mortgage would prime the P Paving lien. Such circular lien problems, however, are not unique in the law.

EXAMPLE 1H:

The facts stated in example 1G remain true. Assume Unit 5, before termination, paid its pro rata share of both the P Paving lien and the tort lien. This reduces the P Paving lien to $40,000, and the tort lien to $80,000. Under Section 3-117, this entitles Unit 5 to a partial release of both claims, and neither P Paving nor the child has a further claim against Unit 5. The interests of the parties are as follows:

UNIT #	1	2	3	4	5
Share of Proceeds	80,000	80,000	80,000	80,000	80,000
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Liens	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	20,000	20,000	20,000	20,000	-0-
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	8,800	10,000	10,000	10,000	-0-
Tort Lien	-0-	10,000	20,000	-0-	20,000
Due Owners	-0-	-0-	5,000	-0-	80,000

EXAMPLE 2:

The facts stated in example 1G remain true. Assume, however, that, at the outset, Unit 5 was twice as large as the others, sold for $100,000, or twice as much as the others, and twice the common expense liability was allocated to it. At termination, it remains twice as valuable. In those circumstances, the results on sale are as follows:

UNIT #	1	2	3	4	5
Sale Proceeds	66,666	66,666	66,666	66,666	133,332
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Lien	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	15,466	16,666	16,666	16,666	33,333
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	13,333	-0-	26,666
Tort Lien	-0-	1,667	16,666	-0-	33,333
Due Owners	-0-	-0-	-0-	-0-	50,000

In this example, the equal distribution of common expense liability coupled with the "fair value" distribution of sales proceeds create the greatest losses for the creditors of the association.

9. Subsection (h) departs significantly from the usual result under most condominium acts. Under those acts the proceeds of the sale of the entire project are distributed upon termination to each unit owner in accordance with the common element interest which was allocated at the outset of the project. Of course, in an older development, those original allocations will bear little resemblance to the actual value of the units. For that reason, the Act adopts an appraisal procedure for distribution of the sales proceeds. As suggested in the examples on the distribution of proceeds, this appraisal may dramatically affect the amount of dollars actually received by unit owners. Accordingly, it is likely the appraisal will be required to be distributed prior to the time the termination agreement is approved, so that unit owners may understand the likely financial consequences of the termination.

10. Subsection (h)(2) is an exception to the "fair market value" rule. It provides that, if appraisal of any unit cannot be made, either through pictures or comparison with other units, so that any unit's appropriate share in the overall proceeds cannot be calculated, then the distribution will fall back on the only objective, albeit artificial, standard available, which is the common element interest allocated to each unit.

11. Foreclosure of a mortgage or other lien or encumbrance does not automatically terminate the condominium, but, if a mortgagee or other lienholder (or any other party) acquires units with a sufficient number of votes, that party can cause the condominium to be terminated pursuant to subsection (a) of this section.

12. A mortgage or deed of trust on a condominium unit may provide for the lien to shift, upon termination, to become a lien on what will then be the borrower's undivided interest in the whole property. However, such a shift would be deemed to occur even in the absence of express language, pursuant to the first sentence of subsection (d).

13. With respect to the association's role as trustee under subsection (c), see Section 3-117.

14. If an initial appraisal made pursuant to subsection (h) were rejected by vote of the unit owners, the association would be obligated to sure a new appraisal.

15. "Foreclosure" in subsection (i) includes deeds in lieu of foreclosure, and "liens" includes tax and other liens on real estate which may be converted or withdrawn from the project.

16. The termination agreement should adopt or contain any restrictions, covenants and other provisions for the governance and operation of the property formerly constituting the condominium which the owners deem appropriate. These might closely parallel the provisions of the declaration and bylaws. This is particularly important in the case of a condominium which is not to be sold pursuant to the terms of the termination agreement. In the absence of such provisions, the general law of the state governing tenancies in common would apply.

17. Note that *all* the liens are allocated in accordance with each unit's common expense liability, since no special provision was made for allocating the costs of the pool, the paving or the tort claim. Unit 5 probably did not contemplate the size of its exposure; nevertheless, fewer dollars were available to creditors upon termination than in Example 1G.

EXAMPLE 3:

The facts stated in Example 1G remain true, including the fact that Unit 5 was originally sold at the same price ($50,000) as the remaining units. Upon appraisal, however, assume that, because of improvements, Unit 5 is now worth $75,000. Three other units have remained at $50,000, while Unit 1 was neglected, and is now worth only $40,000. Common expense liabilities never changed. In this example, the total value of the units is now $265,000.

Since sales proceeds are distributed in accordance with fair market values, the following distribution of proceeds would apply:

Unit 1:	(15.09433%)	$ 60,377
Unit 2:	(18.86793%)	$ 75,472
Unit 3:	(18.86793%)	$ 75,472
Unit 4:	(18.86793%)	$ 75,472
Unit 5:	(28.30188%)	$113,207
	100.00000%	$400,000

UNIT #	1	2	3	4	5
Sales Proceeds	60,377	75,472	75,472	75,472	113,207
Common Expense Lien	600	-0-	-0-	-0-	-0-
First Mortgage Lien	50,000	40,000	25,000	-0-	-0-
Common Expense Lien	600	-0-	-0-	-0-	-0-
XYZ Pool Lien	9,177	20,000	20,000	20,000	20,000
Personal Lien, Unit 4	-0-	-0-	-0-	50,000	-0-
P Paving Lien	-0-	10,000	10,000	5,472	10,000
Tort Lien	-0-	5,472	20,000	-0-	20,000
Due Owners	-0-	-0-	472	-0-	63,207

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-119: Reserved for future codification purposes.

§ 47C-2-120. Master associations.

(a) If the declaration for a condominium provides that any of the powers described in G.S. 47C-3-102 are to be exercised by or may be delegated to a profit or nonprofit corporation (or unincorporated association) which exercises those or other powers on behalf of one or more condominiums or for the benefit of the unit owners of one or more condominiums, all provisions of this chapter applicable to unit owners' associations apply to any such corporation (or unincorporated association), except as modified by this section.

(b) Unless a master association is acting in the capacity of an association described in G.S. 47C-3-101, it may exercise the powers set forth in G.S. 47C-3-102(a)(2) only to the extent expressly permitted in the declarations of condominiums which are part of the master association or expressly described in the delegations of power from those condominiums to the master association.

(c) If the declaration of any condominium provides that the executive board may delegate certain powers to a master association, the members of the executive board have no liability for the acts or omissions of the master association with respect to those powers following delegation.

(d) The rights and responsibilities of unit owners with respect to the unit owners' association set forth in G.S. 47C-3-103, 47C-3-108, 47C-3-109, and 47C-3-110 apply in the conduct of the affairs of a master association only to those persons who elect the board of a master association, whether or not those persons are otherwise unit owners within the meaning of this Chapter.

(e) Notwithstanding the provisions of G.S. 47C-3-103(f) with respect to the election of the executive board of an association by all unit owners after the period of declarant control ends and even if a master association is also an association described in G.S. 47C-3-101, the certificate of incorporation or other instrument creating the master association and the declaration of each condominium, the powers of which are assigned by the declaration or delegated to the master association, may provide that the executive board of the master association must be elected after the period of declarant control in any of the following ways:

(1) All unit owners of all condominiums subject to the master association may elect all members of that executive board.
(2) All members of the executive boards of all condominiums subject to the master association may elect all members of that executive board.
(3) All unit owners of each condominium subject to the master association may elect specified members of that executive board.
(4) All members of the executive board of each condominium subject to the master association may elect specified members of that executive board. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. It is very common in large or multiphased condominiums, particularly those developed under existing laws, for the declarant to create a master or umbrella association which provides management services or decision-making functions for a series of smaller condominiums. While it is expected that this phenomenon will be less necessary under this Act because of the permissible period of time for declarant control over the project, it is nonetheless possible in larger developments that this form of management will continue. Moreover, this section should be of significant benefit to the large number of condominiums created under prior law which have need for the benefits of a provision on master associations.

2. Subsection (a) states the general rule that the powers of a unit owners' association may only be exercised by, or delegated to, a master association by, the declaration for the condominium permits that result. The declaration may have originally provided for a master association; alternatively, the unit owners of several condominiums may amend their declarations in similar fashion to provide for this power. Subsection (a) makes it clear that, if any of the powers of the unit owners' association may be exercised by, or delegated to, a master association, all other provisions of this Act which apply to a unit owners' association apply to that master association except as modified by this section. Accordingly, such provisions on notice, voting, quorums, records, meetings, and other matters which apply to the unit owners' association would apply with equal validity to such a master association.

3. Subsection (b) changes the usual presumption with respect to the powers of the unit owners' association, except in those cases where the master association is actually acting as the only association for one or more condominiums. In those cases where it is not so acting. However, the only power of the unit owners' association which the master association may exercise are the ones expressly permitted in the declaration or in the delegation of power. This is in significant contrast with the rule of Section 3-102 that all of the powers described in that section may be exercised unless limited by the declaration.

4. Subsection (c) clarifies the liability of the members of the executive board of a unit owners' association when the condominium for which the unit owners' association acts has delegated some of its powers to a master association. In that instance, subsection (c) makes it clear that the members of the executive board of the unit owners' association have no liability for acts and omissions of the master association board; under subsection (a), that liability lies with the members of the master association.

5. Subsection (d) addresses the question of the rights and responsibilities of the unit owners in their dealings with the master board. A variety of sections enumerated in subsection (d) provides certain rights and powers to unit owners in their dealings with their association. In the affairs of the master association, however, it would be incongruous for the unit owners to maintain those same rights if those unit owners were not in fact electing the master board. Thus, for example, the question of election of directors, meetings, notice of meetings, quorums, and other matters enumerated in those sections would have little meaning if those sections were read literally when applied to a master board which was not elected by all members of the condominiums subject to the

master board. For that reason, the rights of notice, voting, and other rights enumerated in the Act are available only to the persons who actually elect the board.

6. Subsection (e) recognizes that there may be reasons for a representative form of election of directors of the master association. Alternatively, there may be cases where at-large election is reasonable. For that reason, subsection (e) provides that, after the period of declarant control has terminated, there may be 4 ways of electing the master association board. Those four ways are: (1) at-large election of the master board among all the condominiums subject to the master association; (2) at-large election of the master board only among the members of the executive boards of all condominiums subject to the master association; (3) each condominium might have designated positions on the master board, and those spaces could be filled by an at-large election among all the members of each condominium; or (4) the designated positions could be filled by an election only among the members of the executive board of the unit owners' association for each condominium. It would only be in the case of an at-large election of the master board among all condominiums that subsection (d) would have no relevance.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-2-121. Merger or consolidation of condominiums.

(a) Any two or more condominiums may, by agreement of the unit owners as provided in subsection (b), be merged or consolidated into a single condominium. In the event of a merger or consolidation, unless the agreement otherwise provides, the resultant condominium shall be, for all purposes, the legal successor of all of the pre-existing condominiums, and the operations and activities of all associations of the pre-existing condominiums shall be merged or consolidated into a single association which shall hold all powers, rights, obligations, assets and liabilities of all pre-existing associations.

(b) An agreement of two or more condominiums to merge or consolidate pursuant to subsection (a) must be evidenced by an agreement prepared, executed, recorded and certified by the president of the association of each of the pre-existing condominiums following approval by owners of units to which are allocated the percentage of votes in each condominium required to terminate that condominium. Any such agreement must be executed in the same manner as a deed and recorded in every county in which a portion of the condominium is located and is not effective until recorded.

(c) Every merger or consolidation agreement must provide for the reallocation of the allocated interests in the new association among the units of the resultant condominium either (i) by stating such reallocations or the formulas upon which they are based or (ii) by stating the percentage of overall allocated interests of the new condominium which are allocated to all of the units comprising each of the pre-existing condominiums and providing that the portion of such percentages allocated to each unit formerly comprising a part of such pre-existing condominium shall be equal to the percentages of allocated interests allocated to such unit by the declaration of the pre-existing condominiums. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. There may be circumstances where condominiums may wish to merge or consolidate their activities by the creation of a single condominium; this section provides for that possibility.

Subsection (a) makes it clear that a merger or consolidation may occur by the same vote of the unit owners necessary to terminate the condominium. If 2 or more condominiums are merged or consolidated, the resulting condominium is for all purposes the legal successor of the pre-existing condominiums, with a single association for all purposes. In the event condominiums did not wish to completely merge or consolidate their affairs, it would also be possible for them to create a master association pursuant to Section 2-120.

2. Under subsection (b), the merger or consolidation agreement is treated for recording purposes as an amendment to the declaration, and the same requirements for approval are mandated as for termination.

3. Subsection (c) does not state a minimum requirement for the contents of a merger or consolidation agreement, and any additional clauses not inconsistent with subsection (c) may be included. The important point that subsection (c) makes is that the reallocation of the common element interests, common expense liabilities and votes in the new association must be carefully stated.

Subsection (c) states 2 alternative rules in this respect. First, the reallocations may be accomplished by stating specifically the allocation of common element interests, common expense liability, and votes in the association to each unit, or by stating the formulas by which those interests may be allocated to each unit in all of the pre-existing condominiums.

Alternatively, the merger or consolidation agreement may state the percentage of overall common element interests, common expense liabilities, and votes in the association allocated to "all of the units comprising each of the pre-existing condominiums." The agreement might then also provide that the portion of the percentage allocated to each unit from among the shares allocated to each condominium will be equal to the percentage of common expense liability and votes in the association allocated to that unit by the declaration of the pre-existing condominium. An example of how this alternative formulation would operate may be useful.

EXAMPLE:

Assume that 2 adjoining condominiums wish to merge their activities into one condominium. Assume that the first condominium consists of 10 one-bedroom units, with an annual budget of $10,000. Assume further that each of the units, being identical, has a common element interest of 10%, equal common expense liability of 10%, and one vote per unit.

The second condominium consists of 40 units, with 20 2-bedroom units and 20 3-bedroom units. The budget of the second condominium consists of $70,000 per year. Each of the 2-bedroom units has been allocated a 2% interest in the common elements and a 2% common expense liability, while each of the 3-bedroom units has been allocated a 3% interest in the common elements, and a 3% common expense liability. Finally, each of the units in the second condominium also has an equal vote.

There is no provision in the Act which mandates a particular allocation among condominiums 1 and 2 as to either common element interest, common expense liabilities or votes. Should the unit owners wish to retain as much similarity to their previous common element interests and common expense liabilities, however, and should they wish to retain equal voting in a merged project, it would be possible for them, pursuant to subsection (c)(ii), to state "the percentage of overall allocated interests of the new condominium" as follows: as to common element interests and common expense liabilities, they might allocate 12.5% of those interests in the merged project to condominium 1, and 87.5% thereof to condominium 2. If the agreement further provided that "the portion of the percentages allocated to each unit formerly comprising a part of the pre-existing condominiums must be equal to the percentages of allocated interests allocated to that unit by the declaration of the pre-existing condominium" as required by subsection (c), each unit in condominium 1 would then have allocated to it 1.25% of both the common element interests and common expense liabilities in the new condominium. It happens that 1.25% of the common expenses of a merged condominium which has a budget of $80,000 equals $1,000.

Under the same rationale, if each of the 2-bedroom units in the second condominium to which were formerly allocated 2% of the common element interests and common expense liabilities, now has allocated 2% of the 87.5% allocated to the second condominium, each of those units would then have allocated to it 1.75% of the common element interest and common expense liabilities of the new condominium. 1.75% of $80,000 is $1,400. Similarly, each of the 3-bedroom units would then have allocated to it 2.625% of the common element interest and common expense liabilities in the merged condominium. That percentage of the common expense liabilities of $80,000 would yield an annual cost of $2,100, the same cost as previously obtained in this condominium.

Further, the unit owners are free to allocate votes among the units in any way which they see fit. Of course, if they choose to allocate equal votes to all the units, which was the method previously used in both condominiums, this would have the effect of giving 20% of the votes to condominium 1, even though condominium 1 had only 12.5% of the common expense liabilities. It may be, however, that this tracks with the expectations of the unit owners in both condominiums. Alternatively, condominium 1 might be allocated 12.5% of the votes, which, when divided up among the 10 units, would give each one-bedroom unit a .125 vote. If 87.5% of the votes were allocated equally among the unit owners in the second condominium, then each of the unit owners in condominium 2 would have .21875 votes.

If some other configuration was to be desired, then the allocations would of necessity be made pursuant to paragraphs (c)(i) rather than (c)(ii).

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

Article 3.

Management of the Condominium.

§ 47C-3-101. Organization of unit owners' association.

A unit owners' association shall be organized no later than the date the first unit in the condominium is conveyed. The membership of the association at all times shall consist exclusively of all the unit owners, or following termination of the condominium, of all persons entitled to distributions of proceeds under G.S. 47C-2-118. The association shall be organized as a profit or nonprofit corporation or as an unincorporated nonprofit association. (1985 (Reg. Sess., 1986), c. 877, s. 1; 2006-226, s. 4.)

OFFICIAL COMMENT

1. The first purchaser of a unit is entitled to have in place the legal structure of the unit owners' association. The existence of the structure clarifies the relationship between the developer and other unit owners and makes it easy for the developer to involve unit owners in the governance of the condominium even during a period of declarant control reserved pursuant to Section 3-103(d).

2. The bracketed language preserves the flexibility existing under the vast majority of present condominium statutes to organize the association as a profit or non-profit corporation or as an unincorporated association. Although at least one state (Georgia) requires the organization of the association in corporate form, it is not desirable to mandate this result in a uniform act. If a state wishes to mandate incorporation, it should delete the bracketed language.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

Editor's Note. — Session Laws 2006-226, s. 5, contains a severability clause.

Session Laws 2006-226, s. 6, provides: "This act does not affect an action or proceeding commenced or right accrued before this act takes effect."

Session Laws 2006-226, s. 7, provides: "The Revisor of Statutes shall cause to be printed along with this act all relevant portions of the official comments to the Uniform Unincorporated Nonprofit Association Act and all explanatory comments of the drafters of this act as the Revisor deems appropriate."

Effect of Amendments. — Session Laws 2006-226, s. 4, effective January 1, 2007, substituted "unincorporated nonprofit association" for "unincorporated association" in the last sentence.

§ 47C-3-102. Powers of unit owners' association.

(a) Unless the declaration expressly provides to the contrary, the association, even if unincorporated, may:

(1) Adopt and amend bylaws and rules and regulations;

(2) Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners;
(3) Hire and terminate managing agents and other employees, agents, and independent contractors;
(4) Institute, defend, or intervene in its own name in litigation or administrative proceedings on matters affecting the condominium;
(5) Make contracts and incur liabilities;
(6) Regulate the use, maintenance, repair, replacement, and modification of common elements;
(7) Cause additional improvements to be made as a part of the common elements;
(8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, provided that common elements may be conveyed or subjected to a security interest only pursuant to G.S. 47C-3-112;
(9) Grant easements, leases, licenses, and concessions through or over the common elements;
(10) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements other than limited common elements described in subsections 47C-2-102(2) and (4) and for services provided to unit owners;
(11) Impose charges for late payment of assessments, not to exceed the greater of twenty dollars ($20.00) per month or ten percent (10%) of any assessment installment unpaid and, after notice and an opportunity to be heard, suspend privileges or services provided by the association (except rights of access to lots) during any period that assessments or other amounts due and owing to the association remain unpaid for a period of 30 days or longer, and levy reasonable fines not to exceed one hundred dollars ($100.00) (G.S. 47C-3-107.1) for violations of the declaration, bylaws, and rules and regulations of the association.
(12) Impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by G.S. 47C-4-109, or statements of unpaid assessments;
(13) Provide for the indemnification of and maintain liability insurance for its officers, executive board, directors, employees and agents;
(14) Assign its right to future income, including the right to receive common expense assessments.
(15) Exercise all other powers that may be exercised in this State by legal entities of the same types as the association; and
(16) Exercise any other powers necessary and proper for the governance and operation of the association.

(b) Notwithstanding subsection (a), the declaration may not impose limitations on the power of the association to deal with the declarant that are more restrictive than the limitations imposed on the power of the association to deal with other persons. (1985 (Reg. Sess., 1986), c. 877, s. 1; 2004-109, s. 2; 2005-422, ss. 10, 11.)

OFFICIAL COMMENT

1. This section permits the declaration, subject to the limitations of subsection (b), to include limitations on the exercise of any of the enumerated powers. The bracketed language making a specific reference to unincorporated associations is not intended to exclude other forms of association; the unincorporated association would have such powers, subject to the declaration, regardless of the legal status of an unincorporated association in the state. If a state wishes to permit the association to be unincorporated and the law of the state is unclear whether an unincorporated association would have such powers in the absence of the

language, the bracketed language should be retained and the brackets removed.

2. Required provisions of the bylaws of the association, referenced in paragraph (1), are set forth in Section 3-106.

3. Many state condominium statutes give the association the power to sue and be sued in its own name. In the absence of a statutory grant of standing such as that set forth in paragraph (4), some courts have held that the association, because it has no ownership interest in the condominium, has no standing to bring, defend, or to intervene in litigation or administrative proceedings in its own name.

4. Paragraph (8) refers to the power granted by Section 3-112 to sell or encumber common elements without a termination of the condominium upon a vote of the requisite number of unit owners. Paragraph (9) permits the association to grant easements, leases, licenses, and concessions with respect to the common elements without a vote of the unit owners.

5. The powers granted the association in paragraph (11) to impose charges for late payment of assessments and to levy reasonable fines for violations of the association's rules reflect the need to provide the association with sufficient powers to exercise its "governmental" functions as the ruling body of the condominium community. These powers are intended to be in addition to any rights which the association may have under other law.

6. Under paragraph (14), the declaration may provide for the assignment of income of the association, including common expense assessment income, as security for, or payment of, debts of the association. The power may be limited in any manner specified in the declaration—for example, the power might be limited to specified purposes such as repair of existing structures, or to income from particular sources such as income from tenants, or to a specified percentage of common expense assessments. The power, in many instances, should help materially in securing credit for the association at favorable interest rates. The inability of associations to borrow because of a lack of assets, in spite of its income stream, has been a significant problem.

7. If the association is incorporated, it may, pursuant to paragraph (16), exercise all other powers of a corporation. Similarly, if the association is unincorporated, the association may, by virtue of paragraph (16), exercise all other powers of an unincorporated association. Inconsistent provisions of state corporation or unincorporated association law are subject to the provisions of this Act, as provided in Section 1-108.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, subdivision (4) was amended to delete the requirement that the association act on behalf of "2 or more unit owners" because of a belief that the association should be able to act in its own name. Subdivision (11) was amended to insert a limitation of $150 on the amount of late charges or fines for violations of the declaration, bylaws, or regulations of the association. Subdivision (15) was deleted as unnecessary.

Effect of Amendments. — Session Laws 2005-422, ss. 10 and 11, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, rewrote subdivision (a)(11); deleted "but only to the extent the declaration expressly so provides" at the end of subdivision (a)(14); and made a minor punctuation change.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

CASE NOTES

Applicability of Fee Provision. — Fee provision in new Condominium Act was not made applicable to existing condominium associations. Miesch v. Ocean Dunes Homeowners Ass'n, 120 N.C. App. 559, 464 S.E.2d 64 (1995).

§ 47C-3-103. Executive board members and officers.

(a) Except as provided in the declaration, the bylaws, or subsection (b) or other provisions of this chapter, the executive board may act in all instances on behalf of the association. In the performance of their duties, the officers and members of the executive board shall be deemed to stand in a fiduciary relationship to the association and the unit owners and shall discharge their duties in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions.

(b) The executive board may not act on behalf of the association to amend the declaration (G.S. 47C-2-117), to terminate the condominium (G.S. 47C-2-118), or to elect members of the executive board or determine the qualifications, powers and duties, or terms of office of executive board members (G.S. 47C-3-103(e) and (f)), but the executive board may fill vacancies in its membership for the unexpired portion of any term. Notwithstanding any provision of the declaration or bylaws to the contrary, the unit owners, by at least sixty-seven percent (67%) vote of all persons present and entitled to vote at any meeting of the unit owners at which a quorum is present, may remove any member of the executive board with or without cause, other than members appointed by the declarant.

(c) Within 30 days after adoption of any proposed budget for the condominium, the executive board shall provide a summary of the budget to all the unit owners, and shall set a date for a meeting of the unit owners to consider ratification of the budget not less than 14 nor more than 30 days after mailing of the summary. There shall be no requirement that a quorum be present at the meeting. The budget is ratified unless at that meeting a majority of all the unit owners or any larger vote specified in the declaration rejects the budget. In the event the proposed budget is rejected, the periodic budget last ratified shall be continued until such time as the unit owners ratify a subsequent budget proposed by the executive board.

(d) Subject to subsection (e), the declaration may provide for a period of declarant control of the association, during which period a declarant, or persons designated by him, may appoint and remove the officers and members of the executive board. Regardless of the period provided in the declaration, a period of declarant control terminates no later than the earlier of: (i) 120 days after conveyance of seventy-five percent (75%) of the units (including units which may be created pursuant to special declarant rights) to unit owners other than a declarant; (ii) two years after all declarants have ceased to offer units for sale in the ordinary course of business; or (iii) two years after any development right to add new units was last exercised. A declarant may voluntarily surrender the right to appoint and remove officers and members of the executive board before termination of that period, but in that event he may require, for the duration of the period of declarant control, that specified actions of the association or executive board, as described in a recorded instrument executed by the declarant, be approved by the declarant before they become effective.

(e) Not later than 60 days after conveyance of twenty-five percent (25%) of the units (including units which may be created pursuant to special rights) to unit owners other than a declarant, at least one member and not less than twenty-five percent (25%) of the members of the executive board shall be elected by unit owners other than the declarant. Not later than 60 days after conveyance of fifty percent (50%) of the units (including units which may be created pursuant to special declarant rights) to unit owners other than a declarant, not less than thirty-three percent (33%) of the members of the executive board shall be elected by unit owners other than the declarant.

(f) Not later than the termination of any period of declarant control, the unit owners shall elect an executive board of at least three members, at least a majority of whom must be unit owners. The executive board shall elect the officers. The executive board members and officers shall take office upon election.

(g) The association shall publish the names and addresses of all officers and board members of the association within 30 days of the election. (1985 (Reg. Sess., 1986), c. 877, s. 1; 2005-422, ss. 12, 13.)

OFFICIAL COMMENT

1. Subsection (a) makes members of the executive board appointed by the declarant liable as fiduciaries of the unit owners with respect to their actions or omissions as members of the board. This provision imposes a very high standard of duty because the board is vested with great power over the property interests of unit owners, and because there is a great potential for conflicts of interest between the unit owners and the declarant.

Officers and board members elected by the unit owners are required only to exercise ordinary and reasonable care. This lower standard of care should increase the willingness of unit owners to serve as officers and members of the board.

2. The provisions of paragraph (c) permit the unit owners to disapprove any proposed budget, but a rejection of the budget does not result in cessation of assessment until a budget is approved. Rather, assessments continue on the basis of the last approved periodic budget until the new budget is in effect.

3. Subsection (d) and (e) recognize the practical necessity for the declarant to control the association during the developmental phases of a condominium project. However, any executive board member appointed by the declarant pursuant to subsection (d) is liable as a fiduciary to any unit owner for his acts or omissions in such capacity.

4. Subsection (d) permits a declarant to surrender his right to appoint and remove officers and executive board members prior to the termination of the period of declarant control in exchange for a veto right over certain actions of the association or its executive board. This provision is designed to encourage transfer of control by declarants to unit owners as early as possible, without impinging upon the declarant's rights (for the duration of the period of declarant control) to maintain ultimate control of those matters which he may deem particularly important to him. It might be noted that the declarant at all times (even after the expiration of the period of declarant control) is entitled to cast the votes allocated to his units in the same manner as any other unit owner.

5. Subsection (e), in combination with subsection (d), provides for a gradual transfer of control of the association to the unit owners from the declarant. Such a gradual transfer is preferable to a one-time turnover of control since it assures that the unit owners will be involved, to some extent, in the affairs of the association from a relatively early date and that some unit owners will acquire experience in dealing with association matters.

NORTH CAROLINA COMMENT

The second sentence of subsection (a) was amended to state expressly that the executive board acts as a fiduciary to the association and not the declarant, and by adding the standard of care set out in Chapter 55 of the General Statutes for directors of business corporations.

Changes in subsection (c) were for clarification purposes. The change in subsection (d) from a period of 60 days to 120 days for the termination of declarant control was seen as a more practical period.

In subsection (b) the provision in the Uniform Act (subsection (g)) requiring a two-thirds vote was changed to a requirement of 67 percent to simplify computation.

Effect of Amendments. — Session Laws 2005-422, ss. 12 and 13, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, substituted "(G.S. 47C-3-103(e) and (f))" for "(G.S. 47C-3-103(f))" in subsection (b); and added subsection (g).

§ 47C-3-104. Transfer of special declarant rights.

(a) No special declarant right (G.S. 47C-1-103(23)) created or reserved under this chapter may be transferred except by an instrument evidencing the transfer recorded in every county in which any portion of the condominium is located. The instrument is not effective unless executed by the transferee.

(b) Upon transfer of any special declarant right, the liability of a transferor declarant is as follows:

(1) A transferor is not relieved of any obligation or liability arising before the transfer, including, but not limited to, liability or obligations

relating to warranties. Lack of privity does not deprive any unit owner of standing to bring an action to enforce any obligation of the transferor.

(2) If the successor to any special declarant right is an affiliate of a declarant (G.S. 47C-1-103(1)), the transferor is jointly and severally liable with the successor for any obligation or liability of the successor which relates to the condominium.

(3) If a transferor retains any special declarant right, but transfers other special declarant rights to a successor who is not an affiliate of the declarant, the transferor is liable for any obligations or liabilities imposed on a declarant by this chapter or by the declaration relating to the retained special declarant rights and arising after the transfer.

(4) A transferor has no liability for any act or omission or any breach of a contractual or warranty obligation arising from the exercise of a special declarant right by a successor declarant who is not an affiliate of the transferor.

(c) Unless otherwise provided in a mortgage instrument or deed of trust, in case of foreclosure of a mortgage, tax sale, judicial sale, sale by a trustee under a deed of trust, or sale under Bankruptcy Code or receivership proceedings, of any units owned by a declarant, or real estate in a condominium subject to development rights, a person acquiring title to all the real estate being foreclosed or sold, but only upon his request, succeeds to all special declarant rights related to that real estate held by that declarant, or only to any rights reserved in the declaration and held by that declarant to maintain models, sales offices and signs. The judgment or instrument conveying title shall provide for transfer of only the special declarant rights requested.

(d) Upon foreclosure, tax sale, judicial sale, sale by a trustee under a deed of trust, or sale under Bankruptcy Code or receivership proceedings, of all units and other real estate in a condominium owned by a declarant the declarant ceases to have any special declarant rights.

(e) The liabilities and obligations of persons who succeed to special declarant rights are as follows:

(1) A successor to any special declarant right who is an affiliate of a declarant is subject to all obligations and liabilities imposed on the transferor related to the condominium.

(2) A successor to any special declarant right, other than a successor described in paragraphs (3) and (4) who is not an affiliate of a declarant, is subject to all obligations and liabilities:

a. On a declarant which relate to his exercise or nonexercise of special declarant rights; or

b. On his transferor, other than:

(i) Misrepresentations by any prior declarant;

(ii) Warranty obligations on improvements made by any previous declarant, or made before the condominium was created;

(iii) Breach of any fiduciary obligation by any previous declarant or his appointees to the executive board; or

(iv) Any liability or obligation imposed on the transferor as a result of the transferor's acts or omissions after the transfer.

(3) A successor to only a right reserved in the declaration to maintain models, sales offices, and signs (G.S. 47C-2-115), if he is not an affiliate of a declarant, may not exercise any other special declarant right, and is not subject to any liability or obligation as a declarant, except the obligation to provide a public offering statement, and any liability arising as a result thereof.

(4) A successor to all special declarant rights held by his transferor who is not an affiliate of that declarant and who succeeded to those rights

pursuant to a deed in lieu of foreclosure or a judgment or instrument conveying title to units under subsection (c), may declare his intention in a recorded instrument to hold those rights solely for transfer to another person. Thereafter, until transferring all special declarant rights to any person acquiring title to any unit owned by the successor, or until recording an instrument permitting exercise of all those rights other than the right held by his transferor to control the executive board in accordance with the provisions of G.S. 47C-3-103(d) for the duration of any period of declarant control, and any attempted exercise of those rights is void. So long as a successor declarant may not exercise special declarant rights under this subsection, he is not subject to any liability or obligation as a declarant other than liability for his acts and omissions under G.S. 47C-3-103(d). (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section deals with the issue of the extent to which obligations and liabilities imposed upon a declarant by this Act are transferred to a third party by a transfer of the declarant's interest in a condominium. There are two parts to be [the] problem. First, what obligations and liabilities to unit owners (both existing unit owners and persons who become unit owners in the future) should a declarant retain, notwithstanding his transfer of interests. Second, what obligations and liabilities may fairly be imposed upon the declarant's successor in interest. No present condominium state adequately addresses these issues.

2. This section strikes a balance between the obvious need to protect the interests of unit owners and the equally important need to protect innocent successors to a declarant's rights, especially persons such as mortgagees whose only interest in the condominium project is to protect their debt security. The general scheme of the section is to impose upon a declarant continuing obligations and liabilities for promises, acts, or omissions undertaken during the period that he was in control of the condominium, while relieving a declarant who transfers all or part of his special declarant rights in a project of such responsibilities with respect to the promises, acts, or omissions of a successor over whom he has no control. Similarly, the section imposes obligations and liabilities arising after the transfer upon a non-affiliated successor to a declarant's interests, but absolves such a transferee of responsibility for the promises, acts, or omissions of a transferor declarant over which he had no control. Finally, the section makes special provision for the interests of certain successor declarants (*e.g.,* a mortgagee who succeeds to the rights of the declarant pursuant to a "deed in lieu of foreclosure" and who holds the project solely for transfer to another person) by relieving such persons of virtually all of the obligations and liabilities imposed upon declarants by this Act.

3. Subsection (a) provides that a successor in interest to a declarant may acquire the special rights of the declarant only by recording an instrument which reflects a transfer of those rights. This recordation requirement is important to determine the duration of the period of declarant control pursuant to Section 3-103(d) and (e), as well as to place unit owners on notice of all persons entitled to exercise the special rights of a declarant under this Act. The transfer by a declarant of all of his interest in a condominium project to a successor, without a concomitant transfer of the special rights of a declarant pursuant to this subsection, results in the automatic termination of such special declarant rights and of any period of declarant control.

4. Under subsection (b), a transferor declarant remains liable to unit owners (both existing unit owners and persons who subsequently become unit owners) for all obligations and liabilities, including warranty obligations on all improvements made by him, arising prior to the transfer. If a declarant transfers any special declarant right to an affiliate (as defined in Section 1-103(1)), the transferor remains subject to all liabilities specified in paragraph (1) of subsection (b) and, in addition, is jointly and severally liable with his successor in interest for all obligations and liabilities of the successor.

5. The obligations and liabilities imposed upon transferee declarants under the Act are set forth in subsection (e). In general, a transferee declarant (other than an affiliate of the original declarant and other than a successor whose interest in the project is solely for the protection of debt security) becomes subject to all obligations and liabilities imposed upon a declarant by the Act or by the declaration with respect to any promises, acts, or omissions undertaken subsequent to the transfer which

relate to the rights he holds. Such a transferee is liable for the promises, acts, or omissions of the original declarant undertaken prior to the transfer, except as set forth in paragraph (e)(2)(ii). For example, a successor declarant would not be liable for the warranty obligations of the original declarant with respect to improvements to the project made by the original declarant. Similarly, a successor would not be liable, under normal circumstances, for any misrepresentation or breach of fiduciary duty by the original declarant prior to the transfer. The successor is liable, however, to complete improvements labeled "MUST BE BUILT" on the original plans.

6. To preclude declarants from evading their obligations and liabilities under this Act by transferring their interests to affiliated companies, paragraph (1) of subsection (e) makes clear that any successor declarant who is an affiliate of the original declarant is subject to all obligations and liabilities imposed upon the original declarant by the Act or by the declaration. Similarly, as previously noted, paragraph (2) of subsection (b) provides that an original declarant who transfers his rights to an affiliate remains jointly and severally liable with his successor for all obligations and liabilities imposed upon declarants by the Act or by the declaration.

7. The section handles the problem of certain successor declarants (*i.e.,* persons whose sole interest in the condominium project is the protection of debt security) in three ways. First, subsection (c) provides that, in the case of a foreclosure of a mortgage, a sale by a trustee under a deed of trust, or a sale by a trustee in bankruptcy of any units owned by a declarant, any person acquiring title to all of the units being foreclosed or sold may request the transfer of special declarant rights. In that event, and only upon such request, such rights will be transferred in the instrument conveying title to the units and such transferee will thereafter become a successor declarant subject to the other provisions of this section. In the event of a foreclosure, sale by a trustee under a deed of trust, or sale by a trustee in bankruptcy of *all* units owned by a declarant, if the transferee of such units does not request the transfer of special declarant rights, then, under subsection (d), such special declarant rights cease to exist and any period of declarant control terminates.

Second, any person who succeeds to special declarant rights as a result of the transfers just described or by deed in lieu of foreclosure, may, pursuant to paragraph (4) of subsection (e), declare his intention (in a recorded instrument) to hold those rights solely for transfer to another person. Thereafter, such a successor may transfer all special declarant rights to a third party acquiring title to any units owned by the successor but may not, prior to such transfer, exercise any special declarant rights other than the right to control the executive board of the association in accordance with the provisions of Section 3-103(c). A successor declarant who exercises such a right is relieved of any liability under the Act except liability for any acts or omissions related to his control of the executive board of the association. This provision is designed to deal with the typical problem of a foreclosing mortgage lender who opts to bid in and obtain the project at the foreclosure sale solely for the purpose of subsequent resale. It permits such a foreclosing lender to undertake such a transaction without incurring the full burden of declarant obligations and liabilities. At the same time, the provision recognizes the need for continuing operation of the association and, to that end, permits a foreclosing lender to assume control of the association for the purpose of ensuring a smooth transition.

Third, paragraph (3) of subsection (e) provides that a successor who has only the right to maintain model units, sales offices, and signs does not thereby become subject to any obligations or liabilities as a declarant except for the obligation to provide a public offering statement and any liability resulting therefrom. This provision also is designed to protect mortgage lenders and contemplates the situation where a lender takes over a condominium project and desires to sell out existing units without making any additional improvements to the project. This provision facilitates such a transaction by relieving the mortgage lender, in that instance, from the full burden of obligations and liabilities ordinarily imposed upon a declarant under the Act.

Under Section 2-110, a declarant may reserve the right to create additional units in portions of the condominium which were originally designated as common elements. The declarant becomes the owner of any units created, but, prior to creation of units, the title to those portions of the condominium is in the unit owners. The right to create the units is an interest in land in which a security interest might be granted. If the mortgagee of that interest forecloses, the purchaser at the foreclosure sale has the choices concerning development rights and resulting liability which are described in the preceding paragraph. That is, under subsections (c) and (d), the purchaser may limit his liability by agreeing to hold the developments only for the purpose of transfer as provided by paragraph (e)(4) or may buy the rights under paragraph (c).

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, in subsection (b)(1) the qualifying phrase "imposed upon him by this act" was deleted.

Subsection (d)(2) of the Uniform Act was deleted as an unnecessary restrictive provision which would serve only to reduce the value of a condominium to a prospective purchaser at a foreclosure sale.

Subsection (f) of the Uniform Act was omitted.

§ 47C-3-105. Termination of contracts and leases of declarant.

If entered into by or on behalf of the association before the executive board elected by the unit owners pursuant to G.S. 47C-3-103(f) takes office, (1) any management contract, employment contract, or lease of recreational or parking areas or facilities, (2) any other contract or lease between the association and a declarant or an affiliate of a declarant, or (3) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing may be terminated without penalty by the association at any time after the executive board elected by the unit owners pursuant to G.S. 47C-3-103(f) takes office upon not less than 90 days' notice to the other party. Notice of the substance of the provisions of this section shall be set out in each contract entered into by or on behalf of the association before the executive board elected by the unit owners pursuant to G.S. 47C-3-103(f) takes office. Failure of the contract to contain such a provision shall not effect the rights of the association under this section. This section does not apply to any lease the termination of which would terminate the condominium or reduce its size, unless the real estate subject to that lease was included in the condominium for the purpose of avoiding the right of the association to terminate a lease under this section. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section deals with a common problem in the development of condominium projects: the temptation on the part of the developer, while in control of the association, to enter into, on behalf of the association, long-term contracts and leases with himself or with an affiliated entity.

The Act deals with this problem is [in] two ways. First, Section 3-103(a) imposes upon all executive board members appointed by the declarant liability as fiduciaries of the unit owners for all of their acts or omissions as members of the board. Second, Section 3-105 provides for the termination of certain contracts and leases made during a period of declarant control.

2. In addition to contracts or leases made by a declarant with himself or with an affiliated entity, there are also certain contracts and leases so critical to the operation of the condominium and to the unit owners' full enjoyment of their rights of ownership that they too should be voidable by the unit owners upon the expiration of any period of declarant control. At the same time, a statutorily-sanctioned right of cancellation should not be applicable to all contracts or leases which a declarant may enter into in the course of developing a condominium project. For example, a commercial tenant would not be willing to invest substantial amounts in equipment and other improvements for the operation of his business if the lease could unilaterally be cancelled by the association. Accordingly, this section provides that (subject to the exception set forth in the last sentence thereof), upon the expiration of any period of declarant control, the association may terminate without penalty, any "critical" contract (*i.e.,* any management contract, employment contract, or lease of recreational or parking areas or facilities) entered into during a period of declarant control, any contract or lease to which the declarant or an affiliate of the declarant is a party, or any contract or lease previously entered into by the declarant which is not *bona fide* or which was unconscionable to the unit owners at the time entered into under the circumstances then prevailing.

3. The last sentence of the section addresses the usual leasehold condominium situ-

ation where the underlying real estate is subject to a long-term ground lease which is then submitted to the Act. Because termination of the ground lease would terminate the condominium, this sentence prevents cancellation. However, in order to avoid the possibility that recreation and other leases otherwise cancellable under subsection (a) will be restructured to come within the exception, a subjective test of "intent" is imposed. Under the test, if a declarant's principal purpose in subjecting the leased real estate to the condominium was to prevent termination of the lease, the lease may nevertheless be terminated.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, because of a concern for persons who in good faith enter into a contract with the executive board and expend capital towards fulfilling that contract, a sentence was added to provide that any contract or lease described by the section must contain a provision that it may be terminated by the executive board elected by the unit owners upon not less than 90 days' notice.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-106. Bylaws.

(a) The bylaws of the association shall provide for:

(1) The number of members of the executive board and the titles of the officers of the association;

(2) Election by the executive board of the officers of the association;

(3) The qualifications, powers and duties, terms of office, and manner of electing and removing executive board members and officers and filling vacancies;

(4) Which, if any, of its powers the executive board or officers may delegate to other persons or to a managing agent;

(5) Which of its officers may prepare, execute, certify, and record amendments to the declaration on behalf of the association; and

(6) The method of amending the bylaws.

(b) Any other matters the association deems necessary or appropriate. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. Because the Act does not require the recordation of bylaws, it is contemplated that unrecorded bylaws will set forth only matters relating to the internal operations of the association and various "housekeeping" matters with respect to the condominium. The Act requires specific matters to be set forth in the recorded declaration and not in the bylaws, unless the bylaws are to be recorded as an exhibit to the declaration.

2. The requirement, set forth in subsection (a)(5), that the bylaws designate which of the officers of the association has the responsibility to prepare, execute, certify, and record amendments to the declaration reflects the obligation imposed upon the association by several provisions of this Act to record such amendments in certain circumstances. These provisions include Section 1-107 (Eminent Domain), Section 2-106 (expiration of certain leases), Section 2-112 (Relocation of Boundaries Between Adjoining Units), and Section 2-113 (subdivision or conversion of units). Section 2-117(e) provides that, if no officer is designated for this purpose, it shall be the duty of the president.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act but does contain minor stylistic changes.

§ 47C-3-107. Upkeep; damages; assessments for damages, fines.

(a) Except as provided in G.S. 47C-3-113(h), the association is responsible for causing the common elements to be maintained, repaired, and replaced when necessary and to assess the unit owners as necessary to recover the costs of such maintenance, repair, or replacement except that the cost of maintenance, repair or replacement of a limited common element shall be assessed as provided in G.S. 47C-3-115(b). Each unit owner is responsible for maintenance, repair and replacement of his unit. Each unit owner shall afford to the association and when necessary to another unit owner access through his unit reasonably necessary for any such maintenance, repair or replacement activity.

(b) If damage, for which a unit owner is legally responsible and which is not covered by insurance provided by the association pursuant to G.S. 47C-3-113 is inflicted on any common element, the association may direct such unit owner to repair such damage or the association may itself cause the repairs to be made and recover the costs thereof from the responsible unit owner.

(c) If damage is inflicted on any unit by an agent of the association in the scope of his activities as such agent, the association is liable to repair such damage or to reimburse the unit owner for the cost of repairing such damages. The association shall also be liable for any losses to the unit owner.

(d) The bylaws of the association may in cases when the claim under subsection (b) or (c) is five hundred dollars ($500.00) or less provide for hearings before an adjudicatory panel to determine if a unit owner is responsible for damages to any common element or whether the association is responsible for damages to any unit. Such panel shall accord to the party charged with causing damages notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. This panel may assess a liability for each damage incident not in excess of five hundred dollars ($500.00) against each unit owner charged or against the association. Liabilities of unit owners so assessed shall be assessments secured by lien under G.S. 47C-3-116. Liabilities of the association may be offset by the unit owner against sums owing the association and if so offset shall reduce the amount of any lien of the association against the unit at issue.

(e) The declarant alone is liable for maintenance, repair and all other expenses in connection with real estate subject to development rights. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. The Act permits the declaration to separate maintenance responsibility from ownership. This is commonly done in practice. In the absence of any provision in the declaration, maintenance responsibility follows ownership of the unit or rests with the association in the case of common elements. Under this Act, limited common elements (which might include, for example, patios, balconies, and parking spaces) are common elements. *See* Section 1-103(16). As a result, under subsection (a), unless the declaration requires that unit owners are responsible for the upkeep of such limited common elements, the association will be responsible for their maintenance. Under Section 3-115(c), the cost of maintenance, repair, and replacement for such limited common elements is assessed against all the units in the condominium, unless the declaration provides for such expenses to be paid only by the units benefitted. *See* Comment 1 to Section 2-108.

2. Under Section 2-110, a declarant may reserve the right to create units in portions of the condominium originally designated as common elements. Prior to creation of the units, title to those portions of the condominium is in the unit owners. However, under Section 3-107(b), the developer is obligated to pay all of the expenses of (including real estate taxes properly apportionable to) that real estate. As to real estate taxes, *see* Section 1-105(c).

NORTH CAROLINA COMMENT

Subsections (a), (b), (c) and (e) reflect revisions in language and structure (but not substance) of the Uniform Act. Subsection (d) is new and allows the association in cases when the claim for damages to a common element is $500 or less to hold hearings before an adjudicatory panel to determine whether a unit owner or the association is responsible for the damages. The subsection provides for minimal due process for the party charged with causing the damages. The subsection also provides that the liabilities of unit owners shall be assessments secured by lien under Section 47C-3-116 and the liabilities of the association may be offset by the unit owner against sums owing the association.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-107.1. Procedures for fines and suspension of condominium privileges or services.

Unless a specific procedure for the imposition of fines or suspension of condominium privileges or services is provided for in the declaration, a hearing shall be held before the executive board or an adjudicatory panel appointed by the executive board to determine if any unit owner should be fined or if condominium privileges or services should be suspended pursuant to the powers granted to the association in G.S. 47C-3-102(11). Any adjudicatory panel appointed by the executive board shall be composed of members of the association who are not officers of the association or members of the executive board. The unit owner charged shall be given notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. If it is decided that a fine should be imposed, a fine not to exceed one hundred dollars ($100.00) may be imposed for the violation and without further hearing, for each day more than five days after the decision that the violation occurs. Such fines shall be assessments secured by liens under G.S. 47C-3-116. If it is decided that a suspension of condominium privileges or services should be imposed, the suspension may be continued without further hearing until the violation or delinquency is cured. A unit owner may appeal a decision of an adjudicatory panel to the full executive board by delivering written notice of appeal to the executive board within 15 days after the date of the decision. The executive board may affirm, vacate, or modify the prior decision of the adjudicatory body. (1985 (Reg. Sess., 1986), c. 877, s. 1; 1997-456, s. 27; 2005-422, s. 14.)

NORTH CAROLINA COMMENT

This section was added to authorize an adjudicatory hearing, when permitted by the declaration, for fines, late payments, and violations of the condominium's rules and regulations for up to $150.00 and is similar to the provisions of G.S. 47C-3-107(d) for a hearing on minor damages.

Editor's Note. — This section was originally enacted as G.S. 47C-3-107A. It has been renumbered as G.S. 47C-3-107.1 pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Effect of Amendments. — Session Laws 2005-422, s. 14, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, rewrote this section.

§ 47C-3-108. Meetings.

(a) A meeting of the association shall be held at least once each year. Special meetings of the association may be called by the president, a majority of the executive board, or by unit owners having twenty percent (20%) or any lower percentage specified in the bylaws of the votes in the association. Not less than 10 nor more than 50 days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner, or sent by electronic means, including by electronic mail over the Internet, to an electronic mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove a director or officer.

(b) Meetings of the executive board shall be held as provided in the bylaws. At regular intervals, the executive board meeting shall provide unit owners an opportunity to attend a portion of an executive board meeting and to speak to the executive board about their issues and concerns. The executive board may place reasonable restrictions on the number of persons who speak on each side of an issue and may place reasonable time restrictions on persons who speak.

(c) Except as otherwise provided for in the bylaws, meetings of the association and executive board shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised. (1985 (Reg. Sess., 1986), c. 877, s. 1; 2004-109, s. 5; 2005-422, s. 15.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act. The notice provision uses a period of 50 days to conform to Chapter 55A, the Nonprofit Corporation Act.

Effect of Amendments. — Session Laws 2005-422, s. 15, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, added the subsection (a) designation; and added subsections (b) and (c).

§ 47C-3-109. Quorums.

(a) Unless the bylaws provide otherwise, a quorum is deemed present throughout any meeting of the association if persons entitled to cast twenty percent (20%) of the votes which may be cast for election of the executive board are present in person or by proxy at the beginning of the meeting.

(b) Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the executive board of persons entitled to cast fifty percent (50%) of the votes on that board are present at the beginning of the meeting. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

Mandatory quorum requirements lower than 50 percent for meetings of the association are often justified because of the common difficulty of inducing unit owners to attend meetings.

The problem is particularly acute in the case of resort condominiums where many owners may reside elsewhere, often at considerable distances, for most of the year.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act and there was a deliberate choice for uniformity over the provisions of Chapter 55A, the Nonprofit Corporation Act.

§ 47C-3-110. Voting; proxies.

(a) If only one of the multiple owners of a unit is present at a meeting of the association, he is entitled to cast all the votes allocated to that unit. If more than one of the multiple owners are present, the votes allocated to that unit may be cast only in accordance with the agreement of a majority in interest of the multiple owners, unless the declaration or bylaws expressly provides otherwise. Majority agreement is conclusively presumed if any one of the multiple owners casts the votes allocated to that unit without protest being made promptly to the person presiding over the meeting by any of the other owners of the unit.

(b) Votes allocated to a unit may be cast pursuant to a proxy duly executed by a unit owner. If a unit is owned by more than one person, each owner of the unit may vote or register protest to the casting of votes by the other owners of the unit through a duly executed proxy. A unit owner may not revoke a proxy given pursuant to this section except by written notice of revocation delivered to the person presiding over a meeting of the association. A proxy is void if it is not dated. A proxy terminates one year after its date, unless it specifies a shorter term.

(c) If the declaration requires that votes on specified matters affecting the condominium be cast by lessees rather than unit owners of leased units: (i) the provisions of subsection (a) and (b) apply to lessees as if they were unit owners; (ii) unit owners who have leased their units to other persons may not cast votes on those specified matters; and (iii) lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were unit owners. Unit owners must also be given notice, in the manner provided in G.S. 47C-3-108, of all meetings at which lessees may be entitled to vote.

(d) No votes allocated to a unit owned by the association may be cast.

(e) The declaration may provide that on specified issues only a defined subgroup of unit owners may vote provided:

(1) The issue being voted on is of special interest solely to members of the subgroup; and

(2) All except *de minimis* costs that will be incurred based on the vote taken will be assessed solely against those unit owners entitled to vote.

(f) For purposes of subdivision (e)(1) above an issue to be voted on is not of special interest solely to a subgroup if it substantially affects the overall appearance of the condominium or substantially affects living conditions of unit owners not included in the voting subgroup. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

Subsection (c) addresses an increasingly important matter in the governance of condominiums: the role of tenants occupying units owned by investors or other persons. Most present statutes require voting by owners in the association. However, it may be desirable to give lessees, rather than lessors, of units the right to vote on issues involving day-to-day operation both because the lessees may have a greater interest than the lessors and because it is desirable to have lessees feel they are an integral part of the condominium community.

NORTH CAROLINA COMMENT

Subsections (a), (c) and (d) are not significantly different from the Uniform Act. In subsection (b) the words "or purports to be revocable without notice" was deleted because such a proxy was deemed to be inconceivable.

Subsection (e) was added and authorizes provision to be made in the declaration for subgroup voting when an issue is of special interest solely to members of a defined subgroup of unit owners.

Subsection (f), also added, does not allow subgroup voting when the issue to be voted upon substantially affects the overall appearance of the condominium or the living conditions of unit owners not included in the voting subgroup.

§ 47C-3-111. Tort and contract liability.

(a) Neither the association nor any unit owner except the declarant is liable for that declarant's torts in connection with any part of the condominium which that declarant has the responsibility to maintain.

(b) An action alleging a wrong done by the association must be brought against the association and not against a unit owner.

(c) If an action is brought against the association for a wrong which occurred during any period of declarant control, and if the association gives the declarant who then controlled the association reasonable notice of and an opportunity to defend against the action, such declarant is liable to the association:

(1) for all tort losses not covered by insurance carried by the association suffered by the association or that unit owner, and

(2) for all losses which the association would not have incurred but for a breach of contract. Nothing in this subsection shall be construed to impose strict or absolute liability upon the declarant for wrongs or actions which occurred during the period of declarant control.

(d) In any case where the declarant is liable to the association under this section, the declarant is also liable for all litigation expenses, including reasonable attorneys' fees, incurred by the association. Any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates. A unit owner is not precluded from bringing an action contemplated by this section because he is a unit owner or a member or officer of the association. Liens resulting from judgments against the association are governed by G.S. 47C-3-117 (Other Liens Affecting the Condominium). (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section provides that any action in tort or contract arising out of acts or omissions of the association shall be brought against the association and not against the individual unit owners. This changes the law in states where plaintiffs are forced to name individual unit owners as the real parties in interest to any action brought against the association. The subsection also provides that a unit owner is not precluded from bringing an action in tort or contract against the association solely because he is a unit owner or a member or officer of the association.

2. In recognition of the practical control that can (and in most cases will) be exercised by a declarant over the affairs of the association during any period of declarant control permitted pursuant to Section 3-103, subsection (a) provides that the association or any unit owner shall have a right of action against the declarant for any losses (including both payment of damages and attorneys' fees) suffered by the association or any unit owner as a result of an action based upon a tort or breach of contract arising during any period of declarant control. To assure that the decision to bring such an action can be made by an executive board free from the influence of the declarant, the subsection also provides that any statute of limitations affecting such a right of action by the association shall be tolled until the expiration of any period of declarant control.

3. If a suit based on a claim which accrued during the period of developer control is brought against the association after control of the association has passed from the developer,

reasonable notice to, and grant of an opportunity to the developer to defend, are conditions to developer liability. If, however, suit is brought against the association while the developer is still in control, obviously the developer cannot later resist a suit by the association for reimbursement on the grounds of failure to notify.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, references in the Uniform Act to owners of individual units were deleted. These references were felt to be unnecessary, and to diffuse the thrust of the section.

§ 47C-3-112. Conveyance or encumbrance of common elements.

(a) Portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least eighty percent (80%) of the votes in the association, including eighty percent (80%) of the votes allocated to units not owned by a declarant, or any larger percentage the declaration specifies, agree to that action; provided, that all the owners of units to which any limited common element is allocated must agree in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential uses. Distribution of the proceeds of the sale of a limited common element shall be as provided by agreement between the unit owners to which it is allocated and the association. Proceeds of the sale or financing of a common element (other than a limited common element) shall be an asset of the association.

(b) An agreement to convey common elements or subject them to a security interest must be evidenced by the execution of an agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of unit owners. The agreement must specify a date after which the agreement will be void unless recorded before that date. The agreement and all ratifications thereof must be recorded in every county in which a portion of the condominium is situated, and is effective only upon recordation.

(c) The association, on behalf of the unit owners, may contract to convey common elements, or subject them to a security interest, but the contract is not enforceable against the association until approved pursuant to subsections (a) and (b). Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, including the power to execute deeds or other instruments.

(d) Any purported conveyance, encumbrance, judicial sale or other voluntary transfer of common elements, unless made pursuant to this section, is void.

(e) A conveyance or encumbrance of common elements pursuant to this section shall not deprive any unit of its rights of access and support. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. Subsection (a) provides that, on agreement of unit owners holding 80% of the votes in the association, parts of the common elements may be sold or encumbered. (80% is the percentage required for termination of the condominium under Section 2-118.) This power may be exercised during the period of declarant control, but, in order to be effective, 80% of non-declarant unit owners must approve the action.

The ability to sell a portion of the common elements without termination of the condominium gives the condominium regime desirable flexibility. For example, the unit owners, some years after the initial creation of the condominium, may decide to convey away a portion of the open space which has been reserved as a part of the common elements because they no longer find the area useful or because they wish to use sale proceeds to make other improvements. Similarly, the ability to encumber common elements gives the association power to raise money for improvements through the device of mortgaging the improvements themselves. Of course, recreational improvements will frequently not be sufficient security for a loan for their construction. Nevertheless, the ability to take a security interest in such improvements may lead lenders to be more favorably disposed toward making a loan in larger amounts and at lower interest rates.

2. Subsection (b) requires that the agreement for sale or encumbrance be evidenced by the execution of an agreement in the same manner as a deed by the requisite majority of the unit owners. The agreement then must be recorded in the land records. The recorded agreement signed by the unit owners is not the conveyance itself, but is rather a supporting document which shows that the association has full power to execute a deed or mortgage. Under subsection (c), it is contemplated that the association will execute the actual instrument of conveyance. Under subsection (e), a conveyance or encumbrance of common elements may not deprive a unit owner of rights of access and support.

3. Under the condominium form of ownership, each unit owner owns a share of the common elements as an appurtenant interest to his unit and, when the unit owner mortgages his unit, he also mortgages his appurtenant interest. The unit owner himself cannot convey his unit separately from its interest in the common elements nor can he convey his common element interest separately from the unit. Therefore, if there is a mortgage or other lien against any unit, the problem arises as to whether the association under this section can convey a part of the common elements free from the mortgage interest of the unit mortgage. Subsection (f) answers that question *no*. Therefore, a sale or encumbrance of common elements under this section would be subject to the superior priority of any prior mortgagee on the unit unless the mortgagee releases his interest therein.

The bracketed introductory language to subsection (f) is intended to permit an enacting state to choose whether or not the declaration could vary the rule of subsection (f). If the bracketed language is included, the declaration might provide, for example, that any subsequent conveyance of specified portions of the common elements would be free of prior security interests. In that case, the security interest in the common elements held by unit mortgagees would be cut off. Since the loss of the security interest in the common elements could significantly affect mortgagees, states considering inclusion of the bracketed language probably should consult mortgagee groups. If limited to particular common element real estate such as portions of recreational area land, and if protections are provided for lender interests, the ability to convey free of prior security interests could contribute significantly to the continued economic viability of a project. Therefore, lenders may be favorable to inclusion of the bracketed language.

The declaration could protect lender interests in connection with a conveyance free of the security interests in a number of ways. For example, the declaration might provide for payment of a specified percentage of the sales price to unit mortgagees or it might provide that a specified percentage of the mortgage debt be paid to them. Also, the declaration might provide that no sale or encumbrance of common elements would be effective without the approval of a specified percentage of lenders. There are, no doubt, other devices which could afford substantial protection to lenders.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, in subsection (a) a special provision is set out concerning the distribution of the proceeds of any sale of a limited common element; and subsections (d) and (f) of the Uniform Act were deleted as unnecessary.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-113. Insurance.

(a) Commencing not later than the time of the first conveyance of a unit to a person other than a declarant, the association shall maintain, to the extent available:

(1) Property insurance on the common elements insuring against all risks of direct physical loss commonly insured against including fire and extended coverage perils. The total amount of insurance after application of any deductibles shall be not less than eighty percent (80%) of the replacement cost of the insured property at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations and other items normally excluded from property policies; and

(2) Liability insurance in reasonable amounts, covering all occurrences commonly insured against death, bodily injury and property damage arising out of or in connection with the use, ownership, or maintenance of the common elements.

(b) In the case of a building containing units having horizontal boundaries described in the declaration, the insurance maintained under subdivision (a)(1), to the extent reasonably available, shall include the units, but need not include improvements and betterments installed by unit owners.

(c) If the insurance described in subsection (a) or (b) of this section is not reasonably available, the association promptly shall cause notice of that fact to be hand-delivered or sent prepaid by United States mail to all unit owners. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance it deems appropriate to protect the association or the unit owners.

(d) Insurance policies carried pursuant to subsection (a) must provide that:

(1) Each unit owner is an insured person under the policy with respect to liability arising out of his interest in the common elements or membership in the association;

(2) The insurer waives its right to subrogation under the policy against any unit owner or members of his household;

(3) No act or omission by any unit owner, unless acting within the scope of his authority on behalf of the association, will preclude recovery under the policy; and

(4) If, at the time of a loss under the policy, there is other insurance in the name of a unit owner covering the same risk covered by the policy, the association's policy provides primary insurance.

(e) Any loss covered by the property policy under subsections (a)(1) and (b) shall be adjusted with the association, but the insurance proceeds for that loss shall be payable to any insurance trustee designated for that purpose, or otherwise to the association, and not to any mortgagee or beneficiary under a deed of trust. The insurance trustee or the association shall hold any insurance proceeds in trust for unit owners and lienholders as their interests may appear. Subject to the provisions of subsection (h), the proceeds shall be disbursed first for the repair or restoration of the damaged property, and unit owners and lienholders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or restored, or the condominium is terminated.

(f) An insurance policy issued to the association does not prevent a unit owner from obtaining insurance for his own benefit.

(g) An insurer that has issued an insurance policy under this section shall issue certificates or memoranda of insurance to the association and, upon written request, to any unit owner, mortgagee, or beneficiary under a deed of trust. The insurer issuing the policy may not cancel or refuse to renew it until 30 days after notice of the proposed cancellation or nonrenewal has been mailed to the association, each unit owner and each mortgagee or beneficiary under a deed of trust to whom certificates or memoranda of insurance have been issued at their respective last known addresses.

(h) Any portion of the condominium for which insurance is required under this section which is damaged or destroyed shall be repaired or replaced promptly by the association unless (1) the condominium is terminated, (2) repair or replacement would be illegal under any State or local health or safety statute or ordinance, or (3) the unit owners decide not to rebuild by an eighty percent (80%) vote, including one hundred percent (100%) approval of owners of units not to be rebuilt or owners assigned to limited common elements not to be rebuilt. The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense. If the entire condominium is not repaired or replaced, (1) the insurance proceeds attributable to the damaged common elements shall be used to restore the damaged area to a condition compatible with the remainder of the condominium, (2) the insurance proceeds attributable to units and limited common elements which are not rebuilt shall be distributed to the owners of those units and the owners of the units to which those limited common elements were allocated or to lienholders, as their interest may appear, and (3) the remainder of the proceeds shall be distributed to all the unit owners or lienholders, as their interest may appear, in proportion to their common element interest. If the unit owners vote not to rebuild any unit, that unit's allocated interests are automatically reallocated upon the vote as if the unit had been condemned under G.S. 47C-1-107(a), and the association promptly shall prepare, execute, and record an amendment to the declaration reflecting the reallocations. Notwithstanding the provisions of this subsection, G.S. 47C-2-118 governs the distribution of insurance proceeds if the condominium is terminated.

(i) The provisions of this section may be varied or waived in the case of a condominium all of whose units are restricted to nonresidential use. (1985 (Reg. Sess., 1986), c. 877, s. 1; 1998-211, s. 8(a)-(c).)

OFFICIAL COMMENT

1. Subsections (a) and (b) provide that the required insurance must be maintained only to the extent reasonably available. This permits the association to comply with the insurance requirements even if certain coverages are unavailable or unreasonably expensive.

2. Subsection (b) represents a significant departure from the present law in virtually all states by requiring that the association obtain and maintain property insurance on *both* the common elements *and* the units within buildings with "stacked" units. *See* Comment 3. While it has been common practice in many parts of the country (either by custom or as mandated by statute) for associations to maintain property insurance on the common elements, it has generally not been the practice for the property insurance policy to cover individual units as well. However, given the great interdependence of the unit owners in the stacked unit condominium situation, mandating property insurance for the entire building is the preferable approach. Moreover, such an approach will greatly simplify claims procedures, particularly where both common elements and portions of a unit have been destroyed. If common elements and units are insured separately, the insurers could be involved in disputes as to the coverage provided by each policy.

The Act does not mandate association insurance on units in town house or other arrangements in which there are no stacked units. However, if the developer wishes, the declaration may require association insurance as to units having shared walls or as to all units in the development. Many developments will have some units with horizontal boundaries and other units with no horizontal boundaries. In that case, association insurance as to the units having horizontal boundaries is required, but it is not necessary as to other units.

3. The distinction between what is a common element and what is a unit with respect to the insurance coverage required by this section is complex. The definitions of common elements and a unit in Seciton 1-103(4) and (25) are not sufficient for this purpose. To determine the distinction between the common elements and units, one must refer first to the declaration's section on unit boundaries. That section will define the unit boundaries. If the declaration fails to do so, the provisions of Section 2-102 apply.

In summary, Section 2-102 provides that, if the declaration is silent, all non-loadbearing and non-structural portions of the walls, floors and ceilings are part of the unit, while all loadbearing and structural portions of the walls, floors and ceilings are common elements. Further, with respect to any structure partially within and partially outside of the boundaries of a unit, any portion thereof serving only that unit is a limited common element (*see* definition in Section 1-103(16)), and any portion thereof serving more than one unit or any portion of the common elements is a part of the common elements. This treats and defines ownership of all portions of the electrical, plumbing and mechanical systems serving the building not entirely within the boundaries of a unit.

All spaces, interior partitions, electrical, plumbing and mechanical systems, and all other items within the boundaries of the unit which are attached to the unit boundaries, whether or not deemed fixtures under state law, are part of the unit.

Put simply, if any item is installed, constructed, repaired or replaced by the declarant or his successor in connection with the original sale of a stacked unit, the item is insured by the association. Clearly, this does not include items of personal property easily movable within the unit or easily removable from the unit (whether or not deemed a fixture under state law), such as a vase, table or other furnishings. If installed by the unit owner, the item should be insured by the unit owner. Those items, installed by the unit owner and not covered by the association policy, are called "improvements and betterments".

4. Although "all risk" coverage is not required as to conversion buildings, but merely fire and extended coverage, this is not intended to imply that such coverage is unnecessary. "All risk" coverage is not required because it may not be appropriate in the case of an unrenovated conversion where cost is a critical factor.

5. The minimum requirement as to the amount of insurance, which is 80% of the actual cash value, should not be viewed as a recommendation; rather, the 80% is a floor. Typically, many condominium documents require insurance in an amount equal to *100% of the replacement cost* of the insured property. The Act permits greater flexibility, however, inasmuch as different types of construction and varieties of projects may not require such total coverage with its attendant higher premium cost.

6. Subsection (a)(2) covers only the liability of the association, and unit owners as members, but does not cover the unit owner's individual liability for his acts or omissions or liability for occurrences within his unit.

7. Clause (i) of the third sentence of subsection (h) would operate as follows: (1) if the condominium consists of campsites, restoration after fire damage might consist of merely resodding the area damages; (2) if the condominium consists of separate garden-type buildings, restoration after fire damage might consist of demolishing the remaining structure and paving or landscaping the area; and (3) if the condominium consists of a single highrise building, restoration may not be required (if the building is substantially destroyed) inasmuch as "a condition compatible with the remainder of the condominium" would be damaged and unrestored.

8. The scheme of this section, as set forth in subsection (h), is that any damage or destruction to any portion of the condominium must be repaired (if repairs can be made consistent with applicable safety and health laws) absent a decision to terminate the condominium or a decision by 80% of the unit owners (including the owners of any damaged units) not to rebuild. Unless a decision is made not to rebuild, any available insurance proceeds must be used to effectuate such repairs. For this reason, subsection (e) provides that any loss covered by the association's property insurance policy shall be adjusted with the association and that the proceeds for any loss shall be payable to the association or to any insurance trustee that may be designated for such purpose. Significantly, such insurance proceeds may not be paid to any mortgagee or other outside party. This provision is necessary to insure that insurance proceeds are available to effectuate any repairs or restoration to the condominium that may be required.

9. In the case of commercial or industrial condominiums, unit owners may prefer to act as self-insurers or make other arrangements with respect to property insurance. Accordingly, subsection (i) provides that the insurance requirements of this section may be varied or waived in the case of a condominium all of the units of which are reserved exclusively for non-residential use. Such waiver or modification is not possible in the case of a mixed-use condominium, some of the units of which are used for residential purposes.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, minor changes have been made for the sake of clarity and minor deletions have been made to eliminate unnecessary language. The term "actual cash value" was changed to "replacement cost".

§ 47C-3-114. Surplus funds.

Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provisions for common expenses and any prepayment of reserves must be paid to the unit owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

Surplus funds of the association are generally used first, for the pre-payment of reserves, and remaining funds are thereafter credited to the account of unit owners or paid to them. In some cases, however, unit owners might prefer that surplus funds be used for other purposes (*e.g.*, the purchase of recreational equipment). Accordingly, this section permits the declaration to specify any other use of surplus funds.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-3-115. Assessments for common expense.

(a) Until the association makes a common expense assessment, the declarant shall pay all the common expenses. After any assessment has been made by the association, assessments thereafter must be made at least annually by the association.

(b) Except for assessments under subsections (c), (d), and (e), all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to G.S. 47C-2-107(a). Any past due common expense assessment or installment thereof bears interest at the rate established by the association not exceeding eighteen percent (18%) per year.

(c) To the extent required by the declaration:

(1) Any common expense associated with the maintenance, repair, or replacement of a limited common element must be assessed against the units to which that limited common element is assigned, equally, or in any other proportion that the declaration provides;

(2) Any common expense or portion thereof benefiting fewer than all of the units must be assessed exclusively against the units benefited; and

(3) The costs of insurance must be assessed in proportion to risk and the costs of utilities must be assessed in proportion to usage.

(d) Assessments to pay a judgment against the association (G.S. 47C-3-117(a)) may be made only against the units in the condominium at the time the judgment was entered, in proportion to their common expense liabilities.

(e) If any common expense is caused by the misconduct of any unit owner, the association may assess that expense exclusively against his unit.

(f) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due shall be recalculated in accordance with the reallocated common expense liabilities. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section contemplates that a declarant might find it advantageous, particularly in the early stages of condominium development, to pay all of the expenses of the condo-

minium himself rather than assessing each unit individually. Such a situation might arise, for example, where a declarant owns most of the units in the condominium and wishes to avoid building the costs of each unit separately and crediting payment to each unit. It might also arise in the case of a declarant who, although willing to assume all expenses of the condominium, is unwilling to make payments for replacement reserves or for other expenses which he expects will ultimately be part of the association's budget. Subsection (a) grants the declarant such flexibility while at the same time providing that once an assessment is made against any unit, all units, including those owned by the declarant, must be assessed for their full portion of the common expense liability.

2. Under subsection (c), the declaration may provide for assessment on a basis other than the allocation made in Section 2-107 as to limited common elements, other expenses benefiting less than all units, insurance costs, and utility costs.

3. If additional units are added to a condominium after a judgment has been entered against the association, the new units are not assessed any part of the judgment debt. Since unit owners will know the assessment, and since such unpaid judgment assessments would affect the price paid by purchasers of units, it would be complicated and unnecessary to fairness to reallocate judgment assessments when new units are added.

4. Subsection (f) refers to those instances in which various provisions of this Act require that common expense liabilities be reallocated among the units of a condominium by amendment to the declaration. These provisions include Section 1-107 (Eminent Domain), Section 2-106(d) (expiration of certain leases), Section 2-110 (Exercise of Development Rights) and Section 2-113(b) (subdivision or conversion of units).

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-116. Lien for assessments.

(a) Any assessment levied against a unit remaining unpaid for a period of 30 days or longer shall constitute a lien on that unit when a claim of lien is filed of record in the office of the clerk of superior court of the county in which the unit is located in the manner provided herein. Unless the declaration otherwise provides, fees, charges, late charges and other charges imposed pursuant to G.S. 47C-3-102, 47C-3-107, 47C-3-107.1, and 47C-3-115 are enforceable as assessments under this section. Except as provided in subsections (a1) and (a2) of this section, the association's lien may be foreclosed in like manner as a mortgage on real estate under power of sale under Article 2A of Chapter 45 of the General Statutes.

(a1) An association may not foreclose an association assessment lien under Article 2A of Chapter 45 of the General Statutes if the debt securing the lien consists solely of fines imposed by the association, interest on unpaid fines, or attorneys' fees incurred by the association solely associated with fines imposed by the association. The association, however, may enforce the lien by judicial foreclosure as provided in Article 29A of Chapter 1 of the General Statutes.

(a2) An association shall not levy, charge, or attempt to collect a service, collection, consulting, or administration fee from any unit owner unless the fee is expressly allowed in the declaration. Any lien secured by debt consisting solely of these fees may only be enforced by judicial foreclosure as provided in Article 29A of Chapter 1 of the General Statutes.

(b) The lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances (specifically including, but not limited to, a mortgage or deed of trust on the unit) recorded before the docketing of the lien in the office of the clerk of superior court, and (ii) liens for real estate taxes and other governmental assessments or charges against the unit. This subsection does not affect the priority of mechanics' or materialmen's liens.

(c) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the docketing thereof in the office of the clerk of superior court.

(d) This section does not prohibit actions to recover sums for which subsection (a) creates a lien or prohibit an association taking a deed in lieu of foreclosure.

(e) A judgment, decree, or order in any action brought under this section shall include costs and reasonable attorneys' fees for the prevailing party. If the unit owner does not contest the collection of debt and enforcement of a lien after the expiration of the 15-day period following notice as required in subsection (e1) of this section, then reasonable attorneys' fees shall not exceed one thousand two hundred dollars ($1,200), not including costs or expenses incurred. The collection of debt and enforcement of a lien remain uncontested as long as the unit owner does not dispute, contest, or raise any objection, defense, offset, or counterclaim as to the amount or validity of the debt and lien asserted or the association's right to collect the debt and enforce the lien as provided in this section. The attorneys' fee limitation in this subsection shall not apply to judicial foreclosures or proceedings authorized under subsection (d) of this section or G.S. 47C-4-117.

(e1) A unit owner may not be required to pay attorneys' fees and court costs until the unit owner is notified in writing of the association's intent to seek payment of attorneys' fees and court costs. The notice must be sent by first-class mail to the property address and, if different, to the mailing address for the unit owner in the association's records. The notice shall set out the outstanding balance due as of the date of the notice and state that the unit owner has 15 days from the mailing of the notice by first-class mail to pay the outstanding balance without the attorneys' fees and court costs. If the unit owner pays the outstanding balance within this period, then the unit owner shall have no obligation to pay attorneys' fees and court costs. The notice shall also inform the unit owner of the opportunity to contact a representative of the association to discuss a payment schedule for the outstanding balance as provided in subsection (e2) of this section and shall provide the name and telephone number of the representative.

(e2) The association, acting through its executive board and in the board's sole discretion, may agree to allow payment of an outstanding balance in installments. Neither the association nor the unit owner is obligated to offer or accept any proposed installment schedule. Reasonable administrative fees and costs for accepting and processing installments may be added to the outstanding balance and included in an installment payment schedule. Reasonable attorneys' fees may be added to the outstanding balance and included in an installment schedule only after the unit owner has been given notice as required in subsection (e1) of this section.

(f) Where the holder of a first mortgage or first deed of trust of record, or other purchaser of a unit, obtains title to the unit as a result of foreclosure of a first mortgage or first deed of trust, such purchaser, and its heirs, successors and assigns, shall not be liable for the assessments against such unit which became due prior to acquisition of title to such unit by such purchaser. Such unpaid assessments shall be deemed to be common expenses collectible from all the unit owners including such purchaser, and its heirs, successors and assigns.

(g) A claim of lien shall set forth the name and address of the association, the name of the record owner of the lot at the time the claim of lien is filed, a description of the lot, and the amount of the lien claimed. (1985 (Reg. Sess., 1986), c. 877, s. 1; 2005-422, s. 16; 2006-226, s. 14(a).)

OFFICIAL COMMENT

1. Subsection (a) provides that the association's lien on a unit for unpaid assessments shall be enforceable in the same manner as mortgage liens. In addition, if the use of a power of sale pursuant to a mortgage is permitted in a particular state, the bracketed language (with an appropriate statutory citation inserted) may be used to ensure that the association's lien for unpaid assessments may also be enforced through the power of sale device. The bracketed language requiring notice of foreclosure should be adopted only in states in which the power of sale statute does not require notice to junior lienholders.

2. To ensure prompt and efficient enforcement of the association's lien for unpaid assessments, such liens should enjoy statutory priority over most other liens. Accordingly, subsection (a) provides that the association's lien takes priority over all other liens and encumbrances except those recorded prior to the recordation of the declaration, those imposed for real estate taxes or other governmental assessments or charges against the unit, and first mortgages recorded before the date the assessment became delinquent. However, as to prior first mortgages, the association's lien does have priority for 6 months' assessments based on the periodic budget. A significant departure from existing practice, the 6 months' priority for the assessment lien strikes an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of mortgage lenders. As a practical matter, mortgage lenders will most likely pay the 6 months' assessments demanded by the association rather than having the association foreclose on the unit. If the mortgage lender wishes, an escrow for assessments can be required. Since this provision may conflict with the provisions of some state statutes which forbid some lending institutions from making loans not secured by first priority liens, the law of each state should be reviewed and amended when necessary.

3. Subsection (e) makes clear that the association may have remedies short of foreclosure of its lien that can be used to collect unpaid assessments. The association, for example, might bring an action in debt or breach of contract against a recalcitrant unit owner rather than resorting to foreclosure.

4. In view of the association's powers to enforce its lien for unpaid assessments, subsection (f) provides unit owners with a method to determine the amount presently due and owing. A unit owner may obtain a statement of any unpaid assessment, including fines and other charges enforceable as assessments under subsection (a), currently levied against his unit. The statement is binding on the association, the executive board, and every unit owner in any subsequent action to collect such unpaid assessments.

5. Units may be part of a condominium and of a larger real estate regime (*see* the Uniform Planned Community Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1980, which would govern most associations with assessment powers). For example, a large real estate development any [may] consist of a larger planned community which contains detached single family dwellings and town houses which are not part of any condominium and a highrise building which is organized as a condominium within the planned community. In that case, the planned community association might assess the condominium units for the general maintenance expenses of the planned community and the condominium association would assess for the direct maintenance expenses of the building itself. In such a situation, subsection (c) provides that unpaid liens of the two associations have equal priority regardless of the relative time of creation of the two regimes and regardless of the time the assessments were made or become delinquent.

NORTH CAROLINA COMMENT

This section differs from the Uniform Act and follows previous North Carolina law by requiring that liens of the owners association must be recorded to be perfected and by preserving the priority of purchase money mortgages in order to comply with requirements established by federal mortgage agencies. The act provides for automatic attorney's fees to the prevailing party thereby enhancing the association's ability to enforce the lien.

Effect of Amendments. — Session Laws 2005-422, s. 16, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, rewrote subsection (a); added subsections (a1), (a2), (e1), (e2) and (g); and in subsection (e), substituted "shall" for "must" in the first sentence and added the last three sentences.

Session Laws 2006-226, s. 14(a), effective August 10, 2006, substituted "G.S. 47C-4-117" for "G.S. 47F-4-117" in the last sentence of subsection (e).

CASE NOTES

Fine for Each Day of Continued Violation. — Board of directors of homeowners association did not exceed its authority in levying a fine of $100 for each day plaintiff continued in violation of condominium rule, by altering the outside of her home. Stewart v. Kopp, 118 N.C. App. 161, 454 S.E.2d 672, cert. denied, 340 N.C. 263, 456 S.E.2d 838 (1995).

§ 47C-3-117. Other liens affecting the condominium.

(a) A judgment for money against the association is not a lien on the common elements, but if docketed is a lien in favor of the judgment lienholder against all of the units in the condominium at the time the judgment was entered. No other property of a unit owner is subject to the claims of creditors of the association.

(b) Notwithstanding the provisions of subsection (a), if the association has granted a security interest in the common elements to a creditor of the association pursuant to G.S. 47C-3-112, the holder of that security interest must exercise its right against the common elements before its judgment lien on any unit may be enforced.

(c) Whether perfected before or after the creation of the condominium, if a lien other than a deed of trust or mortgage, including a judgment lien or lien attributable to work performed or materials supplied before creation of the condominium, becomes effective against two or more units, the unit owner of an affected unit may pay the lienholder the amount of the lien attributable to his unit, and the lienholder, upon receipt of payment, promptly shall deliver a release of the lien covering that unit. The amount of the payment must be proportionate to the ratio which that unit owner's common expense liability bears to the common expense liabilities of all unit owners whose units are subject to the lien. After payment, the association may not assess or have a lien against that unit owner's unit for any portion of the common expenses incurred in connection with that lien.

(d) A judgment against the association shall be indexed in the name of the condominium and the association and, if so indexed, is notice of the lien against the units. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section deals with the effect on unit owners of judgments against the association. The issue is not free from difficulty. Presently, in most states, if the association is organized as a corporation, the unit owners are likely to receive the insulation from liability given shareholders of a corporation, so that the judgment lienholder can satisfy his judgment only against the property of the association. On the other hand, if the association is organized as an unincorporated association, under the law of most states each unit owner would have joint and several liability on the judgment. This Act strikes a balance between the two extremes, making the judgment lien a direct lien against each individual unit, but allowing the individual unit owner to discharge the lien by payment of his pro-rata share of the judgment. The judgment would also be a lien against any property owned by the association.

2. It should be noted that, while the judgment lien runs directly against unit owners, the actual liability of the unit owner is almost identical with what it would be if the ordinary corporation rule insulating the unit owner from direct liability were applied. If the incorporated association only is liable for a judgment, it will, of course, have no assets to satisfy the judg-

ment except whatever personal property and real estate not a part of the common elements it owns. If a checking account or other cash funds of the association are attached or garnished by the creditor, the association, in order to maintain its operations and fulfill its other obligations, will be obliged to make an additional assessment against the unit owners to cover the judgment. The same result follows if the association is to prevent the sale of other assets at an execution sale. That additional assessment would be in precisely the amount for which this Act gives a direct lien against the individual unit owners. Further, if an association which is without sufficient assets to satisfy a judgment refuses to make assessments from which the creditor can have his claim satisfied, it is very likely that a court, in a supplemental proceeding on the judgment, would direct the association to make the necessary assessments against the unit owners. Unpaid assessment made by the association constitute liens against units just as do judgments.

Therefore, whether the lien of the judgment creditor runs against the units directly, or whether the lien is only against the association which finds it necessary to make additional assessments to satisfy the judgment, the unit owner who does not pay his proportionate share will end up with a lien against his unit.

The differences, therefore, between the lien system established by Section 3-117 and the system which would be applicable if ordinary corporation rules were applied are these:

(1) The unit owner can discharge his unit from the lien and free it from the possibility of being subsequently assessed by the association for the judgment by making a payment directly to the lien holder. This ability may be valuable to a unit owner who is in the process of selling or securing a mortgage on his unit during the period between the time the judgment is entered and the time the association makes a formal assessment against individual unit owners for the amount of the judgment lien.

(2) The judgment creditor through his ability to threaten to foreclose the lien on an individual unit if the judgment is not paid is given some leverage over individual unit owners to encourage them to see that the association pays the judgment. Procuring an assessment through pressure on individual unit owners may be quicker and cheaper for the judgment creditor than using supplemental proceedings and having a judge order that the board of directors make the necessary assessment.

In the rare case where, under corporation law an association could avoid payment of a judgment by dissolution of the association and vesting of title to the units in the unit owners as tenants-in-common or otherwise, the National Conference of Commissioners on Uniform State Laws believes that that result is inappropriate, and that the unit in the condominium itself should be viewed as equity property of the association capable of being reached by judgment creditors in satisfaction of the judgment. As a matter of social policy the condominium association is in quite a different position than the ordinary corporation. The corporation statutes provide shareholders immunity from liability for debts of the corporation to encourage investment in corporations whose entrepreneurial activities in the marketplace contribute to the general wealth and well-being of society. The condominium association, in managing the affairs of the homeowners, does not serve the same entrepreneurial function. It seems reasonable, as a matter of social policy, that an individual homeowner who would be fully liable for debts incurred in the renovation and maintenance of his home or for torts caused by his failure to adequately maintain the premises should not be able to entirely avoid that liability through the device of organizing with other homeowners into a condominium association. On the other hand, it is perhaps not fair to a unit owner in a condominium regime to have all of his assets at risk based on the contracts of the association over which he has little control and as to which he has only a fractional interest or benefit.

It should be noted that, except for situations in which the association has given a mortgage or deed of trust on common elements, the judgment creditor cannot assert a lien against common elements, but is rather left to a lien against the units. That is, the judgment creditor has no power to levy on the golf course or on the swimming pool or other open spaces and sell them independently of the units to satisfy the judgment.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

Legal Periodicals. — For note which examines the history and development of North Carolina law dealing with condominiums, see 66 N.C.L. Rev. 199 (1987).

§ 47C-3-118. Association records.

(a) The association shall keep financial records sufficiently detailed to enable the association to comply with this chapter. All financial and other records, including records of meetings of the association and executive board, shall be made reasonably available for examination by any unit owner and the unit owner's authorized agents as required by the bylaws and by Chapter 55A of the General Statutes if the association is a nonprofit corporation. If the bylaws do not specify particular records to be maintained, the association shall keep accurate records of all cash receipts and expenditures and all assets and liabilities. In addition to any specific information that is required by the bylaws to be assembled and reported to the unit owners at specified times, the association shall make an annual income and expense statement and balance sheet available to all unit owners at no charge and within 75 days after the close of the fiscal year to which the information relates. Notwithstanding the bylaws, a more extensive compilation, review, or audit of the association's books and records for the current or immediately preceding fiscal year may be required by a vote of the majority of the executive board or by the affirmative vote of a majority of the unit owners present and voting in person or by proxy at any annual meeting or any special meeting duly called for that purpose.

(b) The association, upon written request, shall furnish a unit owner or the unit owner's authorized agents a statement setting forth the amount of unpaid assessments and other charges against a unit. The statement shall be furnished within 10 business days after receipt of the request and is binding on the association, the executive board, and every unit owner.

(c) In addition to the limitations of Article 8 of Chapter 55A of the General Statutes, no financial payments, including payments made in the form of goods and services, may be made to any officer or member of the association's executive board or to a business, business associate, or relative of an officer or member of the executive board, except as expressly provided for in the bylaws or in payments for services or expenses paid on behalf of the association which are approved in advance by the executive board. (1985 (Reg. Sess., 1986), c. 877, s. 1; 2005-422, s. 17.)

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

Effect of Amendments. — Session Laws 2005-422, s. 17, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, in subsection (a), inserted the subsection (a) designation, rewrote the second sentence and added the last three sentences; and added subsections (b) and (c).

§ 47C-3-119. Association as trustee.

With respect to a third person dealing with the association in the association's capacity as a trustee under G.S. 47C-2-118 following termination or G.S. 47C-3-113 for insurance proceeds, the existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person is not bound to inquire whether the association has power to act as trustee or is properly exercising trust powers and a third person, without actual knowledge that the association is exceeding or improperly exercising its powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its capacity as such trustee. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

Based on Section 7 of the Uniform Trustees' Powers Act, this section is intended to protect an innocent third party in its dealings with the association only when the association is acting as a trustee for the unit owners, either under Section 3-113 for insurance proceeds, or Section 2-118 following termination.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-3-121. American and State flags and political sign displays.

Notwithstanding any provision in any declaration of covenants, no restriction on the use of land shall be construed to:

(1) Regulate or prohibit the display of the flag of the United States or North Carolina, of a size no greater than four feet by six feet, which is displayed in accordance with or in a manner consistent with the patriotic customs set forth in 4 U.S.C. §§ 5-10, as amended, governing the display and use of the flag of the United States unless:

  a. For restrictions registered prior to October 1, 2005, the restriction specifically uses the following terms:

    1. Flag of the United States of America;
    2. American flag;
    3. United States flag; or
    4. North Carolina flag.

  b. For restrictions registered on or after October 1, 2005, the restriction shall be written on the first page of the instrument or conveyance in print that is in boldface type, capital letters, and no smaller than the largest print used elsewhere in the instrument or conveyance. The restriction shall be construed to regulate or prohibit the display of the United States or North Carolina flag only if the restriction specifically states: **"THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF THE FLAG OF THE UNITED STATES OF AMERICA OR STATE OF NORTH CAROLINA".**

  This subdivision shall apply to owners of property who display the flag of the United States or North Carolina on property owned exclusively by them and does not apply to common areas, easements, rights-of-way, or other areas owned by others.

(2) Regulate or prohibit the indoor or outdoor display of a political sign by an association member on that member's property owned exclusively by the member, unless:

  a. For restrictions registered prior to October 1, 2005, the restriction specifically uses the term "political signs".

  b. For restrictions registered on or after October 1, 2005, the restriction shall be written on the first page of the instrument or conveyance in print that is in boldface type, capital letters, and no smaller than the largest print used elsewhere in the instrument or conveyance. The restriction shall be construed to regulate or prohibit the display of political signs only if the restriction specifically states: **"THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF POLITICAL SIGNS".**

Even when display of a political sign is permitted under this subdivision, an association (i) may prohibit the display of political signs earlier than 45 days before the day of the election and later than seven days after an election day, and (ii) may regulate the size and number of political signs that may be placed on a member's property if the association's regulation is no more restrictive than any applicable city, town, or county ordinance that regulates the size and number of political signs on residential property. If the local government in which the property is located does not regulate the size and number of political signs on residential property, the association shall permit at least one political sign with the maximum dimensions of 24 inches by 24 inches on a member's property. For the purposes of this subdivision, "political sign" means a sign that attempts to influence the outcome of an election, including supporting or opposing an issue on the election ballot. This subdivision shall apply to owners of property who display political signs on property owned exclusively by them and does not apply to common areas, easements, rights-of-way, or other areas owned by others. (2005-422, s. 18; 2006-226, s. 14(b).)

Editor's Note. — Session Laws 2005-422, s. 20, made this section effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date.

Effect of Amendments. — Session Laws 2006-226, s. 14(b), effective August 10, 2006, deleted "THE" preceding "POLITICAL SIGNS" at the end of subdivision (2)b.

Article 4.

Protection of Purchasers.

§ 47C-4-101. Applicability; waiver.

(a) This Article applies to all units subject to this chapter, except as provided in subsection (b) or as modified or waived by agreement of purchasers of units in a condominium in which all units are restricted to nonresidential use.

(b) Neither a public offering statement nor a resale certificate need be prepared or delivered in the case of a disposition which is:

(1) Gratuitous;
(2) Pursuant to court order;
(3) By a government or governmental agency;
(4) By foreclosure or deed in lieu of foreclosure;
(5) To a person in the business of selling real estate who intends to offer those units to purchasers; or
(6) Subject to cancellation at any time for any reason by the purchasers without penalty. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

In the case of commercial and industrial condominiums, the purchaser is often more sophisticated than the purchaser of residential units and thus better able to bargain for the protections he believes necessary. While this may not always be true, no objective test can be developed which easily distinguishes those commercial purchasers who are able to protect themselves from those who, in the ordinary course of business, have not developed such sophistication. At the same time, the cost of protection imposed by Article 4 may be substantial. Accordingly, subsection (a) permits waiver or modification of Article 4 protection in condominiums where all units are restricted to non-residential use, *e.g.,* in the case of most commercial and industrial condominiums. However, except for certain waivers of implied warranties of quality (*see* Section 4-115) and certain exemptions from public offering statement and resale certificate requirements (*see* subsection (b)), no express waiver of the protections of this Article with respect to the purchasers of residential units is permitted by this subsection. Accordingly, by operation of Section 1-104, the rights provided by this Article may not be waived in the case of residential purchasers. Moreover, because of the interrelated rights of residential and commercial owners in mixed-use condominiums, waiver or modification of rights conferred by this Article is restricted to purchasers in wholly non-residential condominiums.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-4-102. Liability for public offering statement requirements.

(a) Except as provided in subsection (b), a declarant must, prior to the offering of any interest in a unit to the public, prepare a public offering statement conforming to the requirements of G.S. 47C-4-103, 47C-4-104, 47C-4-105, and 47C-4-106.

(b) A declarant may transfer responsibility for preparation of all or a part of the public offering statement to a successor declarant or to a person in the business of selling real estate who intends to offer units in the condominium for his own account. In the event of any such transfer, the transferor must provide the transferee with any information necessary to enable the transferee to fulfill the requirements of subsection (a).

(c) Any declarant or other person in the business of selling real estate who offers a unit for his own account to a purchaser shall deliver a public offering statement in the manner prescribed in G.S. 47C-4-108(a). The person who prepared all or a part of or delivered the public offering statement is subject to G.S. 47C-4-117 for any false or misleading statement set forth therein or for any omission of material fact therefrom with respect to that portion of the public offering statement which he prepared. If a declarant did not prepare any part of or deliver a public offering statement, he is not liable for any false or misleading statement set forth therein or for any omission of material fact therefrom unless he had actual knowledge of the statement or omission. A declarant, who has transferred responsibility for preparation of all or a part of the public offering statement under subsection (b), shall be liable when a false or misleading statement in the public offering statement prepared by another results from the declarant's failure to provide the information required in subsection (b).

(d) If a unit is a part of a condominium and is part of any other real estate regime in connection with the sale of which the delivery of a public offering statement is required under the laws of this State, a single public offering statement conforming to the requirements of G.S. 47C-4-103, 47C-4-104, 47C-4-105, and 47C-4-106 as those requirements relate to all real estate regimes in which the unit is located, and to any other requirements imposed under the laws of this State, may be prepared and delivered in lieu of providing two or more public offering statements. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

This section permits declarants to transfer responsibility for preparation of a public offering statement to successor declarants or dealers, provided the declarant furnishes the information needed by the successor or dealer to complete the statement. The person who prepares the public offering statement is liable for his own misrepresentations and material omissions. A person who delivers a public offering statement prepared by others is responsible for any such deficiencies only to the extent he knows or reasonably should have known of them.

NORTH CAROLINA COMMENT

Subsection (c) was rewritten to provide that a declarant or realtor who delivers a public offering statement shall be liable for incorrect information regardless of who prepared the statement, and that a declarant shall be liable for errors in a public offering statement delivered and prepared by a realtor when the error was the result of the declarant's failure to provide the required information. With that exception the section is not significantly different from the Uniform Act.

§ 47C-4-103. Public offering statement; general provisions.

(a) A public offering statement must contain or fully and accurately disclose:

(1) The name and principal address of the declarant and of the condominium;

(2) A general description of the condominium, including to the extent possible, the types, number, and declarant's schedule of commencement and completion of construction of buildings and amenities which declarant anticipates including as part of the condominium;

(3) The number of units in the condominium;

(4) Copies of the recorded or proposed declaration (other than the plats and plans) and any other recorded covenants, conditions, restrictions and reservations affecting the condominium; the bylaws, and any rules or regulations of the association; copies of any contracts and leases to be signed by purchasers at closing, and copies of or a brief narrative description of any contracts or leases that will or may be subject to cancellation by the association under G.S. 47C-3-105;

(5) Any current balance sheet and a projected budget for the association, either within or as an exhibit to the public offering statement, for one year after the date of the first conveyance to a purchaser, and thereafter the current budget of the association, a statement of who prepared the budget, and a statement of the budget's assumptions concerning occupancy and inflation factors. The budget must include, without limitation:

a. A statement of the amount, or a statement that there is no amount, included in the budget as a reserve for repairs and replacement;

b. A statement of any other reserves;

c. The projected common expense assessment by category of expenditures for the association; and

d. The projected monthly common expense assessment for each type of unit;

(6) Any services that the declarant provides or expenses that he pays which are not reflected in the budget and that he expects may become at any subsequent time a common expense of the association and the projected common expense assessment attributable to each of those services or expenses for the association and for each type of unit;

(7) Any initial or special fee due from the purchaser at closing, together with a description of the purpose and method of calculating the fee;

(8) A description of any known or recorded liens, encumbrances or defects affecting the title to the condominium;

(9) The terms and limitations of any warranties provided by the declarant;

(10) A statement that the purchaser must receive a public offering statement before signing a contract for purchase and that no conveyance can occur until seven calendar days following the signing of a contract for purchase; and that the purchaser has the absolute right to cancel the contract during the seven calendar days period;

(11) A statement of any known or recorded unsatisfied judgments or pending suits against the association, and the status of any pending suits material to the condominium of which a declarant has actual knowledge;

(12) A statement that any deposit made in connection with the purchase of a unit will be held in an escrow account pursuant to G.S. 47C-4-108, together with the name and address of the escrow agent;

(13) Any restraints on alienation of any portion of the condominium;

(14) A description of the insurance coverage provided for the benefit of unit owners;

(15) Any current or known future fees or charges to be paid by unit owners for the use of the common elements and other facilities related to the condominium;

(16) The extent to which financial arrangements have been provided for completion of all improvements labeled "MUST BE BUILT" pursuant to G.S. 47C-4-119;

(17) A brief narrative description of any existing zoning and other land use requirements governing the condominium; and

(18) A statement that any common element may be alienated or conveyed in accordance with G.S. 47C-3-112.

(b) A declarant promptly shall amend the public offering statement to report any material change in the information required by this section and provide a copy of any such material changes to any purchaser who has executed a contract. If any material change is made in a proposed declaration after a contract for purchase of a unit has been signed but before conveyance, the purchaser may rescind the contract within seven days after receipt of the notice of the change. (1985 (Reg. Sess., 1986), c. 877, s. 1; 1997-456, s. 27.)

OFFICIAL COMMENT

1. The best "consumer protection" that the law can provide to any purchaser is to insure that he has an opportunity to acquire an understanding of the nature of the products which he is purchasing. Such a result is difficult to achieve, however, in the case of the condominium purchaser because of the complex nature of the bundle of rights and obligations which each unit owner obtains. For this reason, the Act, adopting the approach of many so-called "second generation" condominium statutes, sets forth a lengthy list of information which must be provided to each purchaser before he contracts for a unit. This list includes a number of important matters not typically required in public offering statements under existing law. The requirement for providing the public offering statement appears in Section 4-102(c), and Section 4-108 provides purchasers with cancellation rights and imposes civil penalties upon declarants not complying with the public offering statement requirements of the Act.

2. Paragraph (a)(2) requires a general description of the condominium and, to the extent possible, the declarant's schedule for commencement and completion of construction for all building amenities that will comprise portions of the condominium. Under Section 2-109, the declarant is obligated to label all improvements which may be made in the condominium as either "MUST BE BUILT" or "NEED NOT BE BUILT." Under Section 4-119, the declarant is obligated to complete all improvements labeled "MUST BE BUILT." The estimated schedule of commencement and completion of construction dates provides a standard for judging whether a declarant has complied with the requirements of Section 4-119.

3. Paragraph (4) requires the public offering statement to include copies of the declaration, bylaws, and any rules and regulations of the condominium, as well as copies of any contracts or leases to be executed by the purchaser. In addition, the paragraph requires the public offering statement to include a brief narrative description of the significant features of those documents, as well as of any management contract, leases of recreational facilities,

and other sorts of contracts which may be subject to cancellation by the association after the period of declarant control expires, as provided in Section 3-105. This latter requirement is intended to encourage the preparation of brief summaries of all condominium documents in laymen's terms, *i.e.,* the "brief narrative description" should be more than a simple explanation of what a declaration (or other document) is, but less than an extended legal analysis duplicating the contents of the documents themselves. The summary requirement is intended to alleviate the common problem of public offering statements being drafted in lawyers' terms and being no more comprehensible to laymen than the documents themselves.

4. The disclosure requirement of paragraph (6) is intended to eliminate the common deceptive sales practice known as "lowballing," a practice by which a declarant intentionally underestimates the budget for the association by providing many of the services himself during the initial sales period. In such a circumstance, the declarant commonly intends that, after a certain time, these services (which might include lawn maintenance, painting, security, bookkeeping, or other services) will become expenses of the association, thereby substantially increasing the periodic common expense assessments which association members must ultimately bear. By requiring the disclosure of these services (including the projected common expense assessment attributable to each) in paragraph (6), the Act seeks to minimize "lowballing". In order to comply fully with the provisions of paragraph (5), the declarant must calculate the budget on the basis of his best estimate of the number of units which will be part of the condominium during that budget year. This requirement as well operates to negate the effects of any attempted "lowballing".

5. Paragraph (9) requires disclosure of any financing "offered" by the declarant. The paragraph contemplates that a declarant disclose any arrangements for financing that may have been made, including arrangements with any unaffiliated lender to provide mortgages to qualified purchasers.

6. Under paragraph (10), the declarant is required to disclose the terms of all warranties provided by the declarant (including the statutory warranties set forth in Section 4-114) and to describe any significant limitations on such warranties, the enforcement thereof, or damages which may be collectible as a result of a breach thereof. This latter requirement would necessitate a description by the declarant of any exclusions or modifications of statutory warranties undertaken pursuant to Section 4-115. The statute of limitations for warranties set forth in Section 4-116, together with any separate written agreement (as required by Section 4-116) providing for reduction of the period of such statute of limitations, must also be disclosed.

7. Paragraph (14) requires that the declarant disclose the existence of any right of first refusal or other restrictions on the uses for which or classes of persons to whom units may be sold.

8. Paragraph (15) corrects a defect common to many condominium statutes by requiring the declarant to describe the insurance coverage provided for the benefit of unit owners. *See* Section 3-113.

9. Under paragraph (16), the declarant is obligated to disclose any current or expected fees or charges which unit owners may be required to pay for the use of the common elements and other facilities related to the condominium. Such fees or charges might include swimming pool fees, golf course fees, or required membership fees for recreation associations. Such fees are often not disclosed to condominium purchasers and can represent a substantial addition to their monthly assessments.

10. The "financial arrangements" required to be disclosed pursuant to paragraph (17) may vary substantially from one condominium development to another. It is the intent of the paragraph to give purchasers as much information as possible with which to assess the declarant's ability to carry out his obligations to complete the improvements. For example, if a declarant has a commitment from a bank to provide construction financing for a swimming pool when 50% of the units in the condominium are completed, that fact should be disclosed to potential purchasers.

11. In addition to the information required to be disclosed by paragraphs (1) through (18), paragraph (19) requires that the declarant disclose all other "unusual and material circumstances, features, and characteristics" of the condominium and all units therein. This requires only information which is both "unusual *and* material." Thus, the provision does not require the disclosure of "material" factors which are commonly understood to be part of the condominium, *e.g.,* the fact that a condominium has a roof, walls, doors, and windows. Similarly, the provision does not require the disclosure of "unusual" information about the condominium which is not also "material," *e.g.,* the fact that a condominium is the first condominium in a particular community. Information which would normally be required to be disclosed pursuant to paragraph (19) might include, to the extent that they are unusual and material, environmental conditions affecting the use or enjoyment of the condominium, features of the location of the condominium, *e.g.,* near the end of an airport runway or a planned rendering plant, and the like.

12. The cost of preparing a public offering statement can be substantial and may, particularly in the case of small condominiums, represent a significant portion of the cost of a unit. For that reason, subsection (b) permits a declarant to exclude from a public offering statement certain information in the case of a small condominium (*i.e.,* less than 12 units) which is not subject to development rights and which is not potentially part of a larger condominium or group of condominiums. Essentially, subsection (b) permits a declarant to exclude from a public offering statement those materials which, as a practical matter, require extended preparation effort by an attorney or engineer in addition to the normal effort which must be exerted to provide the declaration, bylaws, plats and plans, or other documents required by the Act.

NORTH CAROLINA COMMENT

The North Carolina Act makes the following changes in the requirements relating to the contents of the public offering statement set out in subsection (a): Subdivision (4) was amended to allow the delivery of a "proposed" declaration before it has been recorded in recognition of the fact that the actual boundaries of units and buildings after construction differ from the planned boundaries; Subdivision (9) of the Uniform Act requiring information about available financing was deleted because of rapid changes in the terms of such financing and because such information would be supplied to the purchaser as a business practice; amendments to Subdivision (9) of the North Carolina Act reflects the changes to the rescission period set out in Section 47C-4-108; and, modifications reflecting the Commission's decision to eliminate ambiguous requirements or subjective determinations in favor of more definite information.

Subsection (b) of the North Carolina Act adds a seven day rescission period after notice of a material change in the public offering statement. Subsection (c) of the Uniform Act authorizing the omission of certain information for small condominiums was deleted because it was felt that the potential cost savings did not justify the exemption.

§ 47C-4-104. Same; condominiums subject to developmental rights.

If the declaration provides that a condominium is subject to any development rights reserved by the declarant, the public offering statement shall disclose, in addition to the information required by G.S. 47C-4-103:

(1) The maximum number of units, and the maximum number of units per acre, that may be created;

(2) How many or what percentage of the units which may be created will be restricted exclusively to residential use, or a statement that no representations are made regarding use restrictions;

(3) If any of the units that may be built within real estate subject to development rights are not to be restricted exclusively to residential use, a statement, with respect to each portion of that real estate, of the maximum percentage of the real estate areas and the maximum percentage of the floor areas of all units that may be created therein that are not restricted exclusively to residential use;

(4) A brief narrative description of any development rights and of any conditions relating to or limitations upon the exercise of development rights;

(5) The maximum extent to which each unit's allocated interests may be changed by the exercise of any development right;

(6) The extent to which any buildings or other improvements that may be erected pursuant to any development right in any part of the condominium will be compatible with existing buildings and improvements in the condominium in terms of architectural style, quality of construction, and size, or a statement that no assurances are made in those regards;

(7) General descriptions of all other improvements that may be made and limited common elements that may be created within any part of the

condominium pursuant to any development right, or a statement that no assurances are made in that regard;

(8) Any limitations as to the locations of any building or other improvement that may be made within any part of the condominium pursuant to any development right, or a statement that no assurances are made in that regard;

(9) A statement that any limited common elements created pursuant to any development right will be of the same general types and sizes as the limited common elements within other parts of the condominium, or a statement of the types and sizes planned, or a statement that no assurances are made in that regard;

(10) A statement that the proportion of limited common elements to units created pursuant to any development right will be approximately equal to the proportion existing within other parts of the condominium, or a statement of any other assurances in that regard, or a statement that no assurances are made in that regard;

(11) A statement that all restrictions in the declaration affecting use, occupancy, and alienation of units will apply to any units created pursuant to any development right, or a statement of any differentiations that may be made as to those units, or a statement that no assurances are made in that regard; and

(12) A statement of the extent to which any assurances made pursuant to this section apply or do not apply in the event that any development right is not exercised by the declarant. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

This section requires disclosure in the public offering statement of the manner in which the declarant's exercise of development rights may affect purchasers who acquire units before those rights have been fully exercised. The purpose is to put the purchaser on notice of the extent to which the exercise of those rights may alter, sometimes quite dramatically, both the physical and the legal aspects of the project. For example, the prospective purchaser may be contemplating the acquisition of a particular unit because it enjoys a view of open, undeveloped land over which the declarant has, however, reserved development rights. It may be that the boundary of the parcel as to which development rights have been reserved actually coincides with, or runs quite close to, the outer wall of the unit in question. The disclosures or statements made pursuant to paragraphs (8) and (12) of this section will indicate to the prospective purchaser the extent (if any) to which he can rely on the declarant not to do anything which would radically alter the view from the unit which he now finds so appealing.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-4-105. Same; time share.

(a) If the declaration provides that ownership or occupancy of any units are or may be owned in time shares, the public offering statement shall disclose, in addition to the information required by G.S. 47C-4-103:

(1) The number and identity of units in which time shares may be created;

(2) The total number of time shares that may be created;

(3) The minimum duration of any time shares which may be created; and

(4) The extent to which the creation of time shares will or may affect the enforceability of the association's lien for assessments provided in G.S. 47C-3-116.

(b) The provisions of subsection (a) apply to all purchasers of units in the condominium. In addition, the purchaser of time shares shall receive the information required by G.S. 93A-44. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. Time sharing has become increasingly important in recent years, particularly with respect to resort condominiums. In recognition of this fact, this section requires the disclosure of certain information with respect to time sharing.

2. Virtually all existing state condominium statutes are silent with respect to time-share ownership. The inclusion of disclosure provisions for certain forms of time sharing in this Act, however, does not imply that other law regulating time sharing is affected in any way in a state merely because that state enacts this Act.

The Uniform Law Commissioners' Model Real Estate Time-Share Act specifies more extensive disclosures for time-share properties. A "time-share property" may include part or all of the condominium, and Section 1-109 of the Model Act governs conflicts between this Act and time-share legislation.

NORTH CAROLINA COMMENT

Subsection (b) was added to make it clear that the purchaser of any unit is to receive the information in subsection (a) and that a purchaser of a time share must be provided the additional information required by G.S. 93A-44.

§ 47C-4-106. Conversion buildings.

Condominiums containing conversion buildings shall be subject to the provisions of Article 2 of Chapter 47A. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. In the case of a condominium containing one or more conversion buildings, the disclosure of additional information relating to the condition of those buildings is required in the public offering statement because of the difficulty inherent in a single purchaser attempting to determine the condition of what is likely to be an older building being renovated for the purpose of condominium sales.

2. Paragraph (a)(1) requires the person who gives the public offering statement to retain an independent architect or engineer to report on the present condition of all structural components and fixed mechanical and electrical installations in the conversion building. Such information is as useful to declarant as to the purchaser since, under the implied warranty provisions of Section 4-114, a declarant impliedly warrants all improvements made by any person to the building "before creation of the condominium" unless such improvements are specifically excluded from the implied warranty of quality pursuant to Section 4-115(b).

3. *See* Comment 6 to Section 2-101 concerning the meaning of "structural components" as used in paragraph (a)(1). Any material changes in the "present condition" of these systems must be reported by an amendment to the public offering statement.

4. Under paragraph (a)(3), the person required to give the public offering statement is required to provide purchasers with a list of all outstanding notices of uncured violations of building codes or other municipal regulations. The literal wording of this provision does not require disclosure of known violations of such building codes or municipal regulations (at least violations having no effect upon the structural components or fixed mechanical and electrical installations of the condominium) unless actual "notices" of such violations have been received. To the extent that outstanding notices of uncured violations do exist, the cost of curing such violations would become a liability of the unit owners or the association following transfer of the unit to a purchaser. For that reason, the estimated cost of curing any outstanding violations must also be disclosed.

5. For the same reasons set forth in the Comment to Section 4-101(a), this section does not apply to units which are restricted exclusively to nonresidential use.

NORTH CAROLINA COMMENT

This section was amended to incorporate the requirements of Article 2 of Chapter 47A.

§ 47C-4-107. Same; condominium securities.

(a) If an interest in a condominium is registered with the Securities and Exchange Commission of the United States, a declarant satisfies the requirements relating to the preparation of a public offering statement of this chapter if he delivers to the purchaser a copy of the public offering statement filed with the Securities and Exchange Commission to the extent such statement provides the information required by G.S. 47C-4-103, 47C-4-104, 47C-4-105 and 47C-4-106.

(b) The North Carolina Securities Act, Chapter 78A, shall apply to condominiums deemed to be investment contracts or to other securities offered with or incident to a condominium. In the event of such applicability of the North Carolina Securities Act, any real estate broker or salesman registered under Article 1 of Chapter 93A shall not be subject to the provisions of G.S. 78A-36. The exemption provided by the preceding sentence shall not apply to any person who is required to register with the Securities Exchange Commission as a broker or dealer under the Securities and Exchange Act of 1934. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. Some condominiums are regarded as "investment contracts" or other "securities" under federal law because they exhibit certain investment features such as mandatory rental pools. *See* SEC Securities Act Release No. 5347 (January 1973). The purpose of this section is to permit the declarant to file or deliver, in lieu of a public offering statement specifically prepared to comply with the provisions of this Act, the prospectus filed with and distributed pursuant to the regulations of the United States Securities and Exchange Commission. Absent this provision, prospective purchasers of condominiums classified by the SEC as "securities" would have to be given two public offering statements, one prepared pursuant to this Act and the other prepared pursuant to the Securities Act of 1933. Not only would this result increase the declarant's costs (and thus the price) of units, it might also reduce the likelihood of either public offering statement actually being read by prospective purchasers.

2. The bracketed language in the first sentence of this section should be inserted by states which choose to adopt the agency provisions of Article 5 of the Act. The second sentence should also be inserted by states opting to incorporate Article 5 of the Act to avoid duplicative regulation of condominiums by the agency administering the State's securities regulation statutes.

NORTH CAROLINA COMMENT

Subsection (a) is not significantly different from the Uniform Act. Subsection (b) was added to provide an exemption from the securities licensing requirements for licensed real estate agents.

§ 47C-4-108. Purchaser's right to cancel.

(a) A person required to deliver a public offering statement pursuant to G.S. 47C-4-102(c) shall provide a purchaser of a unit or the spouse of such purchaser with a copy of the public offering statement and all amendments thereto before a contract to purchase the unit is executed. No conveyance pursuant to the contract to purchase may occur until seven calendar days following the execution of the contract and a purchaser has the absolute right to cancel the contract at any time during this seven calendar day period.

Cancellation is without penalty, and all payments made by the purchaser before cancellation shall be refunded promptly.

(b) If a purchaser elects to cancel a contract pursuant to subsection (a), he may do so by hand-delivering notice thereof to the offeror or by mailing notice thereof by prepaid United States mail to the offeror or to his agent for service of process. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. The "cooling off" period provided to a purchaser in this section is similar to provisions in many current state condominium statutes.

2. Subsection (a) requires that each purchaser be provided with both the public offering statement and all amendments thereto prior to the time that the unit is conveyed. If there is a contract for the sale of the unit, these documents must be provided not later than the date of the contract. The section makes clear that any amendments to the public offering statement prepared between the date of any contract and the date of conveyance must also be provided to the purchaser.

3. This section does not require the delivery of a public offering statement prior to the execution by the purchaser of an agreement pursuant to which the purchaser reserves the right to buy a unit but is not contractually bound to do so. Because such agreements (frequently referred to as "non-binding reservation agreements") may be unilaterally cancelled at any time by a prospective purchaser without penalty, they do not constitute "contract[s] of sale" within the meaning of the section.

4. The requirement set forth in subsection (a) that a purchaser be provided with subsequent amendments to the public offering statement during the period between execution of the contract for purchase and conveyance of the unit does not, in itself, extend the "cooling off" period. Indeed, the delivery of such amendments is required even if the "cooling off" period has expired. The purpose of this requirement is to assure that purchasers of units are advised of any material change in the condominium which may affect their sales contracts under general law. While many such amendments will be merely technical and will not affect the bargain that the purchaser and declarant entered into, each purchaser should be permitted to judge for himself the materiality of any change in the nature of the condominium.

5. Under the scheme set forth in this section, it is at least theoretically possible that there will be a contract for sale of the unit, and that a public offering statement will be given to the purchaser at closing just prior to conveyance. However, the available evidence suggests that such practice would be rare, and that the provision of a public offering statement moments prior to conveyance would, in itself, tend to dampen the enthusiasm of the purchaser for immediate closing. In such circumstances, under subsection (a), the purchaser would, as a matter of right, be able to extend the date of closing for 15 days from the time the public offering statement was provided. This fact, together with the generally unsatisfactory experience with mandatory "cooling off" periods such as that imposed under the federal Real Estate Settlement Procedures Act, supports the conclusion that it is inappropriate to require a minimum period of delay between delivery of a public offering statement and conveyance.

6. Under subsection (a), the failure to deliver a public offering statement before conveyance does not result in a statutory right by the purchaser to cancel the conveyance or to reconvey the unit once conveyance has occurred. Any such cancellation or reconveyance right following an actual conveyance could create serious mechanical and title problems that could not be easily resolved. The failure of the Act to provide for such cancellation or reconveyance is not, however, intended to diminish any right which a purchaser may otherwise have under general state law. For example, where it appears that a seller, by deliberately failing to disclose certain material information with respect to a transaction, substantially changed the bargain which he and the purchaser entered into, it is possible under the common law in some states that reconveyance would be an available remedy.

Even absent such resort to general law, however, the penalty provisions of subsection (c) are designed to provide a sufficient incentive to the seller to insure that the public offering statement is provided in the timely fashion required by the Act. The penalty so specified in the subsection is in addition to any right a prevailing purchaser may have under Section 4-117 to collect punitive damages and attorney's fees in connection with his action against the declarant.

NORTH CAROLINA COMMENT

This section was amended to expressly provide that the public offering statement is to be provided to a purchaser before a sales contract is executed. The cancellation or 'cooling off' period of seven days begins on the day the contract is executed and the conveyance is not to occur until after the cancellation period.

§ 47C-4-109. Resales of units.

Except in the case of a sale where delivery of a public offering statement is required, or unless exempt under G.S. 47C-4-101(b), a unit owner shall furnish to a prospective purchaser before conveyance a statement setting forth the monthly common expense assessment and any other fees payable by unit owners. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. In the case of the resale of a unit by a private unit owner who is not a declarant or a person in the business of selling real estate for his own account, a public offering statement need not be provided. *See* Section 4-102(c). Nevertheless, there are important facts which a purchaser should have in order to make a rational judgment about the advisability of purchasing the particular condominium unit. Accordingly, each unit owner not required to furnish a public offering statement under Section 4-102(c) and not exempt under Section 4-101(b) is required to furnish to a resale purchaser, before the execution of any contract of sale, a copy of the declaration, bylaws, and rules and regulations of the association and a variety of fiscal, insurance, and other information concerning the condominium and the unit.

2. While the obligation to provide the information required by this section rests upon each unit owner (since the purchaser is in privity only with that unit owner), the association has an obligation to provide the information to the unit owner within 10 days after a request for such information. Under Section 3-102(a)(12), the association is entitled to charge the unit owner a reasonable fee for the preparation of the certificate. Should the association fail to provide the certificate as required, the unit owner would have a right to action against the association pursuant to Section 4-117.

3. Under subsection (c), if a purchaser receives a resale certificate which fails to state the proper amount of the unpaid assessments due from the purchased unit, the purchaser is not liable for any amount greater than that disclosed in the resale certificate. Because a resale purchaser is dependent upon the association for information with respect to the outstanding assessments against the unit which he contemplates buying, it is altogether appropriate that the association should be prohibited from later collecting greater assessments than those disclosed prior to the time of the resale purchase.

NORTH CAROLINA COMMENT

This section was rewritten to reduce the burden upon a seller in a resale situation. The Commission was of the opinion that a resale occurs in an arms length bargaining setting and the requirements placed upon the seller in such a situation seemed unjustified by the current experience in North Carolina. Finally, the Commission was unsure of the consequences of the seller's failure to comply with the requirements of the Uniform Act.

§ 47C-4-110. Escrow of deposits.

(a) Any deposit made in connection with the purchase or reservation of a unit from a person required to deliver a public offering statement pursuant to G.S. 47C-4-102(c) shall be immediately deposited in a trust or escrow account in an insured bank or savings and loan association in North Carolina and shall remain in such account for such period of time as a purchaser is entitled to cancel pursuant to G.S. 47C-4-108 or cancellation by the purchaser thereunder whichever occurs first. Payments held in such trust or escrow accounts shall be deemed to belong to the purchaser and not the seller.

(b) Except as provided in G.S. 47C-4-108, nothing in subsection (a) is intended to preclude the parties to a contract from providing for the use of progress payments by the declarant during construction. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section applies to the sale by persons required to furnish public offering statements of residential units and of non-residential units unless waived pursuant to the provisions of Section 4-101. It does not apply, however, to resales of units between private parties. Escrow provisions are not part of the law in several jurisdictions.

2. This section provides declarant a number of choices as to the appropriate escrow agent. Whether the escrow agent must deposit the funds in an insured institutional depository, or in a particular type of account, depends on state law, or the agreement of the parties. To minimize record keeping, of course, the institutional depository could itself be the escrow agent. The section does not require a separate account for each unit, so that mingling of funds in a single escrow account would be permitted. The account may be held whether in the state where the unit is located, or in the enacting state, in recognition that buyers are often from outside the state where the unit is located.

3. The escrow requirements of this section apply in connection with *any* deposit made by a purchaser, whether such deposit is made pursuant to a binding contract or pursuant to a non-binding reservation agreement (with respect to which no public offering statement is required under Section 4-101(b)(6)).

4. In some states current practice permits escrows to be held by certain title insurance or escrow companies, attorneys, or real estate brokers. Accordingly, the bracketed language should be included or deleted in accordance with local practice.

5. Under this section, any interest earned on an escrow deposit may, but need not, be credited to the purchaser at closing, added to any deposit forfeited to the seller, or added to any deposit refunded to the purchaser. In short, disposition of any interest is left to agreement of the parties.

6. In some states, such as New York, the substitution of a bond in place of a deposit escrow is permitted. The evidence indicates, however, that in many instances the use of the bonding device has forced purchasers to incur substantial costs and delay prior to obtaining refunds to which they are entitled. For this reason, this Act does not include bonding as an alternative to the required escrow of deposits.

NORTH CAROLINA COMMENT

This section was rewritten to make it clear that the escrow period referred to is the period during which the purchaser has the right to cancel. The last sentence of subsection (a) is to negate any reference or argument in favor of ownership or right of possession to the deposit on the part of anyone other than the purchaser. Subsection (b) provides that the parties can contract for the disposition of other payments made prior to the closing.

CASE NOTES

Evidence Regarding Requirement. — Deposit money given to reserve a condominium unit under this section was still rightfully owned by the purchaser were required to be placed in escrow. It follows that it was not error for the trial judge to deny defendant's motion in limine to exclude evidence indicating such a requirement. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

Testimony Regarding Absence of Criminal Sanctions. — Trial judge did not abuse his discretion by refusing to admit the testimony of detective that a violation of this section is not subject to criminal sanctions. State v. Rupe, 109 N.C. App. 601, 428 S.E.2d 480 (1993).

§ 47C-4-111. Release of liens or encumbrances.

(a) In the case of a sale of a unit where delivery of a public offering statement is required pursuant to G.S. 47C-4-102(c), a seller shall, at or before conveying a unit, record or furnish to the purchaser, releases of all liens or encumbrances affecting that unit and its common element interest which the purchaser does not expressly agree to take subject to or assume, or shall provide a surety bond or substitute collateral for or insurance against the lien or encumbrance as provided for liens or encumbrances on real estate in G.S. 44A-16(5) and (6) or insurance against the lien or encumbrance acceptable to the purchaser. This subsection does not apply to any real estate which a declarant has the right to withdraw.

(b) Before conveying real estate to the association the declarant shall have that real estate released from: (1) all liens or encumbrances the foreclosure of which would deprive unit owners of any right of access to or easement of support of their units, and (2) all other liens or encumbrances on that real estate unless the public offering statement describes certain real estate which may be conveyed subject to liens or encumbrances in specified amounts. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

The exemption for withdrawable real estate set forth in subsection (a) is designed to preserve flexibility for the declarant in terms of financing arrangements. Theoretically, a developer might partially avoid the lien release requirement of subsection (a) by placing part of the common element improvements such as a swimming pool or tennis court on withdrawable real estate. By doing so, it could separately mortgage that part of the common elements without being obligated to discharge the mortgage or secure partial releases when individual units are sold. (However, even if there were no withdrawable real estate exemption from the release of lien requirement, developers could still separately mortgage such improvements as pools and tennis courts without having to discharge the mortgage on sale of units. All they would have to do is leave the particular real estate out of the condominium and then convey it directly to the association subject to the mortgage.)

If a mortgage or other lien created by or arising against the developer attaches to withdrawable real estate after the declaration has been recorded, a lapse of the developer's right to withdraw the real estate would also terminate the rights of the lienor, since the lien would attach only to the developer's interest (the right to withdraw). However, an alert lienor would not permit the right to withdraw to lapse without taking steps to see that the right to withdraw is exercised. If the mortgage or other lien attached to the real estate and was perfected before the condominium declaration was recorded, lapse of the right to withdraw would not affect the lienor's rights and it could foreclose on the real estate whether or not the developer had lost the right to withdraw. As a practical matter, whether the mortgage or other lien against withdrawable real estate arises before or after the declaration is recorded, unit owners may find that, if the association does not release liens on withdrawable real estate containing common elements, the lienor will be able to withdraw the land and deprive the unit owners of its use. Therefore, unit purchasers and their counsel should be alert to that possibility.

If units are created in withdrawable real estate, the units, when sold, are subject to the release-of-lien rule of subsection (b)(1) and after a unit in a particular withdrawable parcel is sold, that parcel can no longer be withdrawn. In that case, any lien created by or arising against the developer which attached to the real estate and is subordinate to the condominium declaration would automatically expire.

§ **47C-4-112:** Reserved for future codification purposes.

§ 47C-4-113. Express warranties of quality.

The law relating to express warranties is applicable to the sale of a condominium unit and supplements the provisions of this chapter; provided, however, that the existence of express warranties shall not constitute a disclaimer of implied warranties. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section, together with Sections 4-114, 4-115, and 4-116, are adapted from the real estate warranty provisions contained in the Uniform Land Transactions Act (ULTA).

2. This section, which parallels Section 2-308 of ULTA, deals with express warranties, that is, with the expectations of the purchaser created by particular conduct of the declarant in connection with inducement of the sale. It is based on the principle that, once it is established that the declarant has acted so as to create particular expectations in the purchaser, warranty should be found unless it is clear that, prior to the time of final agreement, the declarant has negated the conduct which created the expectation.

3. Subsection (b) makes it clear that no specific intention to make a warranty is necessary if any of the factors mentioned in subsection (a) are made part of the basis of the bargain between the parties. In actual practice, representations made by a declarant concerning condominium property during the bargaining process are typically regarded as a part of the description. Therefore, no particular reliance on the representations need be shown in order to weave them into the fabric of the agreement. Rather, the burden is on the declarant to show that representations made in the bargaining process were not relied upon by the purchaser at the time of contracting.

4. Subsection (a)(1) provides that representations as to improvements and facilities not located in the condominium may create express warranties. Declarants often assert that recreational facilities, such as swimming pools, golf courses, tennis courts, etc., will be constructed in the future and that unit owners will have the right to utilize such facilities once constructed. Such assertions are intended to be included within the language "have the benefit of facilities not located in the condominium." If, under the circumstances, such improvements would benefit the unit being sold, then the declarant may be liable for breach of express warranty if they are not completed. Such liability is distinct from the declarant's obligations, under Section 4-119, to complete all improvements labeled "MUST BE BUILT" on plats and plans.

5. Under subsection (a)(4), a contract provision permitting the purchaser to use a condominium unit only for a specified use or uses creates an express warranty that the unit may lawfully be used for that purpose. Therefore, if there is a limitation on use, the resulting express warranty could not be disclaimed by a disclaimer of implied warranties under Section 4-115.

6. The precise time when representations set forth in subsection (a) are made is not material. The sole question is whether the language or other representations of the declarant are fairly to be regarded as part of the contract between the parties.

7. Subsection (b) makes clear that it is not necessary to the existence of a warranty that the declarant have intended to assume a warranty obligation. On the other hand, mere statements of opinion or commendations by the declarant do not necessarily create warranties. Whether a particular statement purports to be merely opinion or commendation is basically a question of whether the purchaser could reasonably rely upon the statement as a meaningful representation or promise with respect to the condominium. That determination depends, in turn, not merely upon the words used but also upon the relative characteristics and skills of the parties. Thus a representation by a declarant to a novice purchaser that a particular condominium unit is in "good condition" may be more than mere opinion or commendation, while the same statement by a novice seller to a professional buyer would likely be only opinion or commendation, and thus not a warranty.

8. The provision of subsection (c) that the conveyance of a unit transfers to the purchaser all express warranties made by prior declarants is intended, in part, to avoid the possibility that a declarant could negate his warranty obligations through the device of transferring a unit through a shell entity to the ultimate purchaser.

NORTH CAROLINA COMMENT

The North Carolina Act rewrote this section to provide that the North Carolina express warranty law applicable to single family residential dwellings should also be applicable to condominiums. The Commission was persuaded that the law of North Carolina (based upon a theory of negligence as opposed to contract) provides as much protection to a purchaser as the express warranty provisions of the Uniform Act, see Oates v. JAG, Inc., 314 N.C. 276, 333 S.E.2d 222 (1985).

§ 47C-4-114. Implied warranties of quality.

The law relating to implied warranties, including but not limited to, implied warranties that the premises are free from defective materials, constructed in a workmanlike manner, constructed according to sound engineering and construction standards and that the premises may be used for a particular purpose, is applicable to the sale of a condominium unit and supplements the provisions of this chapter. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section, which is based upon Section 2-309 of ULTA, overturns the rule still applied in many states that a professional seller of real estate makes no implied warranties of quality (the rule of "*caveat emptor*"). In recent years, that rule has been increasingly recognized as a relic of an earlier age whose continued existence defeats reasonable expectations of purchasers. Since the 1930's, more and more courts have completely or partially abolished the *caveat emptor* rule, and it is clear that the judicial tide is now running in favor of seller liability.

2. The principal warranty imposed under this section is that of suitability of both the unit and common elements for ordinary uses of real estate of similar type, and of quality of construction. Both of these warranties, which arise under subsection (b), are imposed only against declarants and not against unit owners selling their units to others.

3. Many recent cases have held that a seller of new housing impliedly warrants that the houses sold are habitable. The warranty of suitability under this Act is similar to the warranty of habitability. However, under the Act, the warranty of suitability applies to both units and common elements in both commercial and residential condominiums. If, for example, a commercial unit is sold for commercial use although it is not suitable for the ordinary uses of condominium units of that type, the warranty of suitability has been breached. Moreover, this warranty of suitability arises in the case of used, as well as new, buildings or other improvements in the condominium.

4. The warranty of suitability and of quality of construction arises only against a declarant and persons in the business of selling real estate for their own account. As in the case of sales of goods, a non-professional seller is liable, if at all, only for any express warranties made by him. However, if a non-professional seller fails to disclose defects of which he is aware, he may be liable to the purchaser for fraud or misrepresentation under the common law of the state where the transaction occurred. Also, the warranties imposed by this section may be used to give content to a general "guarantee" by a non-professional seller.

5. The warranty as to quality of construction for improvements made or contracted for by the declarant or made by any person before the creation of the condominium is broader than the warranty of suitability. Particularly, it imposes liability for defects which may not be so serious as to render the condominium unsuitable for ordinary purposes of real estate of similar type. Moreover, subsection (e) prevents a declarant from avoiding liability with respect to the quality of construction warranty by having an affiliated entity make the desired improvements.

6. Under subsection (c), a declarant also warrants to a residential purchaser that an existing use contemplated by the parties does not violate applicable law. The declarant, therefore, is liable for any violation of housing codes or other laws which renders any existing use of the condominium unlawful.

7. The issue of declarant liability for warranties is an important one in cases where a transfer of the declarant's rights occurs, either as an arm's length transaction, as a transfer to an affiliate, or as a transfer by foreclosure or a deed in lieu of foreclosure. Subsection (f) makes clear that a conveyance of a unit transfers to the purchaser all warranties of quality made by any declarant, and Section 3-104(b)(1) makes clear that the original declarant remains liable for all warranties of quality with respect to improvements made by him, even after he transfers all declarant rights, regardless of whether the unit is purchased from the declarant who made the improvements. If the successor declarant is an affiliate of the original declarant, it is clear, under both Sections 3-104(b)(2) and 4-114(f), that the original declarant remains liable for warranties of quality or improvements made by his successor even after the declarant himself ceases to have any special declarant rights.

8. As to the liabilities of successor declarants for warranties of quality, a successor who is an affiliate of a declarant is liable, pursuant to Section 3-104(e)(1), for warranties or improvements made by his predecessor. However, any non-affiliated successor of the original declarant is liable only for warranties of quality for improvements made or contracted for by him, and is not liable for warranties

which may lie against the original declarant even if the successor sells units completed by the original declarant to a purchaser. *See* Section 3-104(e)(2). In the case of a foreclosing lender, this is the same result as that reached under Section 2-309(f) of ULTA. The same result is also reached under ULTA in the case of a successor who, under ULTA Section 3-309(b), would be a seller in the business of selling real estate since under that subsection the seller is liable only for warranties or improvements made or contracted for by him.

NORTH CAROLINA COMMENT

This section was rewritten to provide that the implied warranty law of North Carolina applicable to single family residential dwellings should also be applicable to condominiums. The Commission was of the belief that the common law of North Carolina provides adequate protection to purchasers of condominiums, see North Carolina commentary to G.S. 47C-4-113, and that the law in this area is evolving through the courts.

Legal Periodicals. — For comment, "From Caveat Emptor to Consumer Equity — The Implied Warranty of Quality Under the Uniform Common Interest Ownership Act," see 27 Wake Forest L. Rev. 571 (1992).

§ 47C-4-115. Exclusion of modification of implied warranties of quality.

(a) Except as limited by subsection (b) with respect to a purchaser of a unit that may be used for residential use, implied warranties of quality:

(1) May be excluded or modified by agreement of the parties; and

(2) Are excluded by expression of disclaimer, such as "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties.

(b) With respect to a purchaser of a unit that may be occupied for residential use, no general disclaimer of implied warranties of quality is effective, but a declarant and any person in the business of selling real estate for his own account may disclaim liability in an instrument signed by the purchaser for a specified defect or specified failure to comply with applicable law, if the defect or failure entered into and became a part of the basis of the bargain. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. This section parallels Section 2-311(b) and (c) of ULTA.

2. Under this section, implied warranties of quality may be disclaimed. However, a warranty disclaimer clause, like any other contract clause, is subject to a possible court holding of unconscionability. Although the section imposes no requirement that a disclaimer be in writing, except in the case of residential units, an oral disclaimer might be ineffective under the law of parole and extrinsic evidence.

3. Except as against purchasers of residential units, there are no formal standards for the effectiveness of a disclaimer clause. All that is necessary under this section is that the disclaimer be calculated to effectively notify the purchaser of the nature of the disclaimer.

4. Under subsection (b), general disclaimers of implied warranties are not permitted with respect to purchasers of residential units. However, a declarant may disclaim liability for a specified defect or a specified failure to comply with applicable law in an instrument signed by such a purchaser. The requirement that the disclaimer as to each defect or failure be in a signed instrument is designed to insure that the declarant sufficiently calls each defect or failure to the purchaser's attention and that the purchaser has the opportunity to consider the effect of the particular defect or failure upon the bargain of the parties. Consequently, this section imposes a special burden upon the declarant who desires to make a "laundry list" of defects or failures by requiring him to emphasize each item on such a list and make its import clear to prospective purchasers. For example, the declarant of a conversion condominium might, consistent with this subsection,

disclaim certain warranties for "all electrical wiring and fixtures in the building, the furnace, all materials comprising or supporting the roof, and all components of the air conditioning system."

5. This section is not intended to be inconsistent with, or to prevent, the use of insured warranty programs offered by some home builders. However, under the Act, the implied warranty that a new condominium unit will be suitable for ordinary uses (*i.e.,* habitable) and will be constructed in a sound, workmanlike manner, and free of defective materials, cannot be disclaimed by general language.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-4-116. Statute of limitations for warranties.

(a) A judicial proceeding for breach of any obligation arising under G.S. 47C-4-113 or 47C-4-114 must be commenced within the applicable period of limitations set out in Chapter 1 of the North Carolina General Statutes.

(b) If a warranty of quality explicitly extends to future performance or duration of any improvement or component of the condominium, the cause of action accrues at the time the breach is discovered or at the end of the period for which the warranty explicitly extends, whichever is earlier. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. Under subsection (a), the parties may agree that the statute of limitations be reduced to as little as 2 years. However, such a contract provision (which, in the case of residential units, must be reflected in a separate written instrument executed by the purchaser) could, like other contract provisions, be subject to attack on grounds of unconscionability in particular cases.

2. Except for warranties of quality which explicitly refer to future performance or duration, a cause of action for breach of a warranty of quality would normally arise when the purchaser to whom it is first made enters into possession. Suit on such a warranty would thus have to be brought within 6 years thereafter. Even an inability to discover the breach would not delay the running of the statute of limitations in this regard.

3. Real estate sales frequently include warranties that certain components (*e.g.,* furnaces, hot water heaters, air conditioning systems, and roofs) will last for a particular period of time. In the case of such warranties, the statute of limitations would not start running until the breach is discovered, or, if not discovered before the end of the warranty term, until the end of the term.

NORTH CAROLINA COMMENT

Subsection (a) of the North Carolina Act reflects the Commission's belief that the general statute of limitations provisions of North Carolina law should apply to condominiums.

§ 47C-4-117. Effect of violations on rights of action; attorney's fees.

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of person adversely affected by that failure has a claim for appropriate relief. The court may award reasonable attorney's fees to the prevailing party. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

This section provides a general clause of action or claim for relief for failure to comply with the Act by either a declarant or any other person subject to the Act's provisions. Such persons might include unit owners, persons exercising a declarant's rights of appointment pursuant to Section 3-103(d), or the association itself. A claim for appropriate relief might include damages, injunctive relief, specific performance, rescission or reconveyance if appropriate under the law of the state, or any other remedy normally available under state law. The section specifically refers to "any person or class of persons" to indicate that any relief available under the state class action statute would be available in circumstances where a failure to comply with this Act has occurred. This section specifically permits punitive damages to be awarded in the case of willful failure to comply with the Act and also permits attorney's fees to be awarded in the discretion of the court to any party that prevails in an action.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act, however, the reference to punitive damages was deleted. The Commission was of the opinion that punitive damages or other deterrent provisions of law (e.g. treble damages for unfair trade practices) should be applied within the context of the general law of the state of North Carolina which is expressly made applicable to condominiums in G.S. 47C-1-108.

CASE NOTES

Attorney's Fees. — Had the General Assembly wished that the recovery of attorney's fees under the Condominium Act be governed by G.S. 6-21.2, they could have included language to that effect. This section is a subsequently enacted, more specific statute which will be used. Brookwood Unit Ownership Ass'n v. Delon, 124 N.C. App. 446, 477 S.E.2d 225 (1996).

Denial of plaintiffs' claim for attorney's fees in their action for the right to review financial records of an incorporated homeowners' association and for declaratory judgments that they could attend board meetings and non-owners could not be on association committees was not an abuse of discretion; although the trial court judge did not provide findings of fact or conclusions of law, the decision was not unsupported by reason. Rosenstadt v. Queens Towers Homeowners' Ass'n, 177 N.C. App. 273, 628 S.E.2d 431, 2006 N.C. App. LEXIS 844 (2006).

§ 47C-4-118. Labeling of promotional material.

If any improvement contemplated in a condominium is labeled "NEED NOT BE BUILT" on a plat or plan, or is to be located within a portion of the condominium with respect to which the declarant has reserved a development right, no promotional material may be displayed or delivered to prospective purchasers which describes or portrays that improvement unless the description or portrayal of the improvement in the promotional material is conspicuously labeled or identified as "NEED NOT BE BUILT". (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. Section 2-109(c) requires that the plats and plans for every condominium indicate whether or not any improvement that might be built in the condominium must be built. However, Section 4-103 does not require that copies of the plats and plans be provided to purchasers as part of the public offering statement. Consequently, this section requiring the labeling of improvements depicted on promotional material is necessary to assure that purchasers are not deceived with respect to which improvements the declarant is obligated to make in a particular condominium project.

2. Since no contemplated improvements on real estate subject to development rights need be shown on plats and plans, additional labeling is required by this section to insure that, if the declarant shows any contemplated improvements in his promotional material which are not shown on the plats and plans, those improvements must also be appropriately labeled.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-4-119. Declarant's obligation to complete.

(a) The declarant shall complete all improvements labeled "MUST BE BUILT" on plats or plans prepared pursuant to G.S. 47C-2-109.

(b) The declarant is subject to liability for the prompt repair and restoration, to a condition compatible with the remainder of the condominium, of any portion of the condominium affected by the exercise of rights reserved pursuant to or created by G.S. 47C-2-110, 47C-2-111, 47C-2-112, 47C-2-113, 47C-2-115, and 47C-2-116. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

1. Subsection (a) requires the declarant to complete any improvement which the plats or plans indicate, pursuant to the requirements of Section 2-109(c), "MUST BE BUILT." This is a fundamental obligation of the declarant and is one with which a successor declarant is obligated to comply under Section 3-104.
2. Under subsection (b), in the event that a declarant exercises the right to use an easement which is created by Section 2-116, or in the event the declarant maintains model units or signs on the condominium, the declarant is obligated to restore the portions of the condominiums used to a condition compatible with the remainder of the condominium.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

§ 47C-4-120. Substantial completion of units.

In the case of a sale of a unit where delivery of a public offering statement is required, a contract of sale may be executed, but no interest in that unit may be conveyed until the declaration is recorded and the unit is substantially completed, as evidenced by a recorded certificate of substantial completion executed by an architect licensed under the provisions of Chapter 83 [83A] of the General Statutes or an engineer registered under the provisions of Chapter 89C of the General Statutes, or by issuance of a certificate of occupancy authorized by law. (1985 (Reg. Sess., 1986), c. 877, s. 1.)

OFFICIAL COMMENT

The purpose of this section, complemented by Section 4-110, is to assure that the declarant is not able to obtain use of the purchaser's money until the purchaser is able to get a completed unit.

NORTH CAROLINA COMMENT

This section is not significantly different from the Uniform Act.

Editor's Note. — Chapter 83, referred to in this section, was rewritten by Session Laws 1979, c. 871, s. 1 and has been recodified as Chapter 83A.

Chapter 47D.

Notice of Settlement Act.

§§ 47D-1 through 47D-10: Expired.

Editor's Note. — Session Laws 1991, c. 261, s. 2, made this Chapter effective July 1, 1992, and provided that the Chapter would expire June 30, 1993.

Chapter 47E.

Residential Property Disclosure Act.

Sec.
47E-1. Applicability.
47E-2. Exemptions.
47E-3. Definitions.
47E-4. Required disclosures.
47E-5. Time for disclosure; cancellation of contract.
47E-6. Owner liability for disclosure of information provided by others.
47E-7. Change in circumstances.
47E-8. Agent's duty.
47E-9. Rights and duties under Chapter 42, landlord and tenant, not affected during lease.
47E-10. Authorization to prepare forms; fees.

§ 47E-1. Applicability.

This Chapter applies to the following transfers of residential real property consisting of not less than one nor more than four dwelling units, whether or not the transaction is with the assistance of a licensed real estate broker or salesman:

(1) Sale or exchange,
(2) Installment land sales contract,
(3) Option, or
(4) Lease with option to purchase, except as provided in G.S. 47E-2(10). (1995, c. 476, s. 1; 1997-472, s. 5.)

Legal Periodicals. — For article, "Silence Is Golden: The Case for Mandatory Disclosure of Coastal Hazards and Land-Use Restrictions by Residential Sellers in North Carolina," 25 N.C. Cent. L.J. 96 (2002).

CASE NOTES

Disclosure Statement Applies to Land Sales. — Although the seller was required by law to furnish a residential property disclosure statement to buyers at the time of the parties' property sale transaction and did not do so, the trial court properly dismissed the buyers' claim for damages pursuant to the Residential Property Disclosure Act, G.S. 47E-1 et seq., as the buyers' sole remedy under the Act was cancellation of the land sale contract; no separate action for damages was permitted under the Act for not providing the disclosure statement. Little v. Stogner, 162 N.C. App. 25, 592 S.E.2d 5, 2004 N.C. App. LEXIS 13 (2004).

§ 47E-2. Exemptions.

The following transfers are exempt from the provisions of this Chapter:

(1) Transfers pursuant to court order, including transfers ordered by a court in administration of an estate, transfers pursuant to a writ of execution, transfers by foreclosure sale, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance.
(2) Transfers to a beneficiary from the grantor or his successor in interest in a deed of trust, or to a mortgagee from the mortgagor or his successor in interest in a mortgage, if the indebtedness is in default; transfers by a trustee under a deed of trust or a mortgagee under a mortgage, if the indebtedness is in default; transfers by a trustee under a deed of trust or a mortgagee under a mortgage pursuant to a foreclosure sale, or transfers by a beneficiary under a deed of trust, who has acquired the real property at a sale conducted pursuant to a foreclosure sale under a deed of trust.

(3) Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.
(4) Transfers from one or more co-owners solely to one or more other co-owners.
(5) Transfers made solely to a spouse or a person or persons in the lineal line of consanguinity of one or more transferors.
(6) Transfers between spouses resulting from a decree of divorce or a distribution pursuant to Chapter 50 of the General Statutes or comparable provision of another state.
(7) Transfers made by virtue of the record owner's failure to pay any federal, State, or local taxes.
(8) Transfers to or from the State or any political subdivision of the State.
(9) Transfers involving the first sale of a dwelling never inhabited.
(10) Lease with option to purchase contracts where the lessee occupies or intends to occupy the dwelling.
(11) Transfers between parties when both parties agree not to complete a residential property disclosure statement. (1995, c. 476, s. 1.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 479.

§ 47E-3. Definitions.

When used in this Chapter, unless the context requires otherwise, the term:
(1) "Owner" means each person having a recorded present or future interest in real estate that is identified in a real estate contract subject to this Chapter; but shall not mean or include the trustee in a deed of trust, or the owner or holder of a mortgage, deed of trust, mechanic's or materialman's lien, or other lien or security interest in the real property, or the owner of any easement or license encumbering the real property.
(2) "Purchaser" means each person or entity named as "buyer" or "purchaser" in a real estate contract subject to this Chapter.
(3) "Real estate contract" means a contract for the transfer of ownership of real property by the means described in G.S. 47E-1.
(4) "Real property" means the lot or parcel, and the dwelling unit(s) thereon, described in a real estate contract subject to this Chapter. (1995, c. 476, s. 1.)

§ 47E-4. Required disclosures.

(a) With regard to transfers described in G.S. 47E-1, the owner of the real property shall furnish to a purchaser a residential property disclosure statement. The disclosure statement shall:
(1) Disclose those items which are required to be disclosed relative to the characteristics and condition of the property and of which the owner has actual knowledge; or
(2) State that the owner makes no representations as to the characteristics and condition of the real property or any improvements to the real property except as otherwise provided in the real estate contract.

(b) The North Carolina Real Estate Commission shall develop and require the use of a standard disclosure statement to comply with the requirements of this section. The disclosure statement shall specify that certain transfers of residential property are excluded from this requirement by G.S. 47E-2, including transfers of residential property made pursuant to a lease with an option to purchase where the lessee occupies or intends to occupy the dwelling, and shall include at least the following characteristics and conditions of the property:

(1) The water supply and sanitary sewage disposal system;
(2) The roof, chimneys, floors, foundation, basement, and other structural components and any modifications of these structural components;
(3) The plumbing, electrical, heating, cooling, and other mechanical systems;
(4) Present infestation of wood-destroying insects or organisms or past infestation the damage for which has not been repaired;
(5) The zoning laws, restrictive covenants, building codes, and other land-use restrictions affecting the real property, any encroachment of the real property from or to adjacent real property, and notice from any governmental agency affecting this real property; and
(6) Presence of lead-based paint, asbestos, radon gas, methane gas, underground storage tank, hazardous material or toxic material (whether buried or covered), and other environmental contamination.

The disclosure statement shall provide the owner with the option to indicate whether the owner has actual knowledge of the specified characteristics or conditions, or the owner is making no representations as to any characteristic or condition.

(c) The rights of the parties to a real estate contract as to conditions of the property of which the owner had no actual knowledge are not affected by this Article unless the residential disclosure statement states that the owner makes no representations as to those conditions. If the statement states that an owner makes no representations as to the conditions of the property, then the owner has no duty to disclose those conditions, whether or not the owner should have known of them. (1995, c. 476, s. 1.; 1997-472, s. 1.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 479.

For article, "Looking Beyond the Title Search: Attorneys Must Consider Environmental Regulations," 25 N.C. Cent. L.J. 182 (2003).

CASE NOTES

Action for Damages Not Permitted for Failure to Provide Disclosure Statement. — Although the seller was required by law to furnish a residential property disclosure statement to buyers at the time of the parties' property sale transaction and did not do so, the trial court properly dismissed the buyers' claim for damages pursuant to the Residential Property Disclosure Act, G.S. 47E-1 et seq., as the buyers' sole remedy under the Act was cancellation of the land sale contract; no separate action for damages was permitted under the Act for not providing the disclosure statement. Little v. Stogner, 162 N.C. App. 25, 592 S.E.2d 5, 2004 N.C. App. LEXIS 13 (2004).

Although the seller was required by law to furnish a residential property disclosure statement to buyers at the time of the parties' property sale transaction disclosing property conditions or stating no representations about the conditions were made to the buyers, and did not do so, the trial court properly dismissed the buyers' claim for damages pursuant to the Residential Property Disclosure Act, G.S. 47E-1 et seq., as the buyers' sole remedy under the Act was cancellation of the land sale contract; no separate action for damages was permitted under the Act for not providing the disclosure statement. Little v. Stogner, 162 N.C. App. 25, 592 S.E.2d 5, 2004 N.C. App. LEXIS 13 (2004).

§ 47E-5. Time for disclosure; cancellation of contract.

(a) The owner of real property subject to this Chapter shall deliver to the purchaser the disclosure statement required by this Chapter no later than the time the purchaser makes an offer to purchase, exchange, or option the property, or exercises the option to purchase the property pursuant to a lease with an option to purchase. The residential property disclosure statement may be included in the real estate contract, in an addendum, or in a separate document.

(b) If the disclosure statement required by this Chapter is not delivered to the purchaser prior to or at the time the purchaser makes an offer, the purchaser may cancel any resulting real estate contract. The purchaser's right to cancel shall expire if not exercised prior to the following, whichever occurs first:

(1) The end of the third calendar day following the purchaser's receipt of the disclosure statement;
(2) The end of the third calendar day following the date the contract was made;
(3) Settlement or occupancy by the purchaser in the case of a sale or exchange; or
(4) Settlement in the case of a purchase pursuant to a lease with option to purchase.

Any right of the purchaser to cancel the contract provided by this subsection is waived conclusively if not exercised in the manner required by this subsection.

In order to cancel a real estate contract when permitted by this section, the purchaser shall, within the time required above, give written notice to the owner or the owner's agent either by hand delivery or by depositing into the United States mail, postage prepaid, and properly addressed to the owner or the owner's agent. If the purchaser cancels a real estate contract in compliance with this subsection, the cancellation shall be without penalty to the purchaser, and the purchaser shall be entitled to a refund of any deposit the purchaser may have paid. Any rights of the purchaser to cancel or terminate the contract for reasons other than those set forth in this subsection are not affected by this subsection. (1995, c. 476, s. 1; 1997-472, s. 2.)

CASE NOTES

Action for Damages Not Permitted for Failure to Provide Disclosure Statement. — Although the seller was required by law to furnish a residential property disclosure statement to buyers at the time of the parties' property sale transaction disclosing property conditions or stating no representations about the conditions were made to the buyers, and did not do so, the trial court properly dismissed the buyers' claim for damages pursuant to the Residential Property Disclosure Act, G.S. 47E-1 et seq., as the buyers' sole remedy under the Act was cancellation of the land sale contract; no separate action for damages was permitted under the Act for not providing the disclosure statement. Little v. Stogner, 162 N.C. App. 25, 592 S.E.2d 5, 2004 N.C. App. LEXIS 13 (2004).

Although the seller was required by law to furnish a residential property disclosure statement to buyers at the time of the parties' property sale transaction disclosing property conditions or stating no representations about the conditions were made to the buyers, and did not do so, the trial court properly dismissed the buyers' claim for damages pursuant to the Residential Property Disclosure Act, G.S. 47E-1 et seq., as the buyers' sole remedy under the Act was cancellation of the land sale contract; no separate action for damages was permitted under the Act for not providing the disclosure statement. Little v. Stogner, 162 N.C. App. 25, 592 S.E.2d 5, 2004 N.C. App. LEXIS 13 (2004).

§ 47E-6. Owner liability for disclosure of information provided by others.

The owner may discharge the duty to disclose imposed by this Chapter by providing a written report attached to the residential property disclosure statement by a public agency or by an engineer, land surveyor, geologist, pest control operator, contractor, home inspector or other expert, dealing with matters within the scope of the public agency's functions or the expert's license or expertise. The owner shall not be liable for any error, inaccuracy, or omission of any information delivered pursuant to this section if the error, inaccuracy, or omission was made in reasonable reliance upon the information provided by the public agency or expert and the owner was not grossly negligent in obtaining the information or transmitting it. (1995, c. 476, s. 1; 1997-472, s. 3.)

§ 47E-7. Change in circumstances.

If, subsequent to the owner's delivery of a residential property disclosure statement to a purchaser, the owner discovers a material inaccuracy in the disclosure statement, or the disclosure statement is rendered inaccurate in a material way by the occurrence of some event or circumstance, the owner shall promptly correct the inaccuracy by delivering a corrected disclosure statement to the purchaser. Failure to deliver the corrected disclosure statement or to make the repairs made necessary by the event or circumstance shall result in such remedies for the buyer as are provided for by law in the event the sale agreement requires the property to be in substantially the same condition at closing as on the date of the offer to purchase, reasonable wear and tear excepted. (1995, c. 476, s. 1.)

§ 47E-8. Agent's duty.

A real estate broker or salesman acting as an agent in a residential real estate transaction has the duty to inform each of the clients of the real estate broker or salesman of the client's rights and obligations under this Chapter. Provided the owner's real estate broker or salesman has performed this duty, the broker or salesman shall not be responsible for the owner's willful refusal to provide a prospective purchaser with a residential property disclosure statement. Nothing in this Chapter shall be construed to conflict with, or alter, the broker or salesman's duties under Chapter 93A of the General Statutes. (1995, c. 476, s. 1; 1997-472, s. 4.)

§ 47E-9. Rights and duties under Chapter 42, landlord and tenant, not affected during lease.

This Chapter shall not affect the landlord-tenant relationship between the parties to a lease with option to purchase contract during the term of the lease, and the rights and duties of landlords and tenants under Chapter 42 of the General Statutes shall remain in effect until transfer of ownership of the property to the purchaser. (1995, c. 476, s. 1.)

§ 47E-10. Authorization to prepare forms; fees.

The North Carolina Real Estate Commission may prepare, or cause to be prepared, forms for use pursuant to this Chapter. The Commission may charge a fee not to exceed twenty-five cents (25¢) per form plus the costs of postage. (1995, c. 476, s. 1.)

Chapter 47F.

North Carolina Planned Community Act.

Article 1.

General Provisions.

Sec.
47F-1-101. Short title.
47F-1-102. Applicability.
47F-1-103. Definitions.
47F-1-104. Variation.
47F-1-105. [Reserved.]
47F-1-106. Applicability of local ordinances, regulations, and building codes.
47F-1-107. Eminent domain.
47F-1-108. Supplemental general principles of law applicable.
47F-1-109. [Reserved.]

Article 2.

Creation, Alteration, and Termination of Planned Communities.

47F-2-101. Creation of the planned community.
47F-2-102. [Reserved.]
47F-2-103. Construction and validity of declaration and bylaws.
47F-2-104 through 47F-2-116. [Reserved.]
47F-2-117. Amendment of declaration.
47F-2-118. Termination of planned community.
47F-2-119. [Reserved.]
47F-2-120. Master associations.
47F-2-121. Merger or consolidation of planned communities.

Article 3.

Management of Planned Community.

47F-3-101. Organization of owners' association.

Sec.
47F-3-102. Powers of owners' association.
47F-3-103. Executive board members and officers.
47F-3-104. Transfer of special declarant rights.
47F-3-105. Termination of contracts and leases of declarant.
47F-3-106. Bylaws.
47F-3-107. Upkeep of planned community; responsibility and assessments for damages.
47F-3-107.1. Procedures for fines and suspension of planned community privileges or services.
47F-3-108. Meetings.
47F-3-109. Quorums.
47F-3-110. Voting; proxies.
47F-3-111. Tort and contract liability.
47F-3-112. Conveyance or encumbrance of common elements.
47F-3-113. Insurance.
47F-3-114. Surplus funds.
47F-3-115. Assessments for common expenses.
47F-3-116. Lien for assessments.
47F-3-117. [Reserved.]
47F-3-118. Association records.
47F-3-119. Association as trustee.
47F-3-120. Declaration limits on attorneys' fees.
47F-3-121. American and State flags and political sign displays.

ARTICLE 1.

General Provisions.

§ 47F-1-101. Short title.

This Chapter shall be known and may be cited as the North Carolina Planned Community Act. (1998-199, s. 1.)

NORTH CAROLINA COMMENT

1. This Act is based, in part, on the provisions of the Uniform Planned Community Act. Many sections, however, have been substantially revised from those that appear in the Uniform Act. Some other sections marked "Reserved" contained provisions which were included in the Uniform Act but were deemed inappropriate for inclusion in this Act. Because of these differences, the Official Comments to the Uniform Act have not been included.

2. It is understood and intended that any development which incorporates or permits horizontal boundaries or divisions between the physical portions of the planned community designated for separate ownership or occupancy will be created under and governed by

the North Carolina Condominium Act and not this Act.

Editor's Note. — Session Laws 1998-199, s. 1, originally enacted this Chapter as 47E, since Chapter 47E already existed this Chapter has been renumbered as 47F at the direction of the Revisor of Statutes.

Legal Periodicals. — For article discussing the changes and effects of North Carolina Planned Community Act, see 22 Campbell L. Rev. 1 (1999).

For article "Wise v. Harrington Grove Community Association, Inc.: A Pickwickian Critique," see 27 Campbell L. Rev. 139 (2005).

CASE NOTES

Power of Homeowners' Association Not Covered by Act. — In a community that was not subject to the North Carolina Planned Community Act, the homeowners' association's amendment to the declaration of restrictive covenants to provide almost unlimited power to assess lot owners was unreasonable; the amendment exceeded the original intent of the contracting parties, as the original declaration provided no such authority, and the community had public roads, no common areas, and no amenities. Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

Where a community is not governed by the North Carolina Planned Community Act, amendments to a declaration of restrictive covenants must be reasonable; reasonableness may be ascertained from the language of the declaration, deeds, and plats, together with other objective circumstances surrounding the parties' bargain, including the nature and character of the community. Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

Applied in Wise v. Harrington Grove Cmty. Ass'n, 357 N.C. 396, 584 S.E.2d 731, 2003 N.C. LEXIS 835 (2003).

Cited in Reid v. Ayers, 138 N.C. App. 261, 531 S.E.2d 231, 2000 N.C. App. LEXIS 606 (2000).

§ 47F-1-102. Applicability.

(a) This Chapter applies to all planned communities created within this State on or after January 1, 1999, except as otherwise provided in this section.

(b) This Chapter does not apply to a planned community created within this State on or after January 1, 1999:

(1) Which contains no more than 20 lots (including all lots which may be added or created by the exercise of development rights) unless the declaration provides or is amended to provide that this Chapter does apply to that planned community; or

(2) In which all lots are restricted exclusively to nonresidential purposes, unless the declaration provides or is amended to provide that this Chapter does apply to that planned community.

(c) Notwithstanding the provisions of subsection (a) of this section, G.S. 47F-3-102(1) through (6) and (11) through (17)(Powers of owners' association), G.S. 47F-3-103(f)(Executive board members and officers), G.S. 47F-3-107(a), (b), and (c)(Upkeep of planned community; responsibility and assessments for damages), G.S. 47F-3-107.1 (Procedures for fines and suspension of planned community privileges or services), G.S. 47F-3-108 (Meetings), G.S. 47F-3-115 (Assessments for common expenses), G.S. 47F-3-116 (Lien for assessments), G.S. 47F-3-118 (Association records), and G.S. 47F-3-121 (American and State flags and political sign displays) apply to all planned communities created in this State before January 1, 1999, unless the articles of incorporation or the declaration expressly provides to the contrary, and G.S. 47F-3-120 (Declaration limits on attorneys' fees) applies to all planned communities created in this State before January 1, 1999. These sections apply only with respect to events and circumstances occurring on or after January 1, 1999, and do not invalidate existing provisions of the declaration, bylaws, or plats and plans of those planned communities. G.S. 47F-1-103 (Definitions) also applies to all planned communities created in this State before January 1, 1999, to the extent necessary in construing any of the preceding sections.

(d) Notwithstanding the provisions of subsections (a) and (c) of this section, any planned community created prior to January 1, 1999, may elect to make the provisions of this Chapter applicable to it by amending its declaration to provide that this Chapter shall apply to that planned community. The amendment may be made by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated or any smaller majority the declaration specifies. To the extent the procedures and requirements for amendment in the declaration conflict with the provisions of this subsection, this subsection shall control with respect to any amendment to provide that this Chapter applies to that planned community.

(e) This Chapter does not apply to planned communities or lots located outside this State. (1998-199, s. 1; 2002-112, s. 2; 2004-109, s. 3; 2005-214, s. 1; 2005-422, s. 9; 2006-226, s. 15(a).)

NORTH CAROLINA COMMENT

The Act is effective January 1, 1999 and applies in its entirety to all planned communities created on or after that date except as provided in subsection (b). G.S. 47F-3-102 (1) through (6) and (11) through (17), G.S. 47F-3-107(a), (b) and (c), G.S. 47F-3-115 and G.S. 47F-3-116 also apply to planned communities created prior to January 1, 1999. Subsection (d) provides the process through which planned communities created prior to January 1, 1999 can make all provisions of the Act applicable to them.

Editor's Note. — Session Laws 1998-199, s. 3, provided: "This act [Session Laws 1998-199, which in s. 1 enacted Chapter 47F] becomes effective January 1, 1999, and applies to planned communities created on or after that date. G.S. 47F-3-102(1) through (6) and (11) through (17), G.S. 47F-3-107(a), (b), and (c), G.S. 47F-3-115, and G.S. 47F-3-116 as enacted by Section 1 of this act apply to planned communities created prior to the effective date, except that the provisions of G.S. 47F-3-116(e) as enacted by Section 1 of this act, apply to actions arising on or after the effective date." Session Laws 2002-112, s. 3, amended Session Laws 1998-199 to read as follows: "This act becomes effective January 1, 1999."

Subsection (c), as amended by Session Laws 2005-214, s. 1, effective July 20, 2005, is applicable to actions commenced on or after that date.

Effect of Amendments. — Session Laws 2005-422, s. 9, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, in subsection (c), inserted references to G.S. 47F-3-107.1, 47F-3-108, 47F-3-118, and 47C-3-121.

Session Laws 2006-226, s. 15(a), effective August 10, 2006, substituted "G.S. 47F-3-121" for "G.S. 47C-3-121" in the first sentence of subsection (c).

CASE NOTES

Substantive Due Process. — When a homeowner's association fined homeowners under G.S. 47F-3-102 and G.S. 47F-3-107.1 as provided for by G.S. 47F-1-102(c) for doing construction that the association's architectural committee disapproved, the retroactive application of these statutes to the homeowners did not violate the homeowners' rights to substantive due process because the Planned Community Act, ch. 47F, of which these statutes were a part, served the legitimate purpose of providing a statutory framework for dealing with modern real estate developments and the statutes were rationally related to that purpose. Reidy v. Whitehart Ass'n, — N.C. App. —, 648 S.E.2d 265, 2007 N.C. App. LEXIS 1740 (2007).

Contracts Clause. — When a homeowner's association fined homeowners under G.S. 47F-3-102 and G.S. 47F-3-107.1 as provided for by G.S. 47F-1-102(c) for doing construction that the association's architectural committee disapproved, the retroactive application of these statutes to the homeowners did not violate the contracts clause in U.S. Const., Art. I, § 10, cl.

1, because this application did not disturb a vested right, impair a binding contract, or create a new obligation, as it only provided an additional remedy to enforce a declaration regarding the homeowners' development. Reidy v. Whitehart Ass'n, — N.C. App. —, 648 S.E.2d 265, 2007 N.C. App. LEXIS 1740 (2007).

Cited in Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

Applied in Wise v. Harrington Grove Cmty. Ass'n, 357 N.C. 396, 584 S.E.2d 731, 2003 N.C. LEXIS 835 (2003); Peninsula Prop. Owners Ass'n v. Crescent Res., LLC, 171 N.C. App. 89, 614 S.E.2d 351, 2005 N.C. App. LEXIS 1165 (2005), cert. denied, — N.C. —, 626 S.E.2d 648 (2005).

§ 47F-1-103. Definitions.

In the declaration and bylaws, unless specifically provided otherwise or the context otherwise requires, and in this Chapter:

(1) Reserved.

(2) "Allocated interests" means the common expense liability and votes in the association allocated to each lot.

(3) "Association" or "owners' association" means the association organized as allowed under North Carolina law, including G.S. 47F-3-101.

(4) "Common elements" means any real estate within a planned community owned or leased by the association, other than a lot.

(5) "Common expenses" means expenditures made by or financial liabilities of the association, together with any allocations to reserves.

(6) "Common expense liability" means the liability for common expenses allocated to each lot as permitted by this Chapter, the declaration or otherwise by law.

(7) "Condominium" means real estate, as defined and created under Chapter 47C [of the General Statutes].

(8) "Cooperative" means real estate owned by a corporation, trust, trustee, partnership, or unincorporated association, where the governing instruments of that organization provide that each of the organization's members, partners, stockholders, or beneficiaries is entitled to exclusive occupancy of a designated portion of that real estate.

(9) "Declarant" means any person or group of persons acting in concert who (i) as part of a common promotional plan, offers to dispose of the person's or group's interest in a lot not previously disposed of, or (ii) reserves or succeeds to any special declarant right.

(10) "Declaration" means any instruments, however denominated, that create a planned community and any amendments to those instruments.

(11), (12) Reserved.

(13) "Executive board" means the body, regardless of name, designated in the declaration to act on behalf of the association.

(14), (15) Reserved.

(16) "Leasehold planned community" means a planned community in which all or a portion of the real estate is subject to a lease, the expiration or termination of which will terminate the planned community or reduce its size.

(17) "Lessee" means the party entitled to present possession of a leased lot whether lessee, sublessee, or assignee.

(18) "Limited common element" means a portion of the common elements allocated by the declaration or by operation of law for the exclusive use of one or more but fewer than all of the lots.

(19) "Lot" means a physical portion of the planned community designated for separate ownership or occupancy by a lot owner.

(20) "Lot owner" means a declarant or other person who owns a lot, or a lessee of a lot in a leasehold planned community whose lease expires

simultaneously with any lease the expiration or termination of which will remove the lot from the planned community, but does not include a person having an interest in a lot solely as security for an obligation.

(21) "Master association" means an organization described in G.S. 47F-2-120, whether or not it is also an association described in G.S. 47F-3-101.

(22) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or other legal or commercial entity.

(23) "Planned community" means real estate with respect to which any person, by virtue of that person's ownership of a lot, is expressly obligated by a declaration to pay real property taxes, insurance premiums, or other expenses to maintain, improve, or benefit other lots or other real estate described in the declaration. For purposes of this act, neither a cooperative nor a condominium is a planned community, but real estate comprising a condominium or cooperative may be part of a planned community. "Ownership of a lot" does not include holding a leasehold interest of less that [than] 20 years in a lot, including renewal options.

(24) "Purchaser" means any person, other than a declarant or a person in the business of selling real estate for the purchaser's own account, who by means of a voluntary transfer acquires a legal or equitable interest in a lot, other than (i) a leasehold interest (including renewal options) of less than 20 years, or (ii) as security for an obligation.

(25) "Real estate" means any leasehold or other estate or interest in, over, or under land, including structures, fixtures, and other improvements and interests which by custom, usage, or law pass with a conveyance of land though not described in the contract of sale or instrument of conveyance. "Real estate" includes parcels with or without upper or lower boundaries, and spaces that may be filled with air or water.

(26) "Reasonable attorneys' fees" means attorneys' fees reasonably incurred without regard to any limitations on attorneys' fees which otherwise may be allowed by law.

(27) Reserved.

(28) "Special declarant rights" means rights reserved for the benefit of a declarant including, without limitation, any right (i) to complete improvements indicated on plats and plans filed with the declaration; (ii) to exercise any development right; (iii) to maintain sales offices, management offices, signs advertising the planned community, and models; (iv) to use easements through the common elements for the purpose of making improvements within the planned community or within real estate which may be added to the planned community; (v) to make the planned community part of a larger planned community or group of planned communities; (vi) to make the planned community subject to a master association; or (vii) to appoint or remove any officer or executive board member of the association or any master association during any period of declarant control.

(29) Reserved. (1998-199, s. 1.)

NORTH CAROLINA COMMENT

The definitions above apply to planned communities formed prior to January 1, 1999 to the extent necessary in construing or applying any of the other provisions made applicable to planned communities formed prior to that date.

CASE NOTES

Applied in Wise v. Harrington Grove Cmty. Ass'n, 357 N.C. 396, 584 S.E.2d 731, 2003 N.C. LEXIS 835 (2003).

Cited in Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

§ 47F-1-104. Variation.

(a) Except as specifically provided in specific sections of this Chapter, the provisions of this Chapter may not be varied by the declaration or bylaws.

(b) The provisions of this Chapter may not be varied by agreement; however, after breach of a provision of this Chapter, rights created hereunder may be knowingly waived in writing.

(c) Notwithstanding any of the provisions of this Chapter, a declarant may not act under a power of attorney or proxy or use any other device to evade the limitations or prohibitions of this Chapter, the declaration, or the bylaws. (1998-199, s. 1.)

§ 47F-1-105: Reserved for future codification purposes.

§ 47F-1-106. Applicability of local ordinances, regulations, and building codes.

A zoning, subdivision, or building code or other real estate use law, ordinance, or regulation may not prohibit a planned community or impose any requirement upon a planned community which it would not impose upon a substantially similar development under a different form of ownership or administration. Otherwise, no provision of this Chapter invalidates or modifies any provision of any zoning, subdivision, or building code or any other real estate use law, ordinance, or regulation. No local ordinance or regulation may require the recordation of a declaration prior to the date required by this Chapter. (1998-199, s. 1.)

§ 47F-1-107. Eminent domain.

(a) If a lot is acquired by eminent domain, or if part of a lot is acquired by eminent domain leaving the lot owner with a remnant which may not practically or lawfully be used for any purpose permitted by the declaration, the award shall compensate the lot owner for his lot and its interest in the common element. Upon acquisition, unless the decree otherwise provides, the lot's allocated interests are automatically reallocated to the remaining lots in proportion to the respective allocated interests of those lots before the taking, exclusive of the lot taken.

(b) Except as provided in subsection (a) of this section, if part of a lot is acquired by eminent domain, the award shall compensate the lot owner for the reduction in value of the lot. Upon acquisition, unless the decree otherwise provides, (i) that lot's allocated interests are reduced in proportion to the reduction in the size of the lot, or on any other basis specified in the declaration, and (ii) the portion of the allocated interests divested from the partially acquired lot are automatically reallocated to that lot and the remaining lots in proportion to the respective allocated interests of those lots before the taking, with the partially acquired lot participating in the reallocation on the basis of its reduced allocated interests.

(c) If there is any reallocation under subsection (a) or (b) of this section, the association shall promptly prepare, execute, and record an amendment to the declaration reflecting the reallocations. Any remnant of a lot remaining after part of a lot is taken under this subsection is thereafter a common element.

(d) If part of the common elements is acquired by eminent domain, the portion of the award attributable to the common elements taken shall be paid to the association. Unless the declaration provides otherwise, any portion of the award attributable to the acquisition of a limited common element shall be apportioned among the owners of the lots to which that limited common element was allocated at the time of acquisition based on their allocated interest in the common elements before the taking.

(e) The court decree shall be recorded in every county in which any portion of the planned community is located. (1998-199, s. 1.)

§ 47F-1-108. Supplemental general principles of law applicable.

The principles of law and equity as well as other North Carolina statutes (including the provisions of the North Carolina Nonprofit Corporation Act) supplement the provisions of this Chapter, except to the extent inconsistent with this Chapter. When these principles or statutes are inconsistent or conflict with this Chapter, the provisions of this Chapter will control. (1998-199, s. 1.)

§ 47F-1-109: Reserved for future codification purposes.

ARTICLE 2.

Creation, Alteration, and Termination of Planned Communities.

§ 47F-2-101. Creation of the planned community.

A declaration creating a planned community shall be executed in the same manner as a deed, shall be recorded in every county in which any portion of the planned community is located, and shall be indexed in the Grantee index in the name of the planned community and the association and in the Grantor index in the name of each person executing the declaration. (1998-199, s. 1.)

§ 47F-2-102: Reserved for future codification purposes.

§ 47F-2-103. Construction and validity of declaration and bylaws.

(a) All provisions of the declaration and bylaws are severable.

(b) The rule against perpetuities may not be applied to defeat any provision of the declaration, bylaws, rules, or regulations adopted pursuant to G.S. 47F-3-102(1).

(c) In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this Chapter.

(d) Title to a lot and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this Chapter. Whether a substantial failure to comply with this Chapter impairs marketability shall be determined by the law of this State relating to marketability. (1998-199, s. 1.)

§§ 47F-2-104 through 47F-2-116: Reserved for future codification purposes.

§ 47F-2-117. Amendment of declaration.

(a) Except in cases of amendments that may be executed by a declarant under the terms of the declaration or by certain lot owners under G.S. 47F-2-118(b), the declaration may be amended only by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated, or any larger majority the declaration specifies or by the declarant if necessary for the exercise of any development right. The declaration may specify a smaller number only if all of the lots are restricted exclusively to nonresidential use.

(b) No action to challenge the validity of an amendment adopted pursuant to this section may be brought more than one year after the amendment is recorded.

(c) Every amendment to the declaration shall be recorded in every county in which any portion of the planned community is located and is effective only upon recordation. An amendment shall be indexed in the Grantee index in the name of the planned community and the association and in the Grantor index in the name of each person executing the amendment.

(d) Reserved.

(e) Amendments to the declaration required by this Chapter to be recorded by the association shall be prepared, executed, recorded, and certified in accordance with G.S. 47-41. (1998-199, s. 1.)

§ 47F-2-118. Termination of planned community.

(a) Except in the case of taking of all the lots by eminent domain (G.S. 47F-1-107), a planned community may be terminated only by agreement of lot owners of lots to which at least eighty percent (80%) of the votes in the association are allocated, or any larger percentage the declaration specifies. The declaration may specify a smaller percentage only if all of the lots in the planned community are restricted exclusively to nonresidential uses.

(b) An agreement to terminate shall be evidenced by the execution of a termination agreement, or ratifications thereof, in the same manner as a deed, by the requisite number of lot owners. The termination agreement shall specify a date after which the agreement will be void unless it is recorded before that date. A termination agreement and all ratifications thereof shall be recorded in every county in which a portion of the planned community is situated and is effective only upon recordation.

(c) A termination agreement may provide for sale of the common elements, but may not require that the lots be sold following termination, unless the declaration as originally recorded provided otherwise or unless all the lot owners consent to the sale. If, pursuant to the agreement, any real estate in the planned community is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.

(d) The association, on behalf of the lot owners, may contract for the sale of real estate in the planned community, but the contract is not binding until approved pursuant to subsections (a) and (b) of this section. Until the sale has been concluded and the proceeds thereof distributed, the association continues in existence with all powers it had before termination. Proceeds of the sale shall be distributed to lot owners and lienholders as their interests may appear, as provided in the termination agreement.

(e) If the real estate constituting the planned community is not to be sold following termination, title to the common elements vests in the lot owners upon termination as tenants in common in proportion to their respective interests as provided in the termination agreement.

(f) Following termination of the planned community, the proceeds of any sale of real estate, together with the assets of the association, are held by the association as trustee for lot owners and holders of liens on the lots as their interests may appear. All other creditors of the association are to be treated as if they had perfected liens on the common elements immediately before termination.

(g) If the termination agreement does not provide for the distribution of sales proceeds pursuant to subsection (d) of this section or the vesting of title pursuant to subsection (e) of this section, sales proceeds shall be distributed and title shall vest in accordance with each lot owner's allocated share of common expense liability.

(h) Except as provided in subsection (i) of this section, foreclosure or enforcement of a lien or encumbrance against the common elements does not of itself terminate the planned community, and foreclosure or enforcement of a lien or encumbrance against a portion of the common elements other than withdrawable real estate does not withdraw that portion from the planned community. Foreclosure or enforcement of a lien or encumbrance against withdrawable real estate does not of itself withdraw that real estate from the planned community, but the person taking title thereto has the right to require from the association, upon request, an amendment excluding the real estate from the planned community.

(i) If a lien or encumbrance against a portion of the real estate comprising the planned community has priority over the declaration and the lien or encumbrance has not been partially released, the parties foreclosing the lien or encumbrance may, upon foreclosure, record an instrument excluding the real estate subject to that lien or encumbrance from the planned community. (1998-199, s. 1.)

NORTH CAROLINA COMMENT

Rights under subsection (i) are lost upon the partial release of any lien or encumbrance by its holder. Subsection (i) is consistent with the Uniform Planned Community Act.

§ 47F-2-119: Reserved for future codification purposes.

§ 47F-2-120. Master associations.

If the declaration for a planned community provides that any of the powers described in G.S. 47F-3-102 are to be exercised by or may be delegated to a profit or nonprofit corporation which exercises those or other powers on behalf of one or more other planned communities or for the benefit of the lot owners of one or more other planned communities, all provisions of this act applicable to lot owners' associations apply to any such corporation. (1998-199, s. 1.)

§ 47F-2-121. Merger or consolidation of planned communities.

(a) Any two or more planned communities, by agreement of the lot owners as provided in subsection (b) of this section, may be merged or consolidated into a single planned community. In the event of a merger or consolidation, unless the agreement otherwise provides, the resultant planned community is, for all purposes, the legal successor of all of the preexisting planned communities, and the operations and activities of all associations of the preexisting planned communities shall be merged or consolidated into a single association which shall hold all powers, rights, obligations, assets, and liabilities of all preexisting associations.

(b) An agreement of two or more planned communities to merge or consolidate pursuant to subsection (a) of this section shall be evidenced by an agreement prepared, executed, recorded, and certified by the president of the association of each of the preexisting planned communities following approval by owners of lots to which are allocated the percentage of votes in each planned community required to terminate that planned community. Any such agreement shall be recorded in every county in which a portion of the planned community is located and is not effective until recorded.

(c) Every merger or consolidation agreement shall provide for the reallocation of the allocated interests in the new association among the lots of the resultant planned community either (i) by stating the reallocations or the formulas upon which they are based or (ii) by stating the percentage of overall common expense liabilities and votes in the new association which are allocated to all of the lots comprising each of the preexisting planned communities, and providing that the portion of the percentages allocated to each lot formerly comprising a part of the preexisting planned community shall be equal to the percentages of common expense liabilities and votes in the association allocated to that lot by the declaration of the preexisting planned community. (1998-199, s. 1.)

ARTICLE 3.

Management of Planned Community.

§ 47F-3-101. Organization of owners' association.

A lot owners' association shall be incorporated no later than the date the first lot in the planned community is conveyed. The membership of the association at all times shall consist exclusively of all the lot owners or, following termination of the planned community, of all persons entitled to distributions of proceeds under G.S. 47F-2-118. Every association created after the effective date of this Chapter shall be organized as a nonprofit corporation. (1998-199, s. 1.)

CASE NOTES

Creation of Homeowners' Association. — When a homeowner's association fined homeowners for doing construction that the association's architectural committee disapproved, the homeowners could not assert that the association had been improperly formed under G.S. 47F-3-101, because this statute was not made applicable to pre-January 1, 1999 communities pursuant to G.S. 47F-3-102. Reidy v. Whitehart Ass'n, — N.C. App. —, 648 S.E.2d 265, 2007 N.C. App. LEXIS 1740 (2007).

Applied in Wise v. Harrington Grove Cmty. Ass'n, 357 N.C. 396, 584 S.E.2d 731, 2003 N.C. LEXIS 835 (2003).

§ 47F-3-102. Powers of owners' association.

Unless the articles of incorporation or the declaration expressly provides to the contrary, the association may:

(1) Adopt and amend bylaws and rules and regulations;

(2) Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from lot owners;

(3) Hire and discharge managing agents and other employees, agents, and independent contractors;

(4) Institute, defend, or intervene in litigation or administrative proceedings on matters affecting the planned community;

(5) Make contracts and incur liabilities;

(6) Regulate the use, maintenance, repair, replacement, and modification of common elements;

(7) Cause additional improvements to be made as a part of the common elements;

(8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real or personal property, provided that common elements may be conveyed or subjected to a security interest only pursuant to G.S. 47F-3-112;

(9) Grant easements, leases, licenses, and concessions through or over the common elements;

(10) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements other than the limited common elements and for services provided to lot owners;

(11) Impose reasonable charges for late payment of assessments, not to exceed the greater of twenty dollars ($20.00) per month or ten percent (10%) of any assessment installment unpaid and, after notice and an opportunity to be heard, suspend privileges or services provided by the association (except rights of access to lots) during any period that assessments or other amounts due and owing to the association remain unpaid for a period of 30 days or longer;

(12) After notice and an opportunity to be heard, impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association;

(13) Impose reasonable charges in connection with the preparation and recordation of documents, including, without limitation, amendments to the declaration or statements of unpaid assessments;

(14) Provide for the indemnification of and maintain liability insurance for its officers, executive board, directors, employees, and agents;

(15) Assign its right to future income, including the right to receive common expense assessments;

(16) Exercise all other powers that may be exercised in this State by legal entities of the same type as the association; and

(17) Exercise any other powers necessary and proper for the governance and operation of the association. (1998-199, s. 1; 2004-109, s. 4; 2005-422, s. 1.)

NORTH CAROLINA COMMENT

1. No specific dollar limitations have been placed on the association's right to impose reasonable late payment charges under subdivision (11). This is intended to afford the association the maximum reasonable latitude in this area. Limitations on the amount of fines levied under subdivision (12) are set forth in G.S. 47F-3-107.1. None of the powers granted to the association in this section are subject to any limitations set forth in Chapter 24 of the General Statutes.

2. In subdivision (15), the association is granted the power to assign its right to future income, including assessments regardless of whether or not its declaration expressly allows such assignments. This differs from the North Carolina Condominium Act and is intended to facilitate the acquisition of financing by the association, which is believed to be the primary goal of the provision.

3. Subdivisions (11) and (12) allow the association to suspend privileges and services under certain circumstances after notice and hearing in addition to other remedies provided for nonpayment of violations.

4. Subdivisions (1) through (6) and (11) through (17) apply to planned communities formed prior to January 1, 1999.

Effect of Amendments. — Session Laws 2005-422, s. 1, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, inserted "not to exceed the greater of twenty dollars ($20.00) per month or ten percent (10%) of any assessment installment unpaid" in subdivision (11).

Legal Periodicals. — For article "Wise v. Harrington Grove Community Association, Inc.: A Pickwickian Critique," see 27 Campbell L. Rev. 139 (2005).

CASE NOTES

Homeowners' Associations. — The trial court correctly held that the statute provided an association with power to impose reasonable fines against its members as nothing in the association's Articles of Incorporation or Declaration limited fining powers. Wise v. Harrington Grove Cmty. Ass'n, 151 N.C. App. 344, 566 S.E.2d 499, 2002 N.C. App. LEXIS 780 (2002).

Statute does not require homeowners' associations to wield the enumerated powers, but merely provides them an option to do so; the statute also explicitly states that the listed powers are subject to the provisions of the articles of incorporation or the declaration. Wise v. Harrington Grove Cmty. Ass'n, 357 N.C. 396, 584 S.E.2d 731, 2003 N.C. LEXIS 835 (2003).

Relevant legal instruments creating a homeowners' association may withhold the statutory powers described under the statute from a homeowners' association, if those instruments expressly so provide. Wise v. Harrington Grove Cmty. Ass'n, 357 N.C. 396, 584 S.E.2d 731, 2003 N.C. LEXIS 835 (2003).

When a homeowner's association fined homeowners under G.S. 47F-3-102 and G.S. 47F-3-107.1 as provided for by G.S. 47F-1-102(c) for doing construction that the association's architectural committee disapproved, the retroactive application of these statutes to the homeowners did not violate the contracts clause in U.S. Const., Art. I, § 10, cl. 1, because this application did not disturb a vested right, impair a binding contract, or create a new obligation, as it only provided an additional remedy to enforce a declaration regarding the homeowners' development. Reidy v. Whitehart Ass'n, — N.C. App. —, 648 S.E.2d 265, 2007 N.C. App. LEXIS 1740 (2007).

When a homeowner's association fined homeowners for doing construction that the association's architectural committee disapproved, the homeowners could not assert that the association had been improperly formed under G.S. 47F-3-101, because this statute was not made applicable to pre-January 1, 1999, communities pursuant to G.S. 47F-3-102. Reidy v. Whitehart Ass'n, — N.C. App. —, 648 S.E.2d 265, 2007 N.C. App. LEXIS 1740 (2007).

When a homeowner's association fined homeowners under G.S. 47F-3-102 and G.S. 47F-3-107.1 as provided for by G.S. 47F-1-102(c) for doing construction that the association's architectural committee disapproved, the retroactive application of these statutes to the homeowners did not violate the homeowners' rights to substantive due process because the Planned Community Act, G.S. ch. 47F, of which these statutes were a part, served the legitimate purpose of providing a statutory framework for dealing with modern real estate developments and the statutes were rationally related to that purpose. Reidy v. Whitehart Ass'n, — N.C. App. —, 648 S.E.2d 265, 2007 N.C. App. LEXIS 1740 (2007).

Homeowners' Association May Obtain Power to Fine Its Members Through Amendment of the Declaration. — Where the declaration of a homeowners' association created prior to 1999 is silent as to whether an association has the power to fine its own members, but provides, as the instant declaration does, for amendment of the declaration provisions, the homeowners' association may certainly obtain the power to fine its members as described under G.S. 47F-3-102(12) by following the prescribed amendment procedure and by adding appropriate language to the declaration. Wise v. Harrington Grove Cmty. Ass'n, 357 N.C. 396, 584 S.E.2d 731, 2003 N.C. LEXIS 835 (2003).

Cited in Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

§ 47F-3-103. Executive board members and officers.

(a) Except as provided in the declaration, in the bylaws, in subsection (b) of this section, or in other provisions of this Chapter, the executive board may act in all instances on behalf of the association. In the performance of their duties, officers and members of the executive board shall discharge their duties in good faith. Officers shall act according to the standards for officers of a nonprofit corporation set forth in G.S. 55A-8-42, and members shall act according to the standards for directors of a nonprofit corporation set forth in G.S. 55A-8-30.

(b) The executive board may not act unilaterally on behalf of the association to amend the declaration (G.S. 47F-2-117), to terminate the planned community (G.S. 47F-2-118), or to elect members of the executive board or determine the qualifications, powers and duties, or terms of office of executive board members (G.S. 47F-3-103(e)), but the executive board may unilaterally fill vacancies in its membership for the unexpired portion of any term. Notwithstanding any provision of the declaration or bylaws to the contrary, the lot owners, by a majority vote of all persons present and entitled to vote at any meeting of the lot owners at which a quorum is present, may remove any member of the executive board with or without cause, other than a member appointed by the declarant.

(c) Within 30 days after adoption of any proposed budget for the planned community, the executive board shall provide to all the lot owners a summary of the budget and a notice of the meeting to consider ratification of the budget, including a statement that the budget may be ratified without a quorum. The executive board shall set a date for a meeting of the lot owners to consider ratification of the budget, such meeting to be held not less than 10 nor more than 60 days after mailing of the summary and notice. There shall be no requirement that a quorum be present at the meeting. The budget is ratified unless at that meeting a majority of all the lot owners in the association or any larger vote specified in the declaration rejects the budget. In the event the proposed budget is rejected, the periodic budget last ratified by the lot owners shall be continued until such time as the lot owners ratify a subsequent budget proposed by the executive board.

(d) The declaration may provide for a period of declarant control of the association, during which period a declarant, or persons designated by the declarant, may appoint and remove the officers and members of the executive board.

(e) Not later than the termination of any period of declarant control, the lot owners shall elect an executive board of at least three members, at least a majority of whom shall be lot owners. The executive board shall elect the officers. The executive board members and officers shall take office upon election.

(f) The association shall publish the names and addresses of all officers and board members of the association within 30 days of their election. (1998-199, s. 1; 2005-422, ss. 2, 3.)

Effect of Amendments. — Session Laws 2005-422, ss. 2 and 3, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, substituted "(G.S. 47F-3-103(e))" for "(G.S. 47F-3-103(f))" in subsection (b); and added subsection (f).

CASE NOTES

Applied in Wise v. Harrington Grove Cmty. Ass'n, 357 N.C. 396, 584 S.E.2d 731, 2003 N.C. LEXIS 835 (2003).

§ 47F-3-104. Transfer of special declarant rights.

Except for transfer of declarant rights pursuant to foreclosure, no special declarant right (G.S. 47F-1-103(28)) may be transferred except by an instrument evidencing the transfer recorded in every county in which any portion of the planned community is located. The instrument is not effective unless executed by the transferee. (1998-199, s. 1.)

CASE NOTES

Applied in Wise v. Harrington Grove Cmty. Ass'n, 151 N.C. App. 344, 566 S.E.2d 499, 2002 N.C. App. LEXIS 780 (2002).

§ 47F-3-105. Termination of contracts and leases of declarant.

If entered into before the executive board elected by the lot owners pursuant to G.S. 47F-3-103(e) takes office, any contract or lease affecting or related to the planned community that is not bona fide or was unconscionable to the lot owners at the time entered into under the circumstances then prevailing, may be terminated without penalty by the association at any time after the executive board elected by the lot owners pursuant to G.S. 47F-3-103(e) takes office upon not less than 90 days' notice to the other party. (1998-199, s. 1.)

§ 47F-3-106. Bylaws.

(a) The bylaws of the association shall provide for:

(1) The number of members of the executive board and the titles of the officers of the association;

(2) Election by the executive board of officers of the association;

(3) The qualifications, powers and duties, terms of office, and manner of electing and removing executive board members and officers and filling vacancies;

(4) Which, if any, of its powers the executive board or officers may delegate to other persons or to a managing agent;

(5) Which of its officers may prepare, execute, certify, and record amendments to the declaration on behalf of the association; and

(6) The method of amending the bylaws.

(b) The bylaws may provide for any other matters the association deems necessary and appropriate. (1998-199, s. 1.)

§ 47F-3-107. Upkeep of planned community; responsibility and assessments for damages.

(a) Except as otherwise provided in the declaration, G.S. 47F-3-113(h) or subsection (b) of this section, the association is responsible for causing the common elements to be maintained, repaired, and replaced when necessary and to assess the lot owners as necessary to recover the costs of such maintenance, repair, or replacement except that the costs of maintenance, repair, or replacement of a limited common element shall be assessed as provided in G.S. 47F-3-115(c)(1). Except as otherwise provided in the declaration, each lot owner is responsible for the maintenance and repair of his lot and any improvements thereon. Each lot owner shall afford to the association and when necessary to another lot owner access through the lot owner's lot reasonably necessary for any such maintenance, repair, or replacement activity.

(b) If a lot owner is legally responsible for damage inflicted on any common element, the association may direct such lot owner to repair such damage, or the association may itself cause the repairs to be made and recover damages from the responsible lot owner.

(c) If damage is inflicted on any lot by an agent of the association in the scope of the agent's activities as such agent, the association is liable to repair such damage or to reimburse the lot owner for the cost of repairing such damages. The association shall also be liable for any losses to the lot owner.

(d) When the claim under subsection (b) or (c) of this section is less than or equal to the jurisdictional amount established for small claims by G.S. 7A-210, any aggrieved party may request that a hearing be held before an adjudicatory panel appointed by the executive board to determine if a lot owner is responsible for damages to any common element or the association is responsible for damages to any lot. If the executive board fails to appoint an adjudicatory panel to hear such matters, hearings under this section shall be held before the executive board. Such panel shall accord to the party charged with causing damages notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. This panel may assess liability for each damage incident against each lot owner charged or against the association not in excess of the jurisdictional amount established for small claims by G.S. 7A-210. When the claim under subsection (b) or (c) of this section exceeds the jurisdictional amount established for small claims by G.S. 7A-210, liability of any lot owner charged or the association shall be determined as otherwise provided by law. Liabilities of lot owners determined by adjudicatory hearing or as otherwise provided by law shall be assessments secured by lien under G.S. 47F-3-116. Liabilities of the association determined by adjudicatory hearing or as otherwise provided by law may be offset by the lot owner against sums owing to the association and if so offset, shall reduce the amount of any lien of the association against the lot at issue.

(e) The association shall not be liable for maintenance, repair, and all other expenses in connection with any real estate which has not been incorporated into the planned community. (1998-199, s. 1.)

NORTH CAROLINA COMMENT

1. Subsection (a) allocates maintenance, repair and replacement responsibilities when those responsibilities are not otherwise allocated in the declaration. Responsibility for repair, maintenance or replacement of lots, common elements or improvements thereon may be allocated differently by express provisions in the declarations or in a duly authorized and adopted amendment to the declaration.

2. Subsection (b) differs from the corresponding section in the North Carolina Condominium Act in that lot owners are legally responsible for the damage they cause whether or not it is covered by insurance provided by the association.

3. Subsection (d) provides for an adjudicatory hearing process for the determination by an adjudicatory panel of damage claims in amounts less than or equal to the jurisdictional amount established by the General Assembly for small claims in G.S. 7A-210. References to small claims and G.S. 7A-210 are only for the purpose of establishing the jurisdictional amount for adjudicatory hearings under subsection (d) and for no other purpose. They are not intended to nor should they be construed to incorporate any of the rules or procedures which may be otherwise applicable to small claims under Chapter 7 of the General Statutes.

4. Subsections (a), (b) and (c) apply to planned communities formed prior to January 1, 1999.

CASE NOTES

Applied in Wise v. Harrington Grove Cmty. Ass'n, 151 N.C. App. 344, 566 S.E.2d 499, 2002 N.C. App. LEXIS 780 (2002).

§ 47F-3-107.1. Procedures for fines and suspension of planned community privileges or services.

Unless a specific procedure for the imposition of fines or suspension of planned community privileges or services is provided for in the declaration, a hearing shall be held before the executive board or an adjudicatory panel appointed by the executive board to determine if any lot owner should be fined or if planned community privileges or services should be suspended pursuant to the powers granted to the association in G.S. 47F-3-102(11) and (12). Any adjudicatory panel appointed by the executive board shall be composed of members of the association who are not officers of the association or members of the executive board. The lot owner charged shall be given notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. If it is decided that a fine should be imposed, a fine not to exceed one hundred dollars ($100.00) may be imposed for the violation and without further hearing, for each day more than five days after the decision that the violation occurs. Such fines shall be shall be assessments secured by liens under G.S. 47F-3-116. If it is decided that a suspension of planned community privileges or services should be imposed, the suspension may be continued without further hearing until the violation or delinquency is cured. The lot owner may appeal the decision of an adjudicatory panel to the full executive board by delivering written notice of appeal to the executive board within 15 days after the date of the decision. The executive board may affirm, vacate, or modify the prior decision of the adjudicatory body. (1997-456, s. 27; 1998-199, s. 1; 2005-422, s. 4.)

NORTH CAROLINA COMMENT

1. This section is applicable to all planned communities based on the fact that the power to fine and suspend planned community privileges or services is granted to all planned communities under G.S. 47F-3-102 (11) and (12).

2. This section has been modified from the corresponding text in the North Carolina Condominium Act to clarify that the procedure for the imposition of fines and suspension of planned community privileges or services may be altered by specific provisions in the declaration. It has also been modified to clarify the amount of and how often the same fine may be imposed for a recurring violation without further hearing.

Editor's Note. — This section was originally enacted as G.S. 47F-3-107A. It has been renumbered as G.S. 47F-3-107.1 pursuant to S.L. 1997-456, s. 27 which authorized the Revisor of Statutes to renumber or reletter sections having a number or letter designation that is incompatible with the General Assembly's computer database.

Effect of Amendments. — Session Laws 2005-422, s. 4, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, inserted "the executive board or" in the first sentence, rewrote the second sentence, substituted "one hundred dollars ($100.00)" for "one hundred fifty dollars ($150.00)" and inserted "more than five days" in the fourth sentence and added the last two sentences.

CASE NOTES

Procedural Due Process. — When a homeowner's association fined homeowners under G.S. 47F-3-107.1 for doing construction that the association's architectural committee disapproved, the association did not violate the homeowners' rights to procedural due process because: (1) G.S. 47F-3-107.1 provided that the homeowners were entitled to notice of the charge against them, an opportunity to be heard and to present evidence, and notice of the decision; and (2) the association provided the homeowners with these rights. Reidy v.

Whitehart Ass'n, — N.C. App. —, 648 S.E.2d 265, 2007 N.C. App. LEXIS 1740 (2007).

Substantive Due Process. — When a homeowner's association fined homeowners under G.S. 47F-3-102 and G.S. 47F-3-107.1 as provided for by G.S. 47F-1-102(c) for doing construction that the association's architectural committee disapproved, the retroactive application of these statutes to the homeowners did not violate the homeowners' rights to substantive due process because the Planned Community Act, G.S. ch. 47F, of which these statutes were a part, served the legitimate purpose of providing a statutory framework for dealing with modern real estate developments and the statutes were rationally related to that purpose. Reidy v. Whitehart Ass'n, — N.C. App. —, 648 S.E.2d 265, 2007 N.C. App. LEXIS 1740 (2007).

Contracts Clause. — When a homeowner's association fined homeowners under G.S. 47F-3-102 and G.S. 47F-3-107.1 as provided for by G.S. 47F-1-102(c) for doing construction that the association's architectural committee disapproved, the retroactive application of these statutes to the homeowners did not violate the contracts clause in U.S. Const., Art. I, § 10, cl. 1, because this application did not disturb a vested right, impair a binding contract, or create a new obligation, as it only provided an additional remedy to enforce a declaration regarding the homeowners' development. Reidy v. Whitehart Ass'n, — N.C. App. —, 648 S.E.2d 265, 2007 N.C. App. LEXIS 1740 (2007).

Applied in Wise v. Harrington Grove Cmty. Ass'n, 151 N.C. App. 344, 566 S.E.2d 499, 2002 N.C. App. LEXIS 780 (2002).

Cited in Armstrong v. Ledges Homeowners Ass'n, 360 N.C. 547, 633 S.E.2d 78, 2006 N.C. LEXIS 845 (2006).

§ 47F-3-108. Meetings.

(a) A meeting of the association shall be held at least once each year. Special meetings of the association may be called by the president, a majority of the executive board, or by lot owners having ten percent (10%), or any lower percentage specified in the bylaws, of the votes in the association. Not less than 10 nor more than 60 days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand-delivered or sent prepaid by United States mail to the mailing address of each lot or to any other mailing address designated in writing by the lot owner, or sent by electronic means, including by electronic mail over the Internet, to an electronic mailing address designated in writing by the lot owner. The notice of any meeting shall state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove a director or officer.

(b) Meetings of the executive board shall be held as provided in the bylaws. At regular intervals, the executive board meeting shall provide lot owners an opportunity to attend a portion of an executive board meeting and to speak to the executive board about their issues or concerns. The executive board may place reasonable restrictions on the number of persons who speak on each side of an issue and may place reasonable time restrictions on persons who speak.

(c) Except as otherwise provided in the bylaws, meetings of the association and the executive board shall be conducted in accordance with the most recent edition of Robert's Rules of Order Newly Revised. (1998-199, s. 1; 2004-109, s. 6; 2005-422, s. 5.)

Effect of Amendments. — Session Laws 2005-422, s. 5, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, added the subsection (a) designation; and added subsections (b) and (c).

§ 47F-3-109. Quorums.

(a) Unless the bylaws provide otherwise, a quorum is present throughout any meeting of the association if persons entitled to cast ten percent (10%) of the votes which may be cast for election of the executive board are present in person or by proxy at the beginning of the meeting.

(b) Unless the bylaws specify a larger percentage, a quorum is deemed present throughout any meeting of the executive board if persons entitled to cast fifty percent (50%) of the votes on that board are present at the beginning of the meeting.

(c) In the event business cannot be conducted at any meeting because a quorum is not present, that meeting may be adjourned to a later date by the affirmative vote of a majority of those present in person or by proxy. Notwithstanding any provision to the contrary in the declaration or the bylaws, the quorum requirement at the next meeting shall be one-half of the quorum requirement applicable to the meeting adjourned for lack of a quorum. This provision shall continue to reduce the quorum by fifty percent (50%) from that required at the previous meeting, as previously reduced, until such time as a quorum is present and business can be conducted. (1998-199, s. 1.)

§ 47F-3-110. Voting; proxies.

(a) If only one of the multiple owners of a lot is present at a meeting of the association, the owner who is present is entitled to cast all the votes allocated to that lot. If more than one of the multiple owners are present, the votes allocated to that lot may be cast only in accordance with the agreement of a majority in interest of the multiple owners, unless the declaration or bylaws expressly provide otherwise. Majority agreement is conclusively presumed if any one of the multiple owners casts the votes allocated to that lot without protest being made promptly to the person presiding over the meeting by any of the other owners of the lot.

(b) Votes allocated to a lot may be cast pursuant to a proxy duly executed by a lot owner. If a lot is owned by more than one person, each owner of the lot may vote or register protest to the casting of votes by the other owners of the lot through a duly executed proxy. A lot owner may not revoke a proxy given pursuant to this section except by actual notice of revocation to the person presiding over a meeting of the association. A proxy is void if it is not dated. A proxy terminates 11 months after its date, unless it specifies a shorter term.

(c) If the declaration requires that votes on specified matters affecting the planned community be cast by lessees rather than lot owners of leased lots, (i) the provisions of subsections (a) and (b) of this section apply to lessees as if they were lot owners; (ii) lot owners who have leased their lots to other persons may not cast votes on those specified matters; and (iii) lessees are entitled to notice of meetings, access to records, and other rights respecting those matters as if they were lot owners. Lot owners shall also be given notice, in the manner provided in G.S. 47F-3-108, of all meetings at which lessees may be entitled to vote.

(d) No votes allocated to a lot owned by the association may be cast.

(e) The declaration may provide that on specified issues only a defined subgroup of lot owners may vote provided:

(1) The issue being voted is of special interest solely to the members of the subgroup; and

(2) All except de minimis cost that will be incurred based on the vote taken will be assessed solely against those lot owners entitled to vote.

(f) For purposes of subdivision (e)(1) above, an issue to be voted on is not a special interest solely to a subgroup if it substantially affects the overall appearance of the planned community or substantially affects living conditions of lot owners not included in the voting subgroup. (1998-199, s. 1.)

§ 47F-3-111. Tort and contract liability.

(a) Neither the association nor any lot owner except the declarant is liable for that declarant's torts in connection with any part of the planned community which that declarant has the responsibility to maintain.

(b) An action alleging a wrong done by the association shall be brought against the association and not against a lot owner.

(c) Any statute of limitation affecting the association's right of action under this section is tolled until the period of declarant control terminates. A lot owner is not precluded from bringing an action contemplated by this section because the person is a lot owner or a member of the association. (1998-199, s. 1.)

§ 47F-3-112. Conveyance or encumbrance of common elements.

(a) Portions of the common elements may be conveyed or subjected to a security interest by the association if persons entitled to cast at least eighty percent (80%) of the votes in the association, or any larger percentage the declaration specifies, agree in writing to that action; provided that all the owners of lots to which any limited common element is allocated shall agree in order to convey that limited common element or subject it to a security interest. The declaration may specify a smaller percentage only if all the lots are restricted exclusively to nonresidential uses. Distribution of proceeds of the sale of a limited common element shall be as provided by agreement between the lot owners to which it is allocated and the association. Proceeds of the sale or financing of a common element (other than a limited common element) shall be an asset of the association.

(b) The association, on behalf of the lot owners, may contract to convey common elements or subject them to a security interest, but the contract is not enforceable against the association until approved pursuant to subsection (a) of this section. Thereafter, the association has all powers necessary and appropriate to effect the conveyance or encumbrance, free and clear of any interest of any lot owner or the association in or to the common element conveyed or encumbered, including the power to execute deeds or other instruments.

(c) Any purported conveyance, encumbrance, or other voluntary transfer of common elements, unless made pursuant to this section is void.

(d) No conveyance or encumbrance of common elements pursuant to this section may deprive any lot of its rights of access and support. (1998-199, s. 1.)

NORTH CAROLINA COMMENT

1. The requirement included in subsection (b) of the corresponding provision of the North Carolina Condominium Act stating that consenting owners must execute an agreement in the form of a deed has been deleted because lot owners in the planned community have no interest in the common elements other than by virtue of their membership in the association.

2. Subsection (b) (subsection (c) in the North Carolina Condominium Act) has been modified to clarify that if conveyance or encumbrance is authorized by the required percentage of owners, common elements may be conveyed or encumbered free and clear of any easements, rights of way or claims which might be asserted by individual lot owners in or to that common area by virtue of the declaration by virtue of their ownership of lots.

§ 47F-3-113. Insurance.

(a) Commencing not later than the time of the first conveyance of a lot to a person other than a declarant, the association shall maintain, to the extent reasonably available:

(1) Property insurance on the common elements insuring against all risks of direct physical loss commonly insured against including fire and extended coverage perils. The total amount of insurance after application of any deductibles shall be not less than eighty percent (80%) of

the replacement cost of the insured property at the time the insurance is purchased and at each renewal date, exclusive of land, excavations, foundations, and other items normally excluded from property policies; and

(2) Liability insurance in reasonable amounts, covering all occurrences commonly insured against for death, bodily injury, and property damage arising out of or in connection with the use, ownership, or maintenance of the common elements.

(b) If the insurance described in subsection (a) of this section is not reasonably available, the association promptly shall cause notice of that fact to be hand-delivered or sent prepaid by United States mail to all lot owners. The declaration may require the association to carry any other insurance, and the association in any event may carry any other insurance it deems appropriate to protect the association or the lot owners.

(c) Insurance policies carried pursuant to subsection (a) of this section shall provide that:

(1) Each lot owner is an insured person under the policy to the extent of the lot owner's insurable interest;

(2) The insurer waives its right to subrogation under the policy against any lot owner or member of the lot owner's household;

(3) No act or omission by any lot owner, unless acting within the scope of the owner's authority on behalf of the association, will preclude recovery under the policy; and

(4) If, at the time of a loss under the policy, there is other insurance in the name of a lot owner covering the same risk covered by the policy, the association's policy provides primary insurance.

(d) Any loss covered by the property policy under subdivision (a)(1) of this section shall be adjusted with the association, but the insurance proceeds for that loss are payable to any insurance trustee designated for that purpose, or otherwise to the association, and not to any mortgagee or beneficiary under a deed of trust. The insurance trustee or the association shall hold any insurance proceeds in trust for lot owners and lienholders as their interests may appear. Subject to the provisions of subsection (h) of this section, the proceeds shall be disbursed first for the repair or restoration of the damaged property, and lot owners and lienholders are not entitled to receive payment of any portion of the proceeds unless there is a surplus of proceeds after the property has been completely repaired or restored, or the planned community is terminated.

(e) An insurance policy issued to the association does not prevent a lot owner from obtaining insurance for the lot owner's own benefit.

(f) An insurer that has issued an insurance policy under this section shall issue certificates or memoranda of insurance to the association and, upon written request, to any lot owner, mortgagee, or beneficiary under a deed of trust. The insurer issuing the policy may not cancel or refuse to renew it until 30 days after notice of the proposed cancellation or nonrenewal has been mailed to the association, each lot owner, and each mortgagee or beneficiary under a deed of trust to whom certificates or memoranda of insurance have been issued at their respective last known addresses.

(g) Any portion of the planned community for which insurance is required under subdivision (a)(1) of this section which is damaged or destroyed shall be repaired or replaced promptly by the association unless (i) the planned community is terminated, (ii) repair or replacement would be illegal under any State or local health or safety statute or ordinance, or (iii) the lot owners decide not to rebuild by an eighty percent (80%) vote, including one hundred percent (100%) approval of owners assigned to the limited common elements not to be rebuilt. The cost of repair or replacement in excess of insurance proceeds and reserves is a common expense. If any portion of the planned community is not repaired or replaced, (i) the insurance proceeds attributable to the damaged common elements shall be used to restore the damaged area to a condition compatible with the remainder of the planned community, (ii) the insurance proceeds attributable to limited common elements which are not rebuilt shall be distributed to the owners of the lots to which those limited common elements were allocated, or to lienholders, as their interests may appear, and (iii) the remainder of the proceeds shall be distributed to all the lot owners or lienholders, as their interests may appear, in proportion to the common expense liabilities of all the lots. Notwithstanding the provisions of this subsection, G.S. 47F-2-118 (termination of the planned community) governs the distribution of insurance proceeds if the planned community is terminated.

(h) The provisions of this section may be varied or waived in the case of a planned community all of whose lots are restricted to nonresidential use. (1998-199, s. 1.)

NORTH CAROLINA COMMENT

This section requires the association to maintain property and casualty insurance covering common elements and limited common elements only. Under subsection (b), the declaration may provide for the maintenance and provision of additional insurance by the association, possibly covering lots and improvements on lots. If such provisions are included in the declaration as originally drafted or as amended, care should be taken to provide for the allocation of responsibility for the payment of insurance deductibles and deficiencies and distribution of any surplus.

§ 47F-3-114. Surplus funds.

Unless otherwise provided in the declaration, any surplus funds of the association remaining after payment of or provision for common expenses, the funding of a reasonable operating expense surplus, and any prepayment of reserves shall be paid to the lot owners in proportion to their common expense liabilities or credited to them to reduce their future common expense assessments. (1998-199, s. 1.)

§ 47F-3-115. Assessments for common expenses.

(a) Except as otherwise provided in the declaration, until the association makes a common expense assessment, the declarant shall pay all common expenses. After any assessment has been made by the association, assessments thereafter shall be made at least annually.

(b) Except for assessments under subsections (c), (d), and (e) of this section, all common expenses shall be assessed against all the lots in accordance with the allocations set forth in the declaration. Any past-due common expense assessment or installment thereof bears interest at the rate established by the association not exceeding eighteen percent (18%) per year. For planned communities created prior to January 1, 1999, interest may be charged on any past-due common expense assessment or installment only if the declaration provides for interest charges, and where the declaration does not otherwise specify the interest rate, the rate may not exceed eighteen percent (18%) per year.

(c) To the extent required by the declaration:

(1) Any common expense associated with the maintenance, repair, or replacement of a limited common element shall be assessed against the lots to which that limited common element is assigned, equally, or in any other proportion that the declaration provides;

(2) Any common expense or portion thereof benefiting fewer than all of the lots shall be assessed exclusively against the lots benefitted; and

(3) The costs of insurance shall be assessed in proportion to risk and the costs of utilities shall be assessed in proportion to usage.

(d) Assessments to pay a judgment against the association may be made only against the lots in the planned community at the time the judgment was entered, in proportion to their common expense liabilities.

(e) If any common expense is caused by the negligence or misconduct of any lot owner or occupant, the association may assess that expense exclusively against that lot owner or occupant's lot.

(f) If common expense liabilities are reallocated, common expense assessments and any installment thereof not yet due shall be recalculated in accordance with the reallocated common expense liabilities. (1998-199, s. 1.)

NORTH CAROLINA COMMENT

1. Subsection (e) has been modified to clarify that any expenses incurred by the association as the result of negligent *or* intentional acts or omissions by an owner *or* anyone who is present with the express or implied consent of the owner may be asserted by the association exclusively against the owner's lot.

2. This section applies in its entirety to planned communities formed prior to January 1, 1999.

CASE NOTES

Applied in Wise v. Harrington Grove Cmty. Ass'n, 151 N.C. App. 344, 566 S.E.2d 499, 2002 N.C. App. LEXIS 780 (2002); Wise v. Harrington Grove Cmty. Ass'n, 357 N.C. 396, 584 S.E.2d 731, 2003 N.C. LEXIS 835 (2003).

§ 47F-3-116. Lien for assessments.

(a) Any assessment levied against a lot remaining unpaid for a period of 30 days or longer shall constitute a lien on that lot when a claim of lien is filed of record in the office of the clerk of superior court of the county in which the lot is located in the manner provided herein. Unless the declaration otherwise provides, fees, charges, late charges, and other charges imposed pursuant to G.S. 47F-3-102, 47F-3-107, 47F-3-107.1, and 47F-3-115 are enforceable as assessments under this section. Except as provided in subsections (a1) and (a2) of this section, the association may foreclose the claim of lien in like manner as a mortgage on real estate under power of sale under Article 2A of Chapter 45 of the General Statutes.

(a1) An association may not foreclose an association assessment lien under Article 2A of Chapter 45 of the General Statutes if the debt securing the lien consists solely of fines imposed by the association, interest on unpaid fines, or attorneys' fees incurred by the association solely associated with fines imposed by the association. The association, however, may enforce the lien by judicial foreclosure as provided in Article 29A of Chapter 1 of the General Statutes.

(a2) An association shall not levy, charge, or attempt to collect a service, collection, consulting, or administration fee from any lot owner unless the fee is expressly allowed in the declaration. Any lien securing a debt consisting solely of these fees may only be enforced by judicial foreclosure as provided in Article 29A of Chapter 1 of the General Statutes.

(b) The lien under this section is prior to all liens and encumbrances on a lot except (i) liens and encumbrances (specifically including, but not limited to, a mortgage or deed of trust on the lot) recorded before the docketing of the claim of lien in the office of the clerk of superior court, and (ii) liens for real estate taxes and other governmental assessments and charges against the lot. This subsection does not affect the priority of mechanics' or materialmen's liens.

(c) A lien for unpaid assessments is extinguished unless proceedings to enforce the lien are instituted within three years after the docketing of the claim of lien in the office of the clerk of superior court.

(d) This section does not prohibit other actions to recover the sums for which subsection (a) of this section creates a lien or prohibit an association taking a deed in lieu of foreclosure.

(e) A judgment, decree, or order in any action brought under this section shall include costs and reasonable attorneys' fees for the prevailing party. If the lot owner does not contest the collection of debt and enforcement of a lien after the expiration of the 15-day period following notice as required in subsection (e1) of this section, then reasonable attorneys' fees shall not exceed one thousand two hundred dollars ($1,200), not including costs or expenses incurred. The collection of debt and enforcement of a lien remain uncontested as long as the lot owner does not dispute, contest, or raise any objection, defense, offset, or counterclaim as to the amount or validity of the debt and lien asserted or the association's right to collect the debt and enforce the lien as provided in this section. The attorneys' fee limitation in this subsection shall not apply to judicial foreclosures or to proceedings authorized under subsection (d) of this section or G.S. 47F-3-120.

(e1) A lot owner may not be required to pay attorneys' fees and court costs until the lot owner is notified in writing of the association's intent to seek payment of attorneys' fees and court costs. The notice must be sent by first-class mail to the property address and, if different, to the mailing address for the lot owner in the association's records. The notice shall set out the outstanding balance due as of the date of the notice and state that the lot owner has 15 days from the mailing of the notice by first-class mail to pay the outstanding balance without the attorneys' fees and court costs. If the lot owner pays the outstanding balance within this period, then the lot owner shall have no obligation to pay attorneys' fees and court costs. The notice shall also inform the lot owner of the opportunity to contact a representative of the association to discuss a payment schedule for the outstanding balance as provided in subsection (e2) of this section and shall provide the name and telephone number of the representative.

(e2) The association, acting through its executive board and in the board's sole discretion, may agree to allow payment of an outstanding balance in installments. Neither the association nor the lot owner is obligated to offer or accept any proposed installment schedule. Reasonable administrative fees and costs for accepting and processing installments may be added to the outstanding balance and included in an installment payment schedule. Reasonable attorneys' fees may be added to the outstanding balance and included in an installment schedule only after the lot owner has been given notice as required in subsection (e1) of this section.

(f) Where the holder of a first mortgage or first deed of trust of record, or other purchaser of a lot obtains title to the lot as a result of foreclosure of a first mortgage or first deed of trust, such purchaser and its heirs, successors, and assigns, shall not be liable for the assessments against such lot which became due prior to the acquisition of title to such lot by such purchaser. Such unpaid assessments shall be deemed to be common expenses collectible from all the lot owners including such purchaser, its heirs, successors, and assigns.

(g) A claim of lien shall set forth the name and address of the association, the name of the record owner of the lot at the time the claim of lien is filed, a description of the lot, and the amount of the lien claimed. (1998-199, s. 1; 2005-422, s. 6.)

NORTH CAROLINA COMMENT

1. Subsection (a) differs from the corresponding section in the North Carolina Condominium Act in that it clarifies that the association's lien is created upon the filing of a claim of lien in the office of the clerk of superior court. Subsection (e) codifies and confirms existing public policy and prior case law by allowing the recovery of attorney's fees by the prevailing party. Subsection (g) has been added to clarify information which must be included in any claim of lien.

2. This section applies in its entirety to planned communities formed prior to January 1, 1999.

Effect of Amendments. — Session Laws 2005-422, s. 6, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, rewrote subsection (a); added subsections (a1), (a2), (e1) and (e2); and added the second through fourth sentences in subsection (e).

CASE NOTES

Failure to Perfect Lien. — Homeowners association's late claim for assessments that had not been paid by a debtor who had filed Chapter 7 bankruptcy was allowed as a postpetition debt on a ruling holding that the sum represented an actual and necessary cost of preserving the bankruptcy estate and thus was a permitted administrative expense under 11 U.S.C.S. § 503(b) and that the result was consistent with the rule on such claims as adopted by the Fourth Circuit; moreover, though the association did not have a secured claim to recover prepetition arrearages arising from the debtor's membership in the association because it did not comply with the filing requirements in G.S. 47F-3-116, that sum was allowed as an unsecured claim. In re Guillebeaux, 361 B.R. 87, 2007 Bankr. LEXIS 430 (Bankr. M.D.N.C. 2007).

Attorney Fees. — When a homeowner's association fined homeowners for doing construction that the association's architectural committee disapproved, but the trial court, which granted the association judgment for the amount of these fines did not award the association reasonable attorney fees under G.S. 47F-3-116(e), an appellate court could not review the trial court's decision because, when the association sought to file a cross-appeal after the homeowners appealed the trial court's judgment on other matters, the association did not file a notice of the association's cross-appeal with the trial court, as required by N.C. R. App. P. 3(a), so the appellate court had no jurisdiction over the cross-appeal. Reidy v. Whitehart Ass'n, — N.C. App. —, 648 S.E.2d 265, 2007 N.C. App. LEXIS 1740 (2007).

Applied in Wise v. Harrington Grove Cmty. Ass'n, 151 N.C. App. 344, 566 S.E.2d 499, 2002 N.C. App. LEXIS 780 (2002); Wise v. Harrington Grove Cmty. Ass'n, 357 N.C. 396, 584 S.E.2d 731, 2003 N.C. LEXIS 835 (2003).

§ 47F-3-117: Reserved for future codification purposes.

NORTH CAROLINA COMMENT

The North Carolina Condominium Act as well as the Uniform Planned Community Act on which this act is based both are designed to apply to communities in which title to common elements is vested in individual owners. Because title to common elements under this act is vested in the association, no provision similar to G.S. 47C-3-117 or Section 3-117 of the Uniform Act has been included.

§ 47F-3-118. Association records.

(a) The association shall keep financial records sufficiently detailed to enable the association to comply with this Chapter. All financial and other records, including records of meetings of the association and executive board, shall be made reasonably available for examination by any lot owner and the lot owner's authorized agents as required in the bylaws and Chapter 55A of the General Statutes. If the bylaws do not specify particular records to be maintained, the association shall keep accurate records of all cash receipts and expenditures and all assets and liabilities. In addition to any specific information that is required by the bylaws to be assembled and reported to the lot owners at specified times, the association shall make an annual income and expense statement and balance sheet available to all lot owners at no charge and within 75 days after the close of the fiscal year to which the information relates. Notwithstanding the bylaws, a more extensive compilation, review, or audit of the association's books and records for the current or immediately preceding fiscal year may be required by a vote of the majority of the executive board or by the affirmative vote of a majority of the lot owners present and voting in person or by proxy at any annual meeting or any special meeting duly called for that purpose.

(b) The association, upon written request, shall furnish to a lot owner or the lot owner's authorized agents a statement setting forth the amount of unpaid assessments and other charges against a lot. The statement shall be furnished within 10 business days after receipt of the request and is binding on the association, the executive board, and every lot owner.

(c) In addition to the limitations of Article 8 of Chapter 55A of the General Statutes, no financial payments, including payments made in the form of goods and services, may be made to any officer or member of the association's executive board or to a business, business associate, or relative of an officer or member of the executive board, except as expressly provided for in the bylaws or in payments for services or expenses paid on behalf of the association which are approved in advance by the executive board. (1998-199, s. 1; 2005-422, s. 7.)

Effect of Amendments. — Session Laws 2005-422, s. 7, effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date, rewrote the second sentence and added the last three sentences in subsection (a); and added subsection (c).

§ 47F-3-119. Association as trustee.

With respect to a third person dealing with the association in the association's capacity as a trustee under G.S. 47F-2-118 following termination or G.S. 47F-3-113 for insurance proceeds, the existence of trust powers and their proper exercise by the association may be assumed without inquiry. A third person is not bound to inquire whether the association has power to act as trustee or is properly exercising trust powers, and a third person, without actual knowledge that the association is exceeding or improperly exercising its powers, is fully protected in dealing with the association as if it possessed and properly exercised the powers it purports to exercise. A third person is not bound to assure the proper application of trust assets paid or delivered to the association in its capacity as trustee. (1998-199, s. 1.)

§ 47F-3-120. Declaration limits on attorneys' fees.

Except as provided in G.S. 47F-3-116, in an action to enforce provisions of the articles of incorporation, the declaration, bylaws, or duly adopted rules or regulations, the court may award reasonable attorneys' fees to the prevailing party if recovery of attorneys' fees is allowed in the declaration. (1998-199, s. 1.)

§ 47F-3-121. American and State flags and political sign displays.

Notwithstanding any provision in any declaration of covenants, no restriction on the use of land shall be construed to:

(1) Regulate or prohibit the display of the flag of the United States or North Carolina, of a size no greater than four feet by six feet, which is displayed in accordance with or in a manner consistent with the patriotic customs set forth in 4 U.S.C. §§ 5-10, as amended, governing the display and use of the flag of the United States unless:

a. For restrictions registered prior to October 1, 2005, the restriction specifically uses the following terms:

1. Flag of the United States of America;
2. American flag;
3. United States flag; or
4. North Carolina flag.

b. For restrictions registered on or after October 1, 2005, the restriction shall be written on the first page of the instrument or conveyance in print that is in boldface type, capital letters, and no smaller than the largest print used elsewhere in the instrument or conveyance. The restriction shall be construed to regulate or prohibit the display of the United States or North Carolina flag only if the restriction specifically states: **"THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF THE FLAG OF THE UNITED STATES OF AMERICA OR STATE OF NORTH CAROLINA"**.

This subdivision shall apply to owners of property who display the flag of the United States or North Carolina on property owned exclusively by them and does not apply to common areas, easements, rights-of-way, or other areas owned by others.

(2) Regulate or prohibit the indoor or outdoor display of a political sign by an association member on property owned exclusively by the member, unless:

a. For restrictions registered prior to October 1, 2005, the restriction specifically uses the term "political signs".

b. For restrictions registered on or after October 1, 2005, the restriction shall be written on the first page of the instrument or conveyance in print that is in boldface type, capital letters, and no smaller than the largest print used elsewhere in the instrument or conveyance. The restriction shall be construed to regulate or prohibit the display of political signs only if the restriction specifically states: **"THIS DOCUMENT REGULATES OR PROHIBITS THE DISPLAY OF POLITICAL SIGNS"**.

Even when display of a political sign is permitted under this subdivision, an association (i) may prohibit the display of political signs earlier than 45 days before the day of the election and later than seven days after an election day, and (ii) may regulate the size and number of political signs that may be placed on a member's property if the association's regulation is no more restrictive than any applicable city, town, or county ordinance that regulates the size and number of political signs on residential property. If the local government in which the property is located does not regulate the size and number of political signs on residential property, the association shall permit at least one political sign with the maximum dimensions of 24 inches by 24 inches on a member's property. For the purposes of this subdivision, "political sign" means a sign that attempts to influence the outcome of an election, including supporting or opposing an issue on the election ballot. This subdivision shall apply to owners of property who display political signs on property owned exclusively by them and does not apply to common areas, easements, rights-of-way, or other areas owned by others. (2005-422, s. 8; 2006-226, s. 15(b).)

Editor's Note. — Session Laws 2005-422, s. 20, made this section effective January 1, 2006, and applicable to violations occurring and proceedings commenced on or after that date and to fiscal years beginning on or after that date.

Effect of Amendments. — Session Laws 2006-226, s. 15(b), effective August 10, 2006, deleted "THE" preceding "POLITICAL SIGNS" at the end of subdivision (2)b.

Chapter 48.

Adoptions.

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Article 1.

General Provisions.

§ 48-1-100. Legislative findings and intent; construction of Chapter.

(a) The General Assembly finds that it is in the public interest to establish a clear judicial process for adoptions, to promote the integrity and finality of adoptions, to encourage prompt, conclusive disposition of adoption proceedings, and to structure services to adopted children, biological parents, and adoptive parents that will provide for the needs and protect the interests of all parties to an adoption, particularly adopted minors.

(b) With special regard for the adoption of minors, the General Assembly declares as a matter of legislative policy that:

(1) The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents, (ii) facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support, (iii) protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing, and (iv) assuring the finality of the adoption; and

(2) Secondary purposes of this Chapter are (i) to protect biological parents from ill-advised decisions to relinquish a child or consent to the child's adoption, (ii) to protect adoptive parents from assuming responsibility for a child about whose heredity or mental or physical condition they know nothing, (iii) to protect the privacy of the parties to the adoption, and (iv) to discourage unlawful trafficking in minors and other unlawful placement activities.

(c) In construing this Chapter, the needs, interests, and rights of minor adoptees are primary. Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor.

(d) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies. (1949, c. 300; 1983, c. 454, ss. 1, 6; 1995, c. 457, s. 2.)

Cross References. — Special Needs Adoption Incentive Fund, see G.S. 108A-50.1.

Editor's Note. — Session Laws 1995, c. 457, effective July 1, 1996, enacts a new Chapter 48 to replace former Chapter 48, derived from Session Laws 1949, c. 300, which it replaces.

For tables of corresponding sections of former and new Chapter 48, see the tables at the end of this Chapter.

Where appropriate, the historical citations to sections of former Chapter 48 have been added to corresponding sections in new Chapter 48.

Many of the case notes appearing under the sections of this Chapter were decided under former Chapter 48 or under prior law.

Former Chapter 48 was derived from Session Laws 1949, c. 300, which rewrote the Chapter as amended by Session Laws 1945, cc. 155, 787, and 788. The original Chapter relating to the adoption of minors was codified from Public Laws 1935, c. 243, as amended by Public Laws 1937, c. 422; 1939, cc. 32, 132; 1941, c. 281; and 1943, c. 735.

Session Laws 1995, c. 457, s. 11, provides: "Nothing in this act shall affect the validity of an adoption completed or validated under any prior law."

Session Laws 2000-67, s. 11.16, effective July 1, 2000, creates a Special Needs Adoptions Incentive Fund to provide financial assistance to facilitate the adoption of special needs children residing in licensed foster care homes, effective January 1, 2001. These funds are to be matched by county funds. This program does not constitute an entitlement and is subject of availability of funds. The Social Services Commission is to adopt rules to implement the provisions of this section.

Legal Periodicals. — For critical analysis and appraisal of the former Chapter, see 13 N.C.L. Rev. 355 (1935).

For article, "Thwarting Adoptions," see 19 N.C.L. Rev. 127 (1941).

For discussion of the 1949 Act, see 27 N.C.L. Rev. 418 (1949).

For case law survey on adoption, see 41 N.C.L. Rev. 458 (1963).

For comment, "The Adoptee's Right of Access to Sealed Adoption Records in North Carolina," see 16 Wake Forest L. Rev. 563 (1980).

For note, "Minimizing the Putative Father's Rights: In re Adoption of Clark," see 68 N.C. L. Rev. 1257 (1990).

For survey, "Why the Best Interests Standard Should Survive Petersen v. Rogers," see 73 N.C.L. Rev. 2451 (1995).

For a note on the effect of equitable adoption on statutory adoption procedures, see 76 N.C.L. Rev. 2446 (1998).

CASE NOTES

Editor's Note. — *Most of the cases below were decided prior to the 1995 revision of Chapter 48.*

1947 Act Rewriting Chapter Held Inoperative. — Session Laws 1947, c. 885, purporting to rewrite this Chapter, was held inoperative and void by reason of the fact that the enacting clause prescribed by N.C. Const., Art. II, § 21 was omitted. Advisory Opinion in re House Bill No. 65, 227 N.C. 708, 43 S.E.2d 73 (1947). For discussion of the invalid act, see 25 N.C.L. Rev. 392, 408.

For historical perspective on adoption statutes, see Crumpton v. Crumpton, 28 N.C. App. 358, 221 S.E.2d 390, vacated on other grounds, 290 N.C. 651, 227 S.E.2d 587 (1976). See also, Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

Chapter Exclusive. — The only procedure for the adoption of minors is that prescribed by this Chapter. In re Simpson, 262 N.C. 206, 136 S.E.2d 647 (1964).

Strict Construction. — Since the adoption statute is in derogation of the common law and works a change in the canons of descent, it must be construed strictly and not so as to enlarge or confer any rights not clearly given. Crumpton v. Crumpton, 28 N.C. App. 358, 221 S.E.2d 390, vacated on other grounds, 290 N.C. 651, 227 S.E.2d 587 (1976). See also, Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

Under this Chapter as it formerly stood, it was held that since the laws of inheritance and distribution of property are directly involved in an adoption proceeding, and since the proceeding is in derogation of the common law, it must be strictly construed. In re Holder, 218 N.C. 136, 10 S.E.2d 620 (1940).

North Carolina recognizes the doctrine of equitable adoption. Lankford v. Wright, 347 N.C. 115, 489 S.E.2d 604 (1997).

Equitable Adoption. — Equitable adoption, does not confer the incidents of formal statutory adoption; rather, it merely confers rights of inheritance upon the foster child in the event of intestacy of the foster parents. Lankford v. Wright, 347 N.C. 115, 489 S.E.2d 604 (1997).

Construction Should Be Fair and Reasonable. — The right of adoption is not only beneficial to those immediately concerned, but likewise to the public, and construction of the statute should not be narrow or technical, but rather fair and reasonable, where all material provisions of the statute have been complied with. Locke v. Merrick, 223 N.C. 799, 28 S.E.2d 523 (1944).

Applicable Rules of Procedure. — The Rules of Civil Procedure, G.S. 1A-1, and the provisions of G.S. 1-393 et seq. apply to adoption proceedings. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Juvenile Court Act Not an Amendment. — The Juvenile Court Act was not an amendment to the former adoption law, and did not affect the procedure therein prescribed for the adoption of minors. Ward v. Howard, 217 N.C. 201, 7 S.E.2d 625 (1940).

An agreement to adopt a minor, made between the person desiring to adopt the minor and the minor's parents, as the respective parties to the agreement, was not an adoption of a minor under the former Chapter. Chambers v. Byers, 214 N.C. 373, 199 S.E. 398 (1938).

Consent Not Procured by Fraud. — Adoptive father's attempt to void his consent to the adoption of his wife's daughter based on fraud failed, because the adoptive father failed to prove that the wife made any misrepresentations with regard to any alleged plans on her part to separate or divorce; based on the wife telling the adoptive father of her unhappiness and the couple's frequent arguments with regard to the adoptive father's drug use, the adoptive father knew or should have known that there was some possibility that the parties would separate. Fakhoury v. Fakhoury, 171 N.C. App. 104, 613 S.E.2d 729, 2005 N.C. App. LEXIS 1163 (2005), cert. denied, 360 N.C. 62, 621 S.E.2d 622 (2005).

Applied in In re Cunningham, 151 N.C. App. 410, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002); In re Anderson, 360 N.C. 271, 624 S.E.2d 626, 2006 N.C. LEXIS 5 (2006).

§ 48-1-101. Definitions.

In this Chapter, the following definitions apply:

(1) "Adoptee" means an individual who is adopted, is placed for adoption, or is the subject of a petition for adoption properly filed with the court.

(2) "Adoption" means the creation by law of the relationship of parent and child between two individuals.

(3) "Adult" means an individual who has attained 18 years of age, or if under the age of 18, is either married or has been emancipated under the applicable State law.

(3a) "Adoption facilitator" means an individual or a nonprofit entity that assists biological parents in locating and evaluating prospective adoptive parents without charge.

(4) "Agency" means a public or private association, corporation, institution, or other person or entity that is licensed or otherwise authorized by the law of the jurisdiction where it operates to place minors for adoption. "Agency" also means a county department of social services in this State.

(4a) "Agency identified adoption" means a placement where an agency has agreed to place the minor with a prospective adoptive parent selected by the parent or guardian.

(5) "Child" means a son or daughter, whether by birth or adoption.

(5a) "Confidential intermediary" means a licensed adoption agency staff person who may act as a third party to facilitate contact between an adult adoptee or the adult lineal descendant of a deceased adoptee and the biological parent.

(5b) "Criminal history" means a county, State, or federal conviction of a felony by a court of competent jurisdiction or a pending felony indictment of a crime for child abuse or neglect, spousal abuse, a crime against a child, including child pornography, or for a crime involving violence, including rape, sexual assault, or homicide, other than physical assault or battery; a county, State, or federal conviction of a felony by a court of competent jurisdiction or a pending felony indictment for physical assault, battery, or a drug-related offense, if the offense was committed within the past five years; or similar crimes under federal law or under the laws of other states.

(6) "Department" means the North Carolina Department of Health and Human Services.

(7) "Division" means the Division of Social Services of the Department.

(8) "Guardian" means an individual, other than a parent, appointed by a clerk of court in North Carolina to exercise all of the powers conferred by G.S. 35A-1241, including a standby guardian appointed under Article 21 of Chapter 35A of the General Statutes whose authority has actually commenced; and also means an individual, other than a parent, appointed in another jurisdiction according to the law of that jurisdiction who has the power to consent to adoption under the law of that jurisdiction.

(9) "Legal custody" of an individual means the general right to exercise continuing care of and control over the individual as authorized by law, with or without a court order, and:

a. Includes the right and the duty to protect, care for, educate, and discipline the individual;

b. Includes the right and the duty to provide the individual with food, shelter, clothing, and medical care; and

c. May include the right to have physical custody of the individual.

(9a) "Lineal descendant of a deceased adoptee" means any person who descends from the direct line of the adoptee.

(10) "Minor" means an individual under 18 years of age who is not an adult.

(11) "Party" means a petitioner, adoptee, or any person whose consent to an adoption is necessary under this Chapter but has not been obtained.

(12) "Physical custody" means the physical care of and control over an individual.

(13) "Placement" means transfer of physical custody of a minor to the selected prospective adoptive parent. Placement may be either:
  a. Direct placement by a parent or the guardian of the minor; or
  b. Placement by an agency.

(14) "Preplacement assessment" means a document, whether prepared before or after placement, that contains the information required by G.S. 48-3-303 and any rules adopted by the Social Services Commission.

(15) "Relinquishment" means the voluntary surrender of a minor to an agency for the purpose of adoption.

(16) "Report to the court" means a document prepared in accordance with G.S. 48-2-501, et seq.

(17) "State" means a state as defined in G.S. 12-3(11).

(18) "Stepparent" means an individual who is the spouse of a parent of a child, but who is not a legal parent of the child. (1949, c. 300; 1953, c. 880; 1957, c. 778, s. 1; 1961, c. 241; 1969, c. 982; 1971, c. 157, ss. 1, 2; c. 1231, s. 1; 1973, c. 476, s. 138; 1975, c. 321, s. 2; 1977, c. 879, s. 1; 1981, c. 924, s. 1; 1985, c. 758, s. 4; 1995, c. 457, s. 2; 1997-215, s. 11(e); 1997-443, s. 11A.118(a); 1998-229, s. 12; 2001-150, s. 1; 2007-262, s. 2; 2007-276, s. 7.)

Editor's Note. — The subdivisions added by Session Laws 2007-262, s. 2, have been designated as (5a) and (9a) at the direction of the Revisor of Statutes. Former subdivision (5a) was redesignated as subdivision (5b) at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2007-262, s. 2, effective January 1, 2008, added the definitions for "Confidential intermediary" and "Lineal descendant of a deceased adoptee."

Session Laws 2007-276, s. 7, effective October 1, 2007, rewrote subdivision (5b).

CASE NOTES

County Department of Social Services was an agency of the state during its involvement in adoption proceedings. Parham v. Iredell County Dep't of Social Servs., 127 N.C. App. 144, 489 S.E.2d 610 (1997).

§ 48-1-102. Parent includes adoptive parent.

As used in this Article, the term "parent" includes one who has become a parent by adoption. (1949, c. 300; 1953, c. 880; 1957, c. 778, s. 1; 1961, c. 241; 1969, c. 982; 1971, c. 157, ss. 1, 2; c. 1231, s. 1; 1973, c. 476, s. 138; 1975, c. 321, s. 2; 1977, c. 879, s. 1; 1981, c. 924, s. 1; 1985, c. 758, s. 4; 1995, c. 457, s. 2.)

§ 48-1-103. Who may adopt.

Any adult may adopt another individual as provided in this Chapter, but spouses may not adopt each other. (1949, c. 300; 1963, c. 699; 1967, c. 619, ss. 1-3; c. 693; c. 880, s. 3; 1969, c. 21, ss. 3-6; 1971, c. 395; c. 1231, s. 1; 1973, c. 849, s. 3; c. 1354, ss. 1-4; 1975, c. 91; 1979, c. 107, s. 6; 1981, c. 657; 1983, c. 454, s. 6; 1989, c. 208; c. 727, s. 219(4); 1993, c. 553, s. 14; 1995, c. 88, s. 3; 1995, c. 457, s. 2.)

§ 48-1-104. Who may be adopted.

Any individual may be adopted as provided in this Chapter. (1949, c. 300; 1957, c. 778, s. 2; 1967, c. 880, ss. 2, 3; 1969, c. 21, ss. 3-6; 1971, c. 1231, s. 1; 1973, c. 849, s. 3; 1975, c. 91; 1981, c. 657; 1987, c. 716, s. 1; 1989, c. 208; c. 727, s. 219(4); 1993, c. 539, s. 410; c. 553, s. 14; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2.)

§ 48-1-105. Name of adoptee after adoption.

When a decree of adoption becomes final, the name of the adoptee shall become the name designated in the decree. (1949, c. 300; 1951, c. 730, ss. 1-4; 1955, c. 951, s. 1; 1967, c. 880, s. 3; c. 1042, ss. 1-3; 1969, c. 21, s. 2-6; c. 977; 1971, c. 1231, s. 1; 1973, c. 476, s. 128; c. 849, ss. 1-3; 1975, c. 91; 1981, c. 657; 1983, c. 454, s. 6; 1989, c. 208; c. 727, s. 219(3), (4); 1993, c. 553, s. 14; 1995, c. 457, s. 2.)

§ 48-1-106. Legal effect of decree of adoption.

(a) A decree of adoption effects a complete substitution of families for all legal purposes after the entry of the decree.

(b) A decree of adoption establishes the relationship of parent and child between each petitioner and the individual being adopted. From the date of the signing of the decree, the adoptee is entitled to inherit real and personal property by, through, and from the adoptive parents in accordance with the statutes on intestate succession and has the same legal status, including all legal rights and obligations of any kind whatsoever, as a child born the legitimate child of the adoptive parents.

(c) A decree of adoption severs the relationship of parent and child between the individual adopted and that individual's biological or previous adoptive parents. After the entry of a decree of adoption, the former parents are relieved of all legal duties and obligations due from them to the adoptee, except that a former parent's duty to make past-due payments for child support is not terminated, and the former parents are divested of all rights with respect to the adoptee.

(d) Notwithstanding any other provision of this section, neither an adoption by a stepparent nor a readoption pursuant to G.S. 48-6-102 has any effect on the relationship between the child and the parent who is the stepparent's spouse.

(e) In any deed, grant, will, or other written instrument executed before October 1, 1985, the words "child", "grandchild", "heir", "issue", "descendant", or an equivalent, or any other word of like import, shall be held to include any adopted person after the entry of the decree of adoption, unless a contrary intention plainly appears from the terms of the instrument, whether the instrument was executed before or after the entry of the decree of adoption. The use of the phrase "hereafter born" or similar language in any such instrument to establish a class of persons shall not by itself be sufficient to exclude adoptees from inclusion in the class. In any deed, grant, will, or other written instrument executed on or after October 1, 1985, any reference to a natural person shall include any adopted person after the entry of the decree of adoption unless the instrument explicitly states that adopted persons are excluded, whether the instrument was executed before or after the entry of the decree of adoption.

(f) Nothing in this Chapter deprives a biological grandparent of any visitation rights with an adopted minor available under G.S. 50-13.2(b1), 50-13.2A, and 50-13.5(j). (1949, c. 300; 1953, c. 824; 1955, c. 813, s. 5; 1957, c. 778, s. 5;

1963, c. 967; 1967, c. 619, s. 5; c. 880, s. 3; 1969, c. 21, ss. 3-6; c. 911, s. 6; 1971, c. 1093, s. 13; c. 1231, s. 1; 1973, c. 849, s. 3; c. 1354, s. 5; 1975, c. 91; 1981, c. 657; 1983, c. 30; c. 454, ss. 2, 6; 1985, c. 67, ss. 1-4; c. 575, s. 1; 1989, c. 208; c. 727, s. 219(4); 1993, c. 553, s. 14; 1995, c. 457, s. 2.)

Legal Periodicals. — For comment on the 1945 amendment to former G.S. 48-6, see 23 N.C.L. Rev. 346 (1945).

For article on inheritance rights consequent to adoption, see 29 N.C.L. Rev. 227 (1951).

For brief comment on the 1953 amendment to former G.S. 48-6, see 31 N.C.L. Rev. 388 (1953).

For comment on the 1955 amendment to former G.S. 48-6, see 33 N.C.L. Rev. 521 (1955).

As to right of adopted children to take under a will as "grandchildren," see 39 N.C.L. Rev. 203 (1961).

For survey of the 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

For survey of 1979 property law, see 58 N.C.L. Rev. 1509 (1980).

For comment on "The Adoptee's Right of Access to Sealed Adoption Records in North Carolina," see 16 Wake Forest L. Rev. 563 (1980).

For survey of 1981 property law, see 60 N.C.L. Rev. 1420 (1982).

For note, "Minimizing the Putative Father's Rights: In re Adoption of Clark," see 68 N.C.L. Rev. 1257 (1990).

CASE NOTES

I. In General.
II. Intestate Succession.
III. Wills and Other Written Instruments.

I. IN GENERAL.

Editor's Note. — *Most of the cases below were decided prior to the 1995 revision of Chapter 48.*

For a brief history of former § 48-6, and the effect of the 1941 amendment thereto, see Phillips v. Phillips, 227 N.C. 438, 42 S.E.2d 604 (1947).

As to construction of former § 48-6, see Edwards v. Yearby, 168 N.C. 663, 85 S.E. 19 (1915); Grimes v. Grimes, 207 N.C. 778, 178 S.E. 573 (1935).

Conclusiveness of Proceedings Under Former § 48-6. — Under former G.S. 48-6, it was held that adoption proceedings are conclusive as to persons who were parties thereto and as to their privies, notwithstanding a defect as to a party who would be entitled to disregard them as not binding on him, but who does not complain of his nonjoinder. Locke v. Merrick, 223 N.C. 799, 28 S.E.2d 523 (1944). See § 48-28.

Adopted Child Acquires Only Rights Declared by Statute. — The rights which a child acquires by adoption are those and only those declared by legislative act. Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 182 (1965).

Severance of legal ties with the child's natural family was not intended to be partial; rather, former G.S. 48-6 means that upon a final order of adoption the severance of legal ties with the child's natural family is total. The child acquires full status as a member of his adoptive family and in so doing is for all legal purposes removed from his natural bloodline. Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

Those Adopted Out of a Family Are Not "Issue" Thereof. — In enacting former G.S. 48-6, the legislature contemplated that upon a final order of adoption a complete substitution of family would take place, with the adopted child becoming the child of his adoptive parents and a member of their family, and the legal relationship with the child's natural parents and family being by virtue of the adoption order completely severed; therefore, those adopted out of a family may not take as "issue" of that family under a deed granting a remainder to issue. Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

Adopted Child Becomes a Stranger to the Bloodline of His Natural Parents. — The General Assembly evidenced its intent that by adoption the child adopted becomes legally a child of his new parents, and the adoption makes him legally a stranger to the bloodline of his natural parents. Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

By adoption, the adopted child becomes legally the child of the adoptive parents and becomes legally a stranger to the bloodline of his natural parents. Acker v. Barnes, 33 N.C. App. 750, 236 S.E.2d 715, cert. denied, 293 N.C. 360, 238 S.E.2d 149 (1977).

Adoption Terminates Rights of Natural Parents. — A final decree of adoption for life terminates the relationship between the natural parents and the child, and the natural parents are divested of all rights with respect to the child. Rhodes v. Henderson, 14 N.C. App. 404, 188 S.E.2d 565 (1972).

The right of the natural mother after she has permitted the child's adoption by others is no greater than that of a stranger to the child. Rhodes v. Henderson, 14 N.C. App. 404, 188 S.E.2d 565 (1972).

A natural parent who has consented to the adoption of his or her children cannot thereafter bring an action against the natural parent and adoptive parent for custody or visitation of the children. Kelly v. Blackwell, 121 N.C. App. 621, 468 S.E.2d 400 (1996).

Prior Termination of Parental Rights Not Necessary. — While termination of a putative father's rights may precede an adoption petition, prior termination of his rights under Chapter 7A is not necessary if, under the applicable provisions of former Chapter 48, his consent to the adoption is not necessary; his parental rights are then terminated by the final order of adoption under former G.S. 48-23. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Prerogative of Adoptive Parents to Determine with Whom Children Associate. — Dismissal for failure to state a claim upon which relief could be granted was proper where the paternal grandmother and natural aunt of children legally adopted by present husband of the natural mother sought visitation rights, since parents with lawful custody of minor children retain the prerogative to determine with whom their children shall associate. Acker v. Barnes, 33 N.C. App. 750, 236 S.E.2d 715, cert. denied, 293 N.C. 360, 238 S.E.2d 149 (1977).

Adoption by Stepparent. — The language of former G.S. 48-7(d), that adoption by a stepparent does not affect the parent-child relationship with the natural parent, is a measure to protect that parent-child relationship from the otherwise sweeping effects of former 48-23(1), which otherwise might be construed to terminate the natural parent-child relationship. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Adopted Children as Lineal Descendants Under Former § 30-3(b). — Natural children of one spouse born during a previous marriage, if adopted by second spouse with consent of their surviving natural parent, were considered lineal descendants by the second marriage for purposes of former G.S. 30-3(b), which determined a dissenting spouse's share. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

Collateral Attack on Adoption by Party Thereto. — The provisions of former G.S. 48-28 would prevent a collateral attack by husband on adoption of wife's child, where he was a party to the proceeding. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Father's Pre-adoption Obligation to Provide Support Not Affected. — In the absence of evidence that the mother waived her right to past due payments, nothing about his childrens' subsequent adoption affected a father's pre-adoption obligation to provide support for his children, and nothing about the subsequent adoption affected the applicable statute of limitations. State ex rel. Pruitt v. Pruitt, 94 N.C. App. 713, 380 S.E.2d 809 (1989).

Cited in Hill v. Newman, 131 N.C. App. 793, 509 S.E.2d 226 (1998).

II. INTESTATE SUCCESSION.

Right of Adopted Child to Inherit — Generally. — The legislature has provided that an adopted child, from the date of its adoption, shall have the same property rights as a natural born child from the date of its birth. Headen v. Jackson, 255 N.C. 157, 120 S.E.2d 598 (1961).

Taken in conjunction with each other, subdivisions (1) and (3) of former G.S. 48-23 gave an adopted person the right to succeed to the estate of the adoptive parent upon intestacy, and to take under the will of the adoptive parent if the parent so provides. This result comes from a recognition of the absolute necessity, given the prevalence of adoptions in modern society, that adoption effect a complete substitution of families. Wachovia Bank & Trust Co. v. Chambless, 44 N.C. App. 95, 260 S.E.2d 688 (1979).

Same — Former Law. — Under former G.S. 48-6, as it stood prior to the 1941 amendment, the effect of adoption was simply to create a personal status between the adoptive parent and the child adopted, so that the adopted child might inherit from the adoptive parent such estate of the adoptive parent as such parent, during his lifetime, might voluntarily have given to such child. Phillips v. Phillips, 227 N.C. 438, 42 S.E.2d 604 (1947). See also, Grimes v. Grimes, 207 N.C. 778, 178 S.E. 573 (1935).

Under former G.S. 48-6, as it stood prior to the 1941 amendment, the adopted child could not inherit through the adoptive parent or from any source other than the "estate of the petitioner." The right to inherit was limited to the property of the adoptive parent, and the adopted child could not inherit from his father's ancestors or other kindred or be a representative of them. Grimes v. Grimes, 207 N.C. 778, 178 S.E. 573 (1935); Phillips v. Phillips, 227 N.C. 438, 42 S.E.2d 604 (1947). See also, Wilson v. Anderson, 232 N.C. 212, 59 S.E.2d 836 (1950).

Same — Effect of 1955 Act. — Any provision of law which prevented an adopted child from sharing in property by descent or distribution in the same manner and to the same extent as a natural born child was swept away by the repealing clause in Session Laws 1955, c. 813. Headen v. Jackson, 255 N.C. 157, 120 S.E.2d 598 (1961).

Under the provisions of Session Laws 1955, c. 813, s. 6, an adopted child is entitled to inherit property from the brother of the adopting parent, notwithstanding that the decree of adoption was entered prior to the passage of the statute, the legislature having the power to determine who shall take the property of a person dying subsequent to the effective date of a legislative act. Bennett v. Cain, 248 N.C. 428, 103 S.E.2d 510 (1958).

Same — From Adoptive Parents and Their Ancestors and Relatives. — The right of the adopted child to inherit, through the statutes of descent and distribution, from her adoptive parent or, through such parent, from that parent's intestate ancestor or collateral relative, is given her by this section. Peele v. Finch, 284 N.C. 375, 200 S.E.2d 635 (1973).

An adopted child shall be entitled to inherit property by, through and from his adoptive parents just as if he were born the legitimate child of the adoptive parents. Greenlee v. Quinn, 255 N.C. 601, 122 S.E.2d 409 (1961).

As to former law regarding inheritance from an adopted child, see Edwards v. Yearby, 168 N.C. 663, 85 S.E. 19 (1915).

III. WILLS AND OTHER WRITTEN INSTRUMENTS.

Enactment of former § 48-23(3) was within the power of the legislature. Peele v. Finch, 284 N.C. 375, 200 S.E.2d 635 (1973).

Legislative Intent in Enacting former § 48-23(3). — Former G.S. 48-23(3) of this section (see now subsection (e)) makes clear that the legislature intended a complete substitution of families and severance of the adopted child's legal ties with his natural parents, to embrace not only intestate succession but also property passing under deeds, grants, wills or other written instruments. Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

The purpose of the legislature in adding to this section former G.S. 48-23(3) (see now subsection (e)), enacted almost immediately after the decision in Thomas v. Thomas, 258 N.C. 590, 129 S.E.2d 239 (1963), was to change the law as there declared. Peele v. Finch, 284 N.C. 375, 200 S.E.2d 635 (1973).

Former § 48-23(3) (see now subsection (e)) applies to orders of adoption from other states, as well as those under North Carolina law. Wachovia Bank & Trust Co. v. Chambless, 44 N.C. App. 95, 260 S.E.2d 688 (1979).

Former § 48-23(3) (see now subsection (e)) does not abolish the rule that the intent of the testator controls the construction of his will. Peele v. Finch, 284 N.C. 375, 200 S.E.2d 635 (1973); Crumpton v. Mitchell, 303 N.C. 657, 281 S.E.2d 1 (1981).

It is well established that the cardinal principle in the construction of a will is to give effect to the intent of the testator as it appears from the language used in the instrument itself, subject to the limits imposed by statute or decision. Former G.S. 48-23(3) (see now subsection (e)) had not changed this principle, but has merely provided the courts with a clear and certain rule of construction to be applied unless a contrary intent plainly appears from the terms of the instrument. Stoney v. MacDougall, 31 N.C. App. 678, 230 S.E.2d 592 (1976), cert. denied, 291 N.C. 716, 232 S.E.2d 208 (1977).

Whether an adopted child would take under the will of her adoptive mother's father depended upon whether she was "issue" of her parent within the meaning of the will. Peele v. Finch, 284 N.C. 375, 200 S.E.2d 635 (1973).

The terms of former § 48-23(3) (see now subsection (e)) being clear, no construction of its provisions by the Supreme Court is required. Peele v. Finch, 284 N.C. 375, 200 S.E.2d 635 (1973).

Rule of Construction in Former § 48-23(3) (See Now Subsection (e)) Applies Irrespective of When Will Was Executed. — It is expressly provided by this section that the rule of construction in former G.S. 48-23(3) (see now subsection (e)) shall apply whether the will was executed before or after the final order of adoption and irrespective of whether the will was executed before or after the enactment of this section. Stoney v. MacDougall, 28 N.C. App. 178, 220 S.E.2d 368 (1975), cert. denied, 289 N.C. 302, 222 S.E.2d 702 (1976).

The rule of construction under this section, that the word "child" in a will shall be construed to include any adopted person unless the contrary plainly appears by the terms of the will itself, applies whether the will was executed before or after the final order of adoption and whether the will was executed before or after the enactment of this section. Simpson v. Simpson, 29 N.C. App. 14, 222 S.E.2d 747 (1976).

Inclusion of Adopted Child — In Term "Child." — The adopted child takes under a limitation to a "child" unless a contrary intent plainly appears by the terms of the will or conveyance. Peele v. Finch, 284 N.C. 375, 200 S.E.2d 635 (1973).

Same — In Term "Descendant." — Former G.S. 48-23(3) (see now subsection (e)), in providing that "descendant" includes any adopted person "unless the contrary plainly appears by the terms thereof" provides a clear and certain rule of construction to be applied unless a contrary intent plainly appears from the terms of the instrument. Wachovia Bank & Trust Co. v. Chambless, 44 N.C. App. 95, 260 S.E.2d 688 (1979).

Same — In Term "Issue." — The express provision of this section is that in any will the word "issue" shall be held to include any adopted person, unless the contrary plainly appears by the terms of the will itself. Stoney v. MacDougall, 28 N.C. App. 178, 220 S.E.2d 368 (1975), cert. denied, 289 N.C. 302, 222 S.E.2d 702 (1976).

Use of the words "my issue" in a will executed prior to this section was not a plain indication of a contrary intent sufficient to prevent the adopted children of an heir from sharing in the distribution of the principal upon termination of the trust created by the will. Stoney v. MacDougall, 28 N.C. App. 178, 220 S.E.2d 368 (1975), cert. denied, 289 N.C. 302, 222 S.E.2d 702 (1976).

Where nothing in the devise made by a will throws any light whatever upon testator's intent, courts must by this section hold that an adopted child is "issue" within the meaning of this will and takes thereunder a share in the proceeds of the land devised. Peele v. Finch, 284 N.C. 375, 200 S.E.2d 635 (1973).

The mere use of the word "issue" in an instrument drafted prior to the enactment of former G.S. 48-23(3) (see now subsection (e)) does not plainly reveal the contrary intent required by this section. Stoney v. MacDougall, 31 N.C. App. 678, 230 S.E.2d 592 (1976), cert. denied, 291 N.C. 716, 232 S.E.2d 208 (1977).

Right of Adopted Children to Take Under Trust. — The terms of this section, which are applied retroactively, give adopted children the same rights as natural children; thus, the adopted children of the settlor's daughter were entitled to take as "issue" or "descendants" under an irrevocable inter vivos trust, where no intention to exclude them appeared in the terms of the instrument. Gibbons v. Cole, 132 N.C. App. 777, 513 S.E.2d 834 (1999).

In determining whether adopted children shared in the distribution of a trust, the court was precluded by this section from considering a purported gift of stock made by the trust settlor to the adopted children, allegedly because of the settlor's mistaken assumption that the adoptees could not take as "issue" or "descendants." Gibbons v. Cole, 132 N.C. App. 777, 513 S.E.2d 834 (1999).

Will Indicating Intent to Exclude Adopted Children. — Where a trust provided benefits for named blood relatives of testator, with provision that this number could be increased only in the event that great nieces and great nephews were born within 21 years after testator's death, the will clearly indicated testator's intent to exclude children adopted by his nieces and nephews from the benefits, and therefore this section, by its express language, did not apply, and the children adopted by testator's nieces and nephews would not take under the will. Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 182 (1965).

Antilapse Statute Applied to Adopted Child of Legatee. — Where a parent by adoption was named a legatee in the will of her mother, but died prior to the death of her mother, the adopted child would take the personalty bequeathed his mother by adoption, even though the adoption was subsequent to the execution of the will, since under the provisions of this section the adopted child has the same standing as though he had been born to his adopted parent at the time of the adoption. Headen v. Jackson, 255 N.C. 157, 120 S.E.2d 598 (1961). See now § 31-42.

Right of Adopted Child to Take Under Will Under Former Law. — Former provisions corresponding to this section had reference to cases of the intestacy of persons standing in loco parentis, and did not apply where the property was disposed of by will. King v. Davis, 91 N.C. 142 (1884); Sorrell v. Sorrell, 193 N.C. 439, 137 S.E. 306 (1927).

Formerly, an adopted or legitimated child did not come within the terms of a devise to "heirs lawfully begotten." Love v. Love, 179 N.C. 115, 101 S.E. 562 (1919).

A deed to the grantor's daughter conveyed lands to be held, with remainder over as designated thereinafter, with habendum to her for her natural life, then over to any child or children she might leave surviving her in fee, qualified by the expression, "should any child or children born unto her predecease her the other such children should take in fee," with an ultimate and further contingent limitation over. It was held that a child adopted by the grantee after the death of the grantor, no other child having been born, was excluded as against the ultimate takers of the blood of the grantor provided by the deed. Tankersley v. Davis, 195 N.C. 542, 142 S.E. 765 (1928).

Under this section as it stood before the 1963 amendment, it was held that where a testator, in 1926, devised real property to a son for life and then to the children of said son living at the time of his death, a child adopted by the son after the death of the testator did not take as though he had been a natural born child of the son. Thomas v. Thomas, 258 N.C. 590, 129 S.E.2d 239 (1963).

§ 48-1-107. Other rights of adoptee.

A decree of adoption does not divest any vested property interest owned by the adoptee immediately prior to the decree of adoption including any public assistance benefit or child support payment due on or before the date of the decree. An adoption divests any property interest, entitlement, or other interest contingent on an ongoing family relationship with the adoptee's former family. (1949, c. 300; 1953, c. 824; 1955, c. 813, s. 5; 1963, c. 967; 1967, c. 619, s. 5; c. 880, s. 3; 1969, c. 21, ss. 3-6; 1971, c. 1231, s. 1; 1973, c. 849, s. 3; 1975, c. 91; 1981, c. 657; 1983, c. 454, s. 6; 1985, c. 67, ss. 1-4; c. 575, s. 1; 1989, c. 208; c. 727, s. 219(4); 1993, c. 553, s. 14; 1995, c. 457, s. 2.)

§ 48-1-108. Adoptees subject to Indian Child Welfare Act.

If the individual is an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. § 1901, et seq., then the provisions of that act shall control the individual's adoption. (1995, c. 457, s. 2.)

Cross References. — As to collaboration between Division of Social Services and Commission of Indian Affairs on Indian Child Welfare Issues, see G.S. 143B-139.5A.

§ 48-1-109. Which agencies may prepare assessments and reports to the court.

(a) Except as authorized in subsections (b) and (c) of this section, only a county department of social services in this State or an agency licensed by the Department may prepare preplacement assessments pursuant to Article 3 of this Chapter or reports to the court pursuant to Article 2 of this Chapter.

(b) A preplacement assessment prepared in another state may be used in this State only if:

(1) The prospective adoptive parent resided in the state where it was prepared; and

(2) The person or entity that prepared it was authorized by the law of that state to gather the necessary information.

An assessment prepared in another state that does not meet the requirements of this section and G.S. 48-3-303(c) through (h) must be updated by a county department of social services in this State or an agency licensed by the Department before being used in this State.

(c) An order for a report to the court must be sent to a county department of social services in this State or an agency licensed by the Department. If the petitioner moves to a different state before the agency completes the report, the agency shall request a report from an agency authorized to prepare such reports in the petitioner's new state of residence pursuant to the Interstate Compact on the Placement of Children, Article 38 of Chapter 7B of the General Statutes. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1983, c. 454, s. 5; 1991, c. 335, s. 2; 1995, c. 457, s. 2; 1998-202, s. 13(h).)

CASE NOTES

Editor's Note. — *The case below was decided prior to the 1995 revision of Chapter 48.*

Department of Social Services Has Duty to Make Investigations. — Under former G.S. 48-16(a), the legislature clearly vested the Department of Social Services with the duty and responsibility to make investigations regarding adoptions; thus, absent any responsibilities or duties to perform, the guardian ad litem is superfluous to an adoption proceeding. In re James S., 86 N.C. App. 364, 357 S.E.2d 430 (1987).

ARTICLE 2.

General Adoption Procedure.

Part 1. Jurisdiction and Venue.

§ 48-2-100. Jurisdiction.

(a) Adoption shall be by a special proceeding before the clerk of superior court.

(b) Except as provided in subsection (c) of this section, jurisdiction over adoption proceedings commenced under this Chapter exists if, at the commencement of the proceeding:

(1) The adoptee has lived in this State for at least the six consecutive months immediately preceding the filing of the petition or from birth;

(2) The prospective adoptive parent has lived in or been domiciled in this State for at least the six consecutive months immediately preceding the filing of the petition; or

(3) An agency licensed by this State or a county department of social services in this State has legal custody of the adoptee.

(c) The courts of this State shall not exercise jurisdiction under this Chapter if at the time the petition for adoption is filed, a court of any other state is exercising jurisdiction substantially in conformity with the Uniform Child-Custody Jurisdiction and Enforcement Act, Article 2 of Chapter 50A of the General Statutes. However, this subsection shall not apply if within 60 days after the date the petition for adoption is filed, the court of the other state dismisses its proceeding or releases its exclusive, continuing jurisdiction. (1949, c. 300; 1963, c. 699; 1967, c. 619, ss. 1-3; c. 693; c. 880, s. 3; 1969, c. 21, ss. 3-6; 1971, c. 233, s. 1; c. 395; c. 1231, s. 1; 1973, c. 849, s. 3; c. 1354, ss. 1-4; 1975, c. 91; 1979, c. 107, s. 6; 1981, c. 657; 1983, c. 454, s. 6; 1989, c. 208; c. 727, s. 219(4); 1993, c. 553, s. 14; 1995, c. 88, ss. 3, 4; c. 457, s. 2; 1999-223, s. 8; 2007-151, s. 2.)

Effect of Amendments. — Session Laws 2007-151, s. 2, effective October 1, 2007, and applicable to motions in the cause or petitions filed on or after that date, in subsection (b), deleted "and the prospective adoptive parent is domiciled in this State" following "birth" at the end of subdivision (b)(1), substituted "; or" for a period at the end of subdivision (b)(2), and added subdivision (b)(3); and added the last sentence in subsection (c).

Legal Periodicals. — For article on interstate and foreign adoptions in North Carolina, see 40 N.C.L. Rev. 691 (1962).

CASE NOTES

Editor's Note. — *Many of the cases below were decided prior to the 1995 revision of Chapter 48.*

The adoption of children is purely a statutory procedure. In re Daughtridge, 25 N.C. App. 141, 212 S.E.2d 519 (1975).

North Carolina recognizes the doctrine of equitable adoption. — Lankford v. Wright, 347 N.C. 115, 489 S.E.2d 604 (1997).

Equitable Adoption. — Equitable adoption, does not confer the incidents of formal statutory adoption; rather, it merely confers rights of inheritance upon the foster child in the event of intestacy of the foster parents. Lankford v. Wright, 347 N.C. 115, 489 S.E.2d 604 (1997).

Original Jurisdiction. — Adoption proceedings are within the original jurisdiction of the clerk of superior court. In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985).

Jurisdiction over Custody Matters. — In an adoption proceeding, the fact that the child had been placed by its mother with the department of social services and that the mother had signed a general consent for his adoption did not vest subject matter jurisdiction over all matters pertaining to the child's custody exclusively in the clerk of the superior court or in the superior court itself. Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979).

Transfer of Action to Superior Court. — The clerk of the superior court did not err in transferring plaintiffs' adoption action to the superior court, where a number of factual issues arose in determining whether defendant department of social services had unreasonably withheld its consent to allow plaintiffs to institute an adoption proceeding. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

The filing of an adoption petition in the superior court divests the district court of jurisdiction to adjudicate issues of custody with regard to the child who is the subject of the adoption petition. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Adoption proceedings are special proceedings and not civil actions. In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985).

Applicable Procedural Rules and Statutes. — Although an adoption proceeding is a special proceeding, no separate procedure is prescribed by statute, so the Rules of Civil Procedure, G.S. 1A-1, and the statutes governing special proceedings, G.S. 1-393 et seq., would apply. In re Searle, 74 N.C. App. 61, 327 S.E.2d 315 (1985).

Filing of Motion Alleging Abuse of Discretion in Adoption Process. — In view of this section, which provides that adoption proceedings shall be before the clerk of superior court, any motion alleging an abuse of discretion in the adoption process should be filed with the clerk of superior court within the 10-day period provided for in G.S. 7A-659(f) [see now G.S. 7B-908(f)]. In re N.C.L., 89 N.C. App. 79, 365 S.E.2d 213, cert. denied, 322 N.C. 481, 370 S.E.2d 226 (1988).

The trial court erred in placing child with petitioners for the purpose of adoption, since adoptions are permitted only upon the statutory procedure set out in this Chapter, by a special proceeding before the clerk of the superior court; moreover, there was no evidence to support the trial court's finding that the department of social services, which had custody of the child, "wrongfully and unreasonably withheld its consent for adoption." In re Sloop, 50 N.C. App. 201, 272 S.E.2d 611 (1980).

Simultaneous Adoption and Custody Actions. — Because the legislature has enunciated a public policy that every child should have a permanent plan of care, because adoption is more likely than a custody proceeding between non-parents to result in a permanent plan of care, and because the superior court has jurisdiction over adoptions, that court's jurisdiction supersedes that of the district court with regard to the custody of a child who is the subject of a simultaneous adoption and custody proceeding. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

In the absence an order of consolidation, when the same child is the subject of a simultaneous custody and adoption proceeding, both the superior and district courts do not have continuing jurisdiction to fully adjudicate the respective issues before them. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

The filing of an adoption petition in the superior court divests the district court of jurisdiction to adjudicate issues of custody with regard to the child who is the subject of the adoption petition. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Upon the entry of an interlocutory order of adoption by the superior court, the jurisdiction of the district court with regard to the custody of the child who is the subject of the interlocutory order is in abeyance until such time as the interlocutory decree is vacated, the adoption petition is dismissed or a final decree of adoption is entered. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

Because adoption is more likely than a custody proceeding between non-parents to result in a permanent plan of care for the child and because the superior court has jurisdiction over adoptions, that court's jurisdiction supersedes that of the district court with regard to the custody of a child who is the subject of a simultaneous adoption and custody proceeding; therefore, upon the entry of an interlocutory order of adoption by the superior court, the jurisdiction of the district court with regard to the custody of the child who is the subject of the interlocutory order is in abeyance until such time as the adoption petition is dismissed or a final decree of adoption is entered. Griffin v. Griffin, 118 N.C. App. 400, 456 S.E.2d 329 (1995).

When legal and physical custody of minor child vested in the Department of Social Services (DSS), it was then authorized to proceed in its discretion with placing child for adoption, and the trial court had no authority to interfere with the DSS's placement decision. In re Asbury, 125 N.C. App. 143, 479 S.E.2d 229 (1996).

§ 48-2-101. Venue.

A petition for adoption may be filed with the clerk of the superior court in the county in which:

(1) A petitioner lives, or is domiciled, at the time of filing;
(2) The adoptee lives; or
(3) An office of the agency that placed the adoptee is located. (1949, c. 300;

1967, c. 880, s. 3; 1969, c. 21, ss. 3-6; 1971, c. 233, s. 1; c. 1231, s. 1; 1973, c. 849, s. 3; 1975, c. 91; 1981, c. 657; 1989, c. 208; c. 727, s. 219(4); 1993, c. 553, s. 14; 1995, c. 88, s. 4; c. 457, s. 2.)

Legal Periodicals. — For article on interstate and foreign adoptions in North Carolina, see 40 N.C.L. Rev. 691 (1962).

§ 48-2-102. Transfer, stay, or dismissal.

(a) If the court, on its own motion or on motion of a party, finds in the interest of justice that the matter should be heard in another county where venue lies under G.S. 48-2-101, the court may transfer, stay, or dismiss the proceeding.

(b) If an adoptee is also the subject of a pending proceeding under Chapter 7B of the General Statutes, then the district court having jurisdiction under Chapter 7B shall retain jurisdiction until the final order of adoption is entered. The district court may waive jurisdiction for good cause. (1949, c. 300; 1971, c. 233, s. 1; 1995, c. 88, s. 4; c. 457, s. 2; 1998-202, s. 13(i).)

Legal Periodicals. — For article on interstate and foreign adoptions in North Carolina, see 40 N.C.L. Rev. 691 (1962).

For survey, "Why the Best Interests Standard Should Survive Petersen v. Rogers," see 73 N.C.L. Rev. 2451 (1995).

CASE NOTES

Editor's Note. — *The case below was decided prior to the 1995 revision of Chapter 48.*

Child Committed to Children's Home Society. — In a case arising under this Chapter before the 1949 revision, the evidence disclosed that the child in question was brought by its mother into the juvenile court of the county of their residence charged with being a dependent child, that the court committed it to the custody of a children's home society having its home office in another county of the State, but that the child was immediately taken by the person seeking to adopt it to that person's residence in another state. It was held that the child never resided in the county in which was located the home office of the children's home society, its mere commitment to the children's home not having had the effect of making the child's constructive residence there, and that adoption proceedings in that county were thus void, since the child was never within its jurisdiction. In re Holder, 218 N.C. 136, 10 S.E.2d 620 (1940).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinion below was issued prior to the 1995 revision of Chapter 48.*

Nature of Venue Provisions. — Venue provisions of former G.S. 48-12(a) are not mandatory except when objection is filed under former G.S. 48-12(b). See opinion of Attorney General to Mr. Robert M. Blackburn, 43 N.C.A.G. 122 (1973).

Under this section as it read prior to the 1971 amendment, venue provisions were mandatory and venue requirements could not be waived. See opinion of Attorney General to Mrs. Joan C. Holland, Supervisor of Adoptions, Department of Social Services, 41 N.C.A.G. 180 (1970).

Part 2. General Procedural Provisions.

§ 48-2-201. Appointment of attorney or guardian ad litem.

(a) The court may appoint an attorney to represent a parent or alleged parent who is unknown or whose whereabouts are unknown and who has not responded to notice of the adoption proceeding as provided in Part 4 of this Article.

(b) The court on its own motion may appoint an attorney or a guardian ad litem to represent the interests of the adoptee in a contested proceeding brought under this Chapter. (1995, c. 457, s. 2.)

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — The opinion below was issued prior to the 1995 revision of Chapter 48.

After an adoption proceeding has been terminated by issuance of the final order of adoption, and it becomes necessary to appoint a guardian for the adopted child, the appointment of the guardian should be made under the provisions of former Chapter 33 (see now Chapter 35A) rather than under this section. See opinion of Attorney General to Mr. Louis O'Conner, Jr., Director, Welfare Programs Division, State Department of Social Services, 40 N.C.A.G. 650 (1969).

§ 48-2-202. No right to jury.

All proceedings under this Chapter must be heard by the court without a jury. (1995, c. 457, s. 2.)

CASE NOTES

Cited in In re Adoption of Shuler, 162 N.C. App. 328, 590 S.E.2d 458, 2004 N.C. App. LEXIS 115 (2004).

§ 48-2-203. Confidentiality of proceedings under Chapter.

A judicial hearing in any proceeding pursuant to this Chapter shall be held in closed court. (1995, c. 457, s. 2.)

§ 48-2-204. Death of a joint petitioner pending final decree.

When spouses have petitioned jointly to adopt and one spouse dies before entry of a final decree, the adoption may nevertheless proceed in the names of both spouses. The name of the deceased spouse shall be entered as one of the adoptive parents on the new birth certificate prepared pursuant to Article 9 of this Chapter, and for purposes of inheritance, testate or intestate, the adoptee shall be treated as a child of the deceased. (1949, c. 300; 1995, c. 457, s. 2.)

CASE NOTES

Editor's Note. — The opinion below was decided prior to the 1995 revision of Chapter 48.

Consent to Adoption by Surviving Spouse. — Former G.S. 48-18(b) overlooks the possibility that the written consent of the natural parent might not allow for adoption by a surviving spouse. In re Kasim, 58 N.C. App. 36, 293 S.E.2d 247, cert. denied, 306 N.C. 742, 295 S.E.2d 478 (1982).

§ 48-2-205. Recognition of adoption decrees from other jurisdictions.

A final adoption decree issued by any other state must be recognized in this State. Where a child has been previously adopted in a foreign country by petitioners seeking to readopt the child under the laws of North Carolina, the adoption order entered in the foreign country may be accepted in lieu of the consent of the biological parent or parents or the guardian of the child to the readoption. (1975, c. 262; 1983, c. 454, s. 6; 1995, c. 457, s. 2.)

CASE NOTES

North Carolina recognizes the doctrine of equitable adoption. — Lankford v. Wright, 347 N.C. 115, 489 S.E.2d 604 (1997).

Equitable Adoption. — Equitable adoption does not confer the incidents of formal statutory adoption; rather, it merely confers rights of inheritance upon the foster child in the event of intestacy of the foster parents. Lankford v. Wright, 347 N.C. 115, 489 S.E.2d 604 (1997).

§ 48-2-206. Prebirth determination of right to consent.

(a) At any time after six months from the date of conception as reasonably determined by a physician, the biological mother, agency, or adoptive parents chosen by the biological mother may file a special proceeding with the clerk requesting the court to determine whether consent of the biological father is required. The biological father shall be served with notice of the intent of the biological mother to place the child for adoption, allowing the biological father 15 days after service to assert a claim that his consent is required.

(b) The notice required under subsection (a) of this section shall contain the special proceeding case caption and file number and shall be substantially similar to the following language:

> "[Name of the biological mother], the biological mother, is expected to give birth to a child on or about [birth due date]. You have been identified as the biological father. It is the intention of the biological mother to place the child for adoption. It is her belief that your consent to the adoption is not required. If you believe your consent to the adoption of this child is required pursuant to G.S. 48-3-601, you must notify the court in writing no later than 15 days from the date you received this notice that you believe your consent is required. A copy of your notice to the court must also be sent to the person or agency that sent you this notice. If you fail to notify the court within 15 days that you believe your consent is required, the court will rule that your consent is not required."

(c) If the biological father fails to respond within the time required, the court shall enter an order that the biological father's consent is not required for the adoption. A biological father who fails to respond within the time required under this section is not entitled to notice under G.S. 48-2-401(c) of an adoption petition filed within three months of the birth of the minor or to participate in the adoption proceeding.

(d) If the biological father notifies the court within 15 days of his receipt of the notice required by subsection (a) of this section that he believes his consent to the adoption is required, on motion of the petitioner, the court shall hold a hearing to determine whether the consent of the biological father is required. Promptly on receipt of the petitioner's motion, the court shall set a date for the hearing no earlier than 60 days nor later than 70 days after the biological father received the notice required by subsection (a) of this section and shall notify the petitioner and the biological father of the date, time, and place of the hearing. The notice of hearing to the biological father shall include a statement substantially similar to the following:

> "To the biological father named above: You have told the court that you believe your consent is necessary for the adoption of the child described in the notice sent to you earlier. This hearing is being held to decide whether your consent is in fact necessary. Before the date of the hearing, you must have taken steps under G.S. 48-3-601 to establish that your consent is necessary or this court will decide that your consent is not necessary and the child can be adopted without it."

During the hearing, the court may take such evidence as necessary and enter an order determining whether or not the consent of the biological father is necessary. If the court determines that the consent of the biological father is not required, that individual is not entitled to receive notice under G.S. 48-2-401(c) of an adoption petition filed within three months of the birth of the minor or to participate in the adoption proceeding.

(e) The manner of service under this section shall be the same as set forth in G.S. 48-2-402.

(f) The jurisdiction provisions of Article 6A of Chapter 1 of the General Statutes and the venue provisions of Article 7 of Chapter 1 of the General Statutes rather than the provisions of Part 1 of this Article apply to proceedings under this section.

(g) Computation of periods of time provided for in this section shall be calculated as set forth in G.S. 1A-1, Rule 6.

(h) Transfer under G.S. 1-301.2 and appeal under G.S. 1-279.1 shall be as for an adoption proceeding.

(i) A determination by the court under this section that the consent of the biological father is not required shall only apply to an adoption petition filed within three months of the birth of the minor. (1997-215, s. 14; 2002-159, s. 11; 2005-166, s. 1.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

§ 48-2-207. Necessity of consent post-petition.

(a) If any individual described in G.S. 48-2-401(c)(3) is served with notice of the filing of the petition in accordance with G.S. 48-2-402 and fails to respond within the time specified in the notice, the court, upon motion by the petitioner, shall enter an order under G.S. 48-3-603(a)(7) that the individual's consent is not required for the adoption.

(b) The court shall hold a hearing to take evidence and determine whether an individual's consent to an adoption is required if any of the following:

(1) Any individual described in G.S. 48-2-401(c)(3) who has been served with notice of the filing of the petition in accordance with G.S. 48-2-402 notifies the court within the time specified in the notice that he believes his consent to the adoption is required.

(2) Any individual who has not been served with the notice of the filing of the petition intervenes in the adoption proceeding alleging that his or her consent to the adoption is required.

(c) If the court determines that the consent of any individual is required, the adoption cannot proceed until such individual's consent is obtained or such individual's parental rights are terminated. If the individual whose consent is required did not have physical custody of the minor immediately prior to the placement of the minor with the prospective adoptive parents, a finding that such individual's consent is required does not entitle such individual to physical custody of the minor.

(d) If the court determines that the consent of any individual described in G.S. 48-2-401(c)(3) is not required, such individual shall not be entitled to receive notice of, or to participate in, further proceedings in the adoption. (2005-166, s. 2.)

Editor's Note. — Session Laws 2005-166, s. 7, made this section effective October 1, 2005, and applicable to actions filed on or after that date.

Part 3. Petition for Adoption.

§ 48-2-301. Petition for adoption; who may file.

(a) A prospective adoptive parent may file a petition for adoption pursuant to Article 3 of this Chapter only if a minor has been placed with the prospective adoptive parent pursuant to Part 2 of Article 3 of this Chapter unless the requirement of placement is waived by the court for cause.

(b) Except as authorized by Articles 4 and 6 of this Chapter, the spouse of a petitioner must join in the petition, unless the spouse has been declared incompetent or unless this requirement is otherwise waived by the court for cause.

(c) If the individual who files the petition is unmarried, no other individual may join in the petition. (1949, c. 300; 1963, c. 699; 1967, c. 619, ss. 1-3; c. 693; c. 880, s. 3; 1969, c. 21, ss. 3-6; 1971, c. 395; c. 1231, s. 1; 1973, c. 849, s. 3; c. 1354, ss. 1-4; 1975, c. 91; 1979, c. 107, s. 6; 1981, c. 657; 1983, c. 454, s. 6; 1989, c. 208; c. 727, s. 219(4); 1993, c. 553, s. 14; 1995, c. 88, s. 3; c. 457, s. 2.)

CASE NOTES

Editor's Note. *— The cases below were decided prior to the 1995 revision of Chapter 48.*

Wife's failure to "join" in her husband's petition for the adoption of her two minor children by a previous marriage in no way affected her relationship with the children and was immaterial to a determination of her husband's distributive share under former G.S. 30-3(d). In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Withdrawal of One Spouse After Entry of Interlocutory Decree. — The former version of this Chapter was silent on the question of what effect the withdrawal of one spouse from the petition has on the proceedings when the interlocutory decree has already been entered. In re Kasim, 58 N.C. App. 36, 293 S.E.2d 247, cert. denied, 306 N.C. 742, 295 S.E.2d 478 (1982).

Earlier decision setting aside termination order did not "void" basis of subsequent adoption proceeding or earlier termination proceeding, but simply held that termination order must be set aside since the service on putative father was void. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989).

§ 48-2-302. Time for filing petition.

(a) Except for petitions filed pursuant to Articles 4 and 6 of this Chapter, a petition for adoption must be filed no later than 30 days after a minor is placed with the petitioner or this State acquires jurisdiction to hear the petition, whichever is later, unless the court extends the time for filing.

(b) If a petition is not filed in accordance with subsection (a) of this section, any person may notify the county department of social services for appropriate action.

(c) A petition for adoption may be filed concurrently with a petition to terminate parental rights. (1949, c. 300; 1957, c. 90; c. 778, s. 3; 1971, c. 1185, s. 17; 1975, c. 321, s. 1; 1977, c. 879, s. 2; 1979, c. 107, s. 7; 1985, c. 758, ss. 5-9; 1987, c. 371, s. 1; 1995, c. 457, s. 2.)

§ 48-2-303. Caption of petition for adoption.

The caption of the petition shall be substantially as follows:

STATE OF NORTH CAROLINA
IN THE DISTRICT COURT
______________________ COUNTY
BEFORE THE CLERK

______________________ *(Full name of petitioning father) and ______________________ *(Full name of petitioning mother) and FOR THE ADOPTION OF ______________________	PETITION FOR ADOPTION

*(Full name by which the adoptee is to be known if the adoption is granted). (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1995, c. 88, s. 5; c. 457, s. 2; 1997-215, s. 9(d).)

§ 48-2-304. Petition for adoption; content.

(a) The original petition for adoption must be signed and verified by each petitioner, and the original and two exact or conformed copies shall be filed with the clerk of court. The petition shall state:

(1) Each petitioner's full name, current address, place of domicile if different from current address, and whether each petitioner has resided or been domiciled in this State for the six months immediately preceding the filing of the petition;
(2) The marital status and gender of each petitioner;
(3) The sex and, if known, the date and state or country of birth of the adoptee;
(4) The full name by which the adoptee is to be known if the petition is granted;
(5) That the petitioner desires and agrees to adopt and treat the adoptee as the petitioner's lawful child; and
(6) A description and estimate of the value of any property of the adoptee.

(b) Any petition to adopt a minor shall also state:

(1) The length of time the adoptee has been in the physical custody of the petitioner.
(2) If the adoptee is not in the physical custody of the petitioner, the reason why the petitioner does not have physical custody and the date and manner in which the petitioner intends to acquire custody.
(3) That the petitioner has the resources, including those available under a subsidy for an adoptee with special needs, to provide for the care and support of the adoptee.
(4) Any information required by the Uniform Child-Custody Jurisdiction and Enforcement Act, Article 2 of Chapter 50A of the General Statutes, which is known to the petitioner.
(5) That any required assessment has been completed or updated within the 18 months before the placement.
(6) That all necessary consents, relinquishments, or terminations of parental rights have been obtained and will be filed as additional documents with the petition; or that the necessary consents, relinquishments, and terminations of parental rights that have been obtained will be filed as additional documents with the petition, along with the document listing the names of any other individuals whose consent, relinquishment, or termination of rights may be necessary but has not been obtained.

(c) A petition to adopt a minor under Article 3 of this Chapter shall also state all of the following:

(1) A description of the source of placement and the date of placement of the adoptee with the petitioner.
(2) That the provisions of the Interstate Compact on the Placement of Children, Article 38 of Chapter 7B of the General Statutes, were followed if the adoptee was brought into this State from another state for purposes of adoption, or that a statement is attached describing the circumstances of any noncompliance.

(d) A petition to adopt a minor under Article 4 of this Chapter shall also state:

(1) The date of the petitioner's marriage, the name of the petitioner's spouse, and whether the spouse is deceased or has been adjudicated incompetent;

(2) The length of time the petitioner's spouse or the petitioner has had legal custody of the adoptee and the circumstances under which custody was acquired; and

(3) That the adoptee has resided primarily with the petitioner or with the petitioner and the petitioner's spouse during the six months immediately preceding the filing of the petition.

(e) Any petition to adopt an adult shall also state:

(1) The name, age, and last known address of any child of the prospective adoptive parent, including a child previously adopted by the prospective adoptive parent or the adoptive parent's spouse, and the date and place of the adoption; and

(2) The name, age, and last known address of any living parent, spouse, or child of the adoptee.

(f) The Department may promulgate a standard adoption petition. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1995, c. 88, s. 5; c. 457, s. 2; 1998-202, s. 13(k); 1999-223, s. 9; 2001-150, s. 2; 2005-166, s. 3.)

CASE NOTES

Editor's Note. — *The cases below were decided prior to the 1995 revision of Chapter 48.*

Collateral Attack on Adoption by Party Thereto. — The provisions of former G.S. 48-28 would prevent a collateral attack by husband on adoption of wife's child, where he was a party to the proceeding. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Subsequently Filed Affidavit Did Not Relate Back to Original Filing Date. — Where termination order, later held to be invalid for failure to use due diligence in ascertaining putative father's address, was filed with an adoption petition in lieu of affidavit required by former G.S. 48-13, subsequently filed affidavit did not relate back to original filing date of petition so as to cut off rights of putative father who filed legitimation petition to former G.S. 49-10 before affidavit was filed. In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

§ 48-2-305. Petition for adoption; additional documents.

At the time the petition is filed, the petitioner shall file or cause to be filed the following documents:

(1) Any required affidavit of parentage executed under G.S. 48-3-206.

(2) Any required consent or relinquishment that has been executed.

(3) A certified copy of any court order terminating the rights and duties of a parent or a guardian of the adoptee.

(4) A certified copy of any court order or pleading in a pending proceeding concerning custody of or visitation with the adoptee.

(5) A copy of any required preplacement assessment certified by the agency that prepared it and any certificate of service required by G.S. 48-3-307 or an affidavit from the petitioner stating why the assessment is not available.

(6) A copy of any document containing the information required under G.S. 48-3-205 concerning the health, social, educational, and genetic history of the adoptee and the adoptee's original family which the petitioner received before the placement or at any later time, certified by the person who prepared it, or if this document is not available, an affidavit stating the reason why it is not available.

(7) Any signed copy of the form required by the Interstate Compact on the Placement of Children, Article 38 of Chapter 7B of the General Statutes, authorizing a minor to come into this State, or any statement required by G.S. 48-2-304(c) describing the circumstances of any noncompliance.

(8) A writing that states the name of any individual whose consent is or may be required, but who has not executed a consent or a relinquish-

ment or whose parental rights have not been legally terminated, and any fact or circumstance that may excuse the lack of consent or relinquishment.

(9) In an adoption pursuant to Article 4 of this Chapter, a copy of any agreement to release past-due child support payments.

(10) Any consent to an agency by a placing parent and adopting parents to release identifying information under G.S. 48-9-109.

The petitioner may also file any other document necessary or helpful to the court's determination. (1949, c. 300; 1953, c. 906; 1961, c. 186; 1969, c. 911, s. 7; c. 982; 1975, c. 702, ss. 1-3; 1977, c. 879, s. 5; 1985, c. 758, ss. 10, 11; 1995, c. 457, s. 2; 1997-215, s. 1; 1998-202, s. 13(m); 2001-150, s. 3; 2005-166, s. 4.)

Editor's Note. — Subdivision (7), as amended by Session Laws 2005-166, s. 4, effective October 1, 2005, is applicable to actions filed on or after that date.

CASE NOTES

Applied in In re Cunningham, 151 N.C. App. 410, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002).

§ 48-2-306. Omission of required information.

(a) Before entry of a decree of adoption, the court may require or allow the filing of any additional information required by this Chapter.

(b) After entry of a decree of adoption, omission of any information required by G.S. 48-2-304 and G.S. 48-2-305 does not invalidate the decree. (1995, c. 457, s. 2.)

Part 4. Notice of Pendency of Proceedings.

§ 48-2-401. Notice by petitioner.

(a) No later than 30 days after a petition for adoption is filed pursuant to Part 3 of this Article, the petitioner shall serve notice of the filing on the persons required to receive notice under subsections (b), (c), and (d) of this section.

(b) In all adoptions, the petitioner shall serve notice of the filing on each of the following:

(1) Any individual whose consent to the adoption is required but has not been obtained, has been revoked in accord with this Chapter, or has become void as provided in this Chapter.

(2) The spouse of the petitioner if that spouse is required to join in the petition and petitioner is requesting that the joinder requirement be waived, provided the court for cause may waive this notice requirement.

(3) Any individual who has executed a consent or relinquishment, but who the petitioner has actually been informed has filed an action to set it aside for fraud or duress.

(4) Any other person designated by the court who can provide information relevant to the proposed adoption.

(c) In the adoption of a minor, the petitioner shall also serve notice of the filing on each of the following:

(1) A minor whose consent is dispensed with under G.S. 48-3-603(b)(2).

(2) Any agency that placed the adoptee.

(3) A man who to the actual knowledge of the petitioner claims to be or is named as the biological or possible biological father of the minor, and

any biological or possible biological fathers who are unknown or whose whereabouts are unknown, but notice need not be served upon a man who has executed a consent, a relinquishment, or a notarized statement denying paternity or disclaiming any interest in the minor, a man whose parental rights have been legally terminated or who has been judicially determined not to be the minor's parent, or, provided the petition is filed within three months of the birth of the minor, a man whose consent to the adoption has been determined not to be required under G.S. 48-2-206.

(4) Any individual who the petitioner has been actually informed has legal or physical custody of the minor or who has a right of visitation or communication with the minor under an existing court order issued by a court in this State or another state.

(d) In the adoption of an adult, the petitioner shall also serve notice of the filing on any adult children of the prospective adoptive parent and any parent, spouse, or adult child of the adoptee who are listed in the petition to adopt; provided the court for cause may waive the requirement of notice to a parent of an adult adoptee.

(e) Only those persons identified in subsections (b), (c), and (d) of this section are entitled to notice of the proceeding.

(f) A notice required under this section must state that the person served must file a response to the petition within 30 days after service in order to participate in and to receive further notice of the proceeding, including notice of the time and place of any hearing. (1949, c. 300; 1957, c. 778, s. 5; 1969, c. 911, s. 6; 1971, c. 1093, s. 13; 1973, c. 1354, s. 5; 1983, c. 30; c. 454, ss. 2, 6; 1995, c. 457, s. 2; 1997-215, s. 2; 2001-208, s. 12; 2001-487, s. 101; 2005-166, s. 5.)

Editor's Note. — Subsection (b) and subdivisions (b2) and (c)(3), as amended by Session Laws 2005-166, s. 3, effective October 1, 2005, are applicable to actions filed on or after that date.

§ 48-2-402. Manner of service.

(a) Service of the notice required under G.S. 48-2-401 must be made as provided by G.S. 1A-1, Rule 4, for service of process.

(b) In the event that the identity of a biological or possible biological parent cannot be ascertained and notice is required, the parent or possible parent shall be served by publication pursuant to G.S. 1A-1, Rule 4 (j1). The time for response shall be the time provided in the rule. The words "In re Doe" may be substituted for the title of the action in the notice as long as the notice contains the correct docket number. The notice shall be directed to "the unknown father [or mother] of" the adoptee, and the adoptee shall be described by sex, date of birth, and place of birth. The notice shall contain any information known to the petitioner that would allow an unknown parent or possible parent to identify himself or herself as the individual being addressed, such as the approximate date and place of conception, any name by which the other biological parent was known to the unknown parent or possible parent, and any fact about the unknown parent or possible parent known to or believed by the other biological parent. The notice shall also state that any parental rights the unknown parent or possible parent may have will be terminated upon entry of the order of adoption.

(c) In an agency placement under Article 3 of this Chapter, the agency or other proper person shall file a petition to terminate the parental rights of an unknown parent or possible parent instead of serving notice under subsection (b) of this section, and the court shall stay any adoption proceeding already filed, except that nothing in this subsection shall require that the agency or other proper person file a petition to terminate the parental rights of any known or possible parent who has been served notice as provided under G.S. 1A-1, Rule 4(j)(1) of the Rules of Civil Procedure. (1949, c. 300; 1957, c. 778, s. 5; 1969, c. 911, s. 6; 1971, c. 1093, s. 13; 1973, c. 1354, s. 5; 1983, c. 30; c. 454, ss. 2, 6; 1995, c. 457, s. 2; 2001-150, s. 4.)

§ 48-2-403. Notice of proceedings by clerk.

No later than five days after a petition is filed, the clerk of the court shall mail or otherwise deliver notice of the adoption proceeding to any agency that has undertaken but not yet completed a preplacement assessment and any agency ordered to make a report to the court pursuant to Part 5 of this Article. (1995, c. 457, s. 2; 1997-215, s. 3.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

§ 48-2-404. Notice of proceedings by court to alleged father.

If, at any time in the proceeding, it appears to the court that there is an alleged father of a minor adoptee as described in G.S. 48-2-401(c)(3) who has not been given notice, the court shall require notice of the proceeding to be given to him pursuant to G.S. 48-2-402. (1995, c. 457, s. 2.)

§ 48-2-405. Rights of persons entitled to notice.

Except as provided in G.S. 48-2-206(c), 48-2-206(d), and 48-2-207(d), a person entitled to notice whose consent is not required may appear and present evidence only as to whether the adoption is in the best interest of the adoptee. (1995, c. 457, s. 2; 2005-166, s. 6.)

§ 48-2-406. Waiver of notice; effect.

(a) If notice is required under this Part, it may be waived in open court by the person entitled to receive it or by an agent authorized by that person; it may also be waived at any time in a writing signed by the person entitled to receive the notice.

(b) A person who has executed a consent or relinquishment or otherwise waived notice is not a necessary party and, except as provided in subsection (c) of this section, is not entitled to appear in any subsequent proceeding related to the petition.

(c) A parent who has executed a consent or relinquishment may appear in the adoption proceeding for the limited purpose of moving to set aside the consent or relinquishment on the grounds that it was obtained by fraud or duress. (1949, c. 300; 1957, c. 778, s. 5; 1969, c. 911, s. 6; 1971, c. 1093, s. 13; 1973, c. 1354, s. 5; 1983, c. 30; c. 454, ss. 2, 6; 1995, c. 457, s. 2.)

§ 48-2-407. Filing proof of service.

Proof of service of notice on each person entitled to receive notice under this Part, or a certified copy of each waiver of notice, must be filed with the court before the hearing on the adoption begins. (1995, c. 457, s. 2.)

Part 5. Report to the Court.

§ 48-2-501. Report to the court during proceeding for adoption of a minor.

(a) Whenever a petition for adoption of a minor is filed, the court shall order a report to the court made to assist the court to determine if the proposed adoption of the minor by the petitioner is in the minor's best interest.

(b) Consistent with G.S. 48-1-109, the court shall order the report to be prepared:

(1) By the agency that placed the minor;
(2) By the agency that made the preplacement assessment pursuant to Part 3 of Article 3 of this Chapter; or
(3) By another agency.

(c) The court shall provide the individual who prepares the report with copies of:

(1) The petition to adopt; and
(2) The documents filed with it.

(d) As an exception to this section, in any stepparent adoption under Article 4 of this Chapter in which the minor has lived with the stepparent for at least the two consecutive years immediately preceding the filing of the petition, the court may order a report, but it is not required to order a report unless the minor's consent is to be waived, the minor has revoked a consent, or both of the minor's parents are dead. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1983, c. 454, s. 5; 1991, c. 335, s. 2; 1995, c. 457, s. 2; 1997-215, s. 12(a).)

CASE NOTES

Department of Social Services Has Duty to Make Investigations. — Under former G.S. 48-16(a), the legislature clearly vested the Department of Social Services with the duty and responsibility to make investigations regarding adoptions; thus, absent any responsibilities or duties to perform, the guardian ad litem is superfluous to an adoption proceeding. In re James S., 86 N.C. App. 364, 357 S.E.2d 430 (1987) (decided under prior law).

Applied in Fakhoury v. Fakhoury, 171 N.C. App. 104, 613 S.E.2d 729, 2005 N.C. App. LEXIS 1163 (2005), cert. denied, 360 N.C. 62, 621 S.E.2d 622 (2005).

§ 48-2-502. Preparation and content of report.

(a) In preparing a report to the court, the agency shall conduct a personal interview with each petitioner in the petitioner's residence and at least one additional interview with each petitioner and the adoptee, and shall observe the relationship between the adoptee and the petitioner or petitioners.

(b) The report must be in writing and contain:

(1) An account of the petitioner's marital or family status, physical and mental health, home environment, property, income, and financial obligations; if there has been a preplacement assessment, the account may be limited to any changes since the filing of the preplacement assessment;
(2) All reasonably available nonidentifying information concerning the physical, mental, and emotional condition of the adoptee required by G.S. 48-3-205 which is not already included in the document prepared under that section;
(3) Copies of any court order, judgment, decree, or pending legal proceeding affecting the adoptee, the petitioner, or any child of the petitioner relevant to the welfare of the adoptee;

(4) A list of the expenses, fees, or other charges incurred, paid, or to be paid in connection with the adoption that can reasonably be ascertained by the agency;
(5) Any fact or circumstance known to the agency that raises a specific concern about whether the proposed adoption is contrary to the best interest of the adoptee because it poses a significant risk of harm to the well-being of the adoptee;
(6) A finding by the agency concerning the suitability of the petitioner and the petitioner's home for the adoptee;
(7) A recommendation concerning the granting of the petition; and
(8) Such other information as may be required by rules adopted pursuant to subsection (c) of this section.

In an agency adoption, the report shall be written in such a way as to exclude all information that could reasonably be expected to lead directly to the identity of the adoptee at birth or any former parent or family member of the adoptee, and any copies of documents included pursuant to subdivision (3) of this subsection shall be redacted to exclude this information.

(c) The Social Services Commission may adopt rules to implement the provisions of this section. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1983, c. 454, s. 5; 1991, c. 335, s. 2; 1995, c. 457, s. 2; 1997-215, s. 4.)

CASE NOTES

Editor's Note. *— The case below was decided prior to the 1995 revision of Chapter 48.*

Department of Social Services Has Duty to Make Investigations. — Under former G.S. 48-16(a), the legislature clearly vested the Department of Social Services with the duty and responsibility to make investigations regarding adoptions; thus, absent any responsibilities or duties to perform, the guardian ad litem is superfluous to an adoption proceeding. In re James S., 86 N.C. App. 364, 357 S.E.2d 430 (1987).

§ 48-2-503. Timing and filing of report.

(a) The agency shall complete a written report and file it with the court within 60 days after the mailing or delivery of the order under G.S. 48-2-501 unless the court extends the time for filing. The agency shall have three additional days to complete and file the report if the order was mailed.

(b) If the agency identifies a specific concern about the suitability of the petitioner or the petitioner's home for the adoptee, the agency must file an interim report immediately, which must contain an account of the specific concern. The agency shall indicate in the final report whether its concerns have been satisfied and in what manner.

(b1) When an agency identifies a specific concern in a final report and the court extends the time for a final hearing or disposition to allow resolution of these concerns, the agency shall file a supplemental report indicating whether its concerns have been satisfied and in what manner.

(c) The agency shall give the petitioner a copy of each report filed with the court, and the agency shall retain a copy. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1983, c. 454, s. 5; 1991, c. 335, s. 2; 1995, c. 457, s. 2; 1997-215, s. 5(a)-(c).)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

§ 48-2-504. Fee for report.

(a) An agency that prepares a report to the court may charge the petitioner a reasonable fee for preparing and writing the report. No fee may be charged except pursuant to a written fee agreement which must be signed by the parties to be charged prior to the beginning of the preparation. The fee agreement may not be based on the outcome of the report or the adoption proceeding.

(b) A fee for a report is subject to review by the court pursuant to G.S. 48-2-602 and G.S. 48-2-603.

(c) The Department shall set the maximum fees, based on ability to pay and other factors, which may be charged by county departments of social services. The Department shall require waiver of fees for those unable to pay. Fees collected under this section shall be applied to the costs of preparing and writing reports and shall be used by the county department of social services to supplement and not to supplant appropriated funds. (1995, c. 457, s. 2.)

Part 6. Dispositional Hearing; Decree of Adoption.

§ 48-2-601. Hearing on, or disposition of, adoption petition; transfer of adoption proceeding; timing.

(a) If it appears to the court that a petition to adopt a minor is not contested, the court may dispose of the petition without a formal hearing.

(a1) If an issue of fact, an equitable defense, or a request for equitable relief is raised before the clerk, the clerk shall transfer the proceeding to the district court under G.S. 1-301.2.

(b) No later than 90 days after a petition for adoption has been filed, the court shall set a date and time for hearing or disposing of the petition.

(c) The hearing or disposition must take place no later than six months after the petition is filed, but the court for cause may extend the time for the hearing or disposition. (1949, c. 300; 1953, c. 571; 1959, cc. 340, 561; 1961, cc. 186, 384; 1967, c. 19; c. 619, s. 4; 1969, c. 982; 1973, c. 1354, s. 6; 1989 (Reg. Sess., 1990), c. 977, s. 1; 1995, c. 457, s. 2; 1997-215, s. 10(a); 2002-159, s. 12.)

§ 48-2-602. Disclosure of fees and charges.

At least 10 days before the date of the hearing or disposition, each petitioner shall file with the court an affidavit accounting for any payment or disbursement of money or anything of value made or agreed to be made by or on behalf of each petitioner in connection with the adoption, or pursuant to Article 10, including the amount of each payment or disbursement made or to be made and the name and address of each recipient. The court in its discretion may request a more specific statement of any fees, charges, or payments made or to be made by any petitioner in connection with the adoption. (1995, c. 457, s. 2.)

§ 48-2-603. Hearing on, or disposition of, petition to adopt a minor.

(a) At the hearing on, or disposition of, a petition to adopt a minor, the court shall grant the petition upon finding by a preponderance of the evidence that the adoption will serve the best interest of the adoptee, and upon finding the following:

(1) At least 90 days have elapsed since the filing of the petition for adoption, unless the court for cause waives this requirement.

(2) The adoptee has been in the physical custody of the petitioner for at least 90 days, unless the court for cause waives this requirement.
(3) Notice of the filing of the petition has been served on any person entitled to receive notice under Part 4 of this Article.
(4) Each necessary consent, relinquishment, waiver, or judicial order terminating parental rights, has been obtained and filed with the court and the time for revocation has expired.
(5) Any assessment required by this Chapter has been filed with and considered by the court.
(6) If applicable, the requirements of the Interstate Compact on the Placement of Children, Article 38 of Chapter 7B of the General Statutes, have been met.
(7) Any motion to dismiss the proceeding has been denied.
(8) Each petitioner is a suitable adoptive parent.
(9) Any accounting and affidavit required under G.S. 48-2-602 has been reviewed by the court, and the court has denied, modified, or ordered reimbursement of any payment or disbursement that violates Article 10 or is unreasonable when compared with the expenses customarily incurred in connection with an adoption.
(10) The petitioner has received information about the adoptee and the adoptee's biological family if required by G.S. 48-3-205.
(10a) Any certificate of service required by G.S. 48-3-307 has been filed.
(11) There has been substantial compliance with the provisions of this Chapter.

(b) If the Court finds a violation of this Chapter pursuant to Article 10 or of the Interstate Compact on the Placement of Children, Article 38 of Chapter 7B of the General Statutes, but determines that in every other respect there has been substantial compliance with the provisions of this Chapter, and the adoption will serve the best interest of the adoptee, the court shall:
(1) Grant the petition to adopt; and
(2) Impose the sanctions provided by this Chapter against any individual or entity who has committed a prohibited act or report the violations to the appropriate legal authorities.

(c) The court on its own motion may continue the hearing for further evidence. (1949, c. 300; 1953, c. 571; 1959, cc. 340, 561; 1961, cc. 186, 384; 1967, c. 19; c. 619, s. 4; 1969, c. 982; 1973, c. 476, s. 138; c. 1354, s. 6; 1989 (Reg. Sess., 1990), c. 977, s. 1; 1995, c. 457, s. 2; 1998-202, s. 13(l); 2001-150, s. 5.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

CASE NOTES

Applied in In re Cunningham, 151 N.C. App. 410, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002).

§ 48-2-604. Denying petition to adopt a minor.

(a) If at any time between the filing of a petition to adopt a minor and the issuance of the final order completing the adoption it appears to the court that the minor should not be adopted by the petitioners or the petition should be dismissed for some other reason, the court may dismiss the proceeding.

(b) The court, before entering an order to dismiss the proceeding, shall give at least five days' notice of the motion to dismiss to the parties, to the agency that made the report to the court, and to the Department of Health and Human

Services. The parties and agency entitled to notice under this subsection, and the Department, shall be entitled to a hearing on the issue of dismissing the proceeding.

(c) If the court denies the petition, the custody of the minor shall revert to any agency or person having custody immediately before the filing of the petition. If the placement of the minor was a direct placement under Article 3 of this Chapter, the court shall notify the director of social services of the county in which the petition was filed of the dismissal, and the director of social services shall be responsible for taking appropriate action for the protection of the minor. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1983, c. 454, s. 6.; 1995, c. 457, s. 2; 1997-215, s. 6(a); 1997-443, s. 11A.118(b).)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

CASE NOTES

Editor's Note. — *The case below was decided prior to the 1995 revision of Chapter 48.*

Court May Consider Many Factors. — This section allows the court to consider many factors which might bear on the question of dismissal. The factors considered should relate to the state legislative policy, which is the framework of adoption in this State. In re Kasim, 58 N.C. App. 36, 293 S.E.2d 247, cert. denied, 306 N.C. 742, 295 S.E.2d 478 (1982).

Withdrawal of One Petitioner. — The withdrawal of one petitioner from the adoption petition does not, in and of itself, require dismissal of the proceedings. The withdrawal, however, is a factor to be considered in determining the best interests of the child. The question of the child's best interests should be paramount in the court's consideration of a motion to dismiss the proceedings. In re Kasim, 58 N.C. App. 36, 293 S.E.2d 247, cert. denied, 306 N.C. 742, 295 S.E.2d 478 (1982).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinion below was issued prior to the 1995 revision of Chapter 48.*

Adoption May Only Be Dismissed Pursuant to this Section. — See opinion of Attorney General to Dr. Renee Westcott, Department of Social Services, 43 N.C.A.G. 296 (1974).

§ 48-2-605. Hearing on petition to adopt an adult.

(a) At the hearing on a petition to adopt an adult, the prospective adoptive parent and the adoptee shall both appear in person, unless the court waives this requirement for cause, in which event an appearance may be made for either or both of them by an attorney authorized in writing to make the appearance.

(b) At the hearing, the court shall grant the petition for adoption upon finding by a preponderance of the evidence all of the following:

(1) At least 30 days have elapsed since the filing of the petition for adoption, but the court for cause may waive this requirement;

(2) Notice of the petition has been served on any person entitled to receive notice under Part 4 of this Article;

(3) Each necessary consent, waiver, document, or judicial order has been obtained and filed with the court;

(4) The adoption is entered into freely and without duress or undue influence for the purpose of creating the relation of parent and child between each petitioner and the adoptee, and each petitioner and the adoptee understand the consequences of the adoption; and

(5) There has been substantial compliance with the provisions of this Chapter. (1967, c. 880, s. 3; 1969, c. 21, ss. 3-6; 1971, c. 1231, s. 1; 1973, c. 849, s. 3; 1975, c. 91; 1981, c. 657; 1989, c. 208; c. 727, s. 219(4); 1993, c. 553, s. 14.; 1995, c. 457, s. 2.)

§ 48-2-606. Decree of adoption.

(a) A decree of adoption must state at least:

(1) The name and gender of each petitioner for adoption;

(2) Whether the petitioner is married, a stepparent, or single;

(3) The name by which the adoptee is to be known;

(4) Information to be incorporated in a new standard certificate of birth to be issued by the State Registrar;

(5) The adoptee's date and place of birth, if known, or as determined under subsection (b) of this section in the case of an adoptee born outside the United States;

(6) The effect of the decree of adoption as set forth in G.S. 48-1-106; and

(7) That the adoption is in the best interest of the adoptee.

(b) In stating the date and place of birth of an adoptee born outside the United States, the court shall:

(1) Enter the date and place of birth as stated in the certificate of birth from the country of origin, the United States Department of State's report of birth abroad, or the documents of the United States Immigration and Naturalization Service;

(2) If the exact place of birth is unknown, enter the information that is known, including the country of origin; and

(3) If the exact date of birth is unknown, determine and enter a date of birth based upon medical evidence by affidavit or testimony as to the probable chronological age of the adoptee and other evidence the court finds appropriate to consider.

(c) A decree of adoption must not contain the name of a former parent of the adoptee. (1949, c. 300; 1973, c. 476, s. 138.; 1983, c. 454, s. 6.; 1995, c. 457, s. 2.)

§ 48-2-607. Appeals.

(a) Except as provided in subsections (b) and (c) of this section, after the final order of adoption is entered, no party to an adoption proceeding nor anyone claiming under such a party may question the validity of the adoption because of any defect or irregularity, jurisdictional or otherwise, in the proceeding, but shall be fully bound by the order. No adoption may be attacked either directly or collaterally because of any procedural or other defect by anyone who was not a party to the adoption. The failure on the part of the court or an agency to perform duties or acts within the time required by the provisions of this Chapter shall not affect the validity of any adoption proceeding.

(b) A party to an adoption proceeding may appeal a final decree of adoption entered by a clerk of superior court to district court by giving notice of appeal as provided in G.S. 1-301.2. A party to an adoption proceeding may appeal a judgment or order entered by a judge of district court by giving notice of appeal as provided in G.S. 1-279.1.

(c) A parent or guardian whose consent or relinquishment was obtained by fraud or duress may, within six months of the time the fraud or duress is or ought reasonably to have been discovered, move to have the decree of adoption set aside and the consent declared void. A parent or guardian whose consent was necessary under this Chapter but was not obtained may, within six months of the time the omission is or ought reasonably to have been discovered, move to have the decree of adoption set aside. Any action for damages against an adoptee or the adoptive parents for fraud or duress in obtaining a consent must be brought within six months of the time the fraud or duress is or ought reasonably to have been discovered. (1949, c. 300; 1961, c. 186; 1969, c. 982; 1983, c. 454, s. 6; 1995, c. 457, s. 2; 1999-216, s. 11.1.)

CASE NOTES

***Editor's Note.** — The cases below were decided prior to the 1995 revision of Chapter 48.*

Only Parent or Guardian Who Was Not Party May Attack Adoption Proceeding. — The provision in former G.S. 48-26 which permitted a direct or collateral attack on an adoption proceeding by a natural parent or guardian of the person of the child was limited to such natural parent or guardian of the person of the child who was not a party to the adoption proceeding. Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961).

Collateral Attack on Adoption by Party Is Prohibited. — The provisions of former G.S. 48-26 would prevent a collateral attack by husband on adoption of wife's child, where he was a party to the proceeding. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Attack on Adoption by Child. — Former G.S. 48-26 clearly prohibits any direct or collateral attack in adoption proceedings except by a biological parent or guardian of the child. It makes no provision for attack by the child, and nothing in the section requires that the child have been represented by counsel or that a guardian ad litem have been appointed. Flinn v. Laughinghouse, 68 N.C. App. 476, 315 S.E.2d 72, appeal dismissed and cert. denied, 311 N.C. 755, 321 S.E.2d 132 (1984).

Where it was apparent that child was begotten during the period of separation between her natural mother and her mother's husband which figured in the couple's divorce action as the basis of the court's judgment, the child had no standing in an action over 20 years later to attack her adoption on the grounds that her natural father was not made a party to the adoption proceedings, and that she herself was not represented by counsel or a guardian ad litem and did not give her consent to the adoption. Flinn v. Laughinghouse, 68 N.C. App. 476, 315 S.E.2d 72, appeal dismissed and cert. denied, 311 N.C. 755, 321 S.E.2d 132 (1984).

Cited in In re Adoption of Shuler, 162 N.C. App. 328, 590 S.E.2d 458, 2004 N.C. App. LEXIS 115 (2004).

ARTICLE 3.

Adoption of Minors.

Part 1. General Provisions.

§ 48-3-100. Application of Article.

This Article shall apply to the adoption of minors by adults who are not their stepparents. (1995, c. 457, s. 2.)

CASE NOTES

North Carolina recognizes the doctrine of equitable adoption. Lankford v. Wright, 347 N.C. 115, 489 S.E.2d 604 (1997).

Equitable Adoption. — Equitable adoption, does not confer the incidents of formal statutory adoption; rather, it merely confers rights of inheritance upon the foster child in the event of intestacy of the foster parents. Lankford v. Wright, 347 N.C. 115, 489 S.E.2d 604 (1997).

Part 2. Placement of Minors for Adoption.

§ 48-3-201. Who may place minors for adoption.

(a) Only the following may place the minor for adoption:
  (1) An agency,
  (2) A guardian,
  (3) Both parents acting jointly, if
    a. Both parents are married to each other and living together, or
    b. One parent has legal custody of a minor and the other has physical custody but neither has both, or

(4) A parent with legal and physical custody of a minor, except as provided in subdivision (3) of this subsection.

(b) A parent, guardian, or agency that places a minor directly for adoption shall execute a consent to the minor's adoption pursuant to Part 6 of this Article.

(c) A parent or guardian of a minor who wants an agency to place the minor for adoption must execute a relinquishment to the agency pursuant to Part 7 of this Article before the agency can place the minor.

(d) An agency having legal and physical custody of a minor may place the minor for adoption at any time after a relinquishment is executed by anyone as permitted by G.S. 48-3-701. The agency may place the minor for adoption even if other consents are required before an adoption can be granted, unless an individual whose consent is required notifies the agency in writing of the individual's objections before the placement. The agency shall act promptly after accepting a relinquishment to obtain all other necessary consents, relinquishments, or terminations of any guardian's authority pursuant to Chapter 35A of the General Statutes or parental rights pursuant to Article 11 of Chapter 7B of the General Statutes. (1995, c. 457, s. 2; 1997-215, s. 11(b); 1998-202, s. 13(j).)

§ 48-3-202. Direct placement for adoption.

(a) In a direct placement, a parent or guardian must personally select a prospective adoptive parent, but a parent or guardian may obtain assistance from another person or entity, or an adoption facilitator, in locating or evaluating a prospective adoptive parent, subject to the limitations of Article 10 of this Chapter.

(b) Information about a prospective adoptive parent shall be provided to a parent or guardian by the prospective adoptive parent, the prospective adoptive parent's attorney, or a person or entity assisting the parent or guardian. Except as otherwise provided in this subsection, this information shall include the preplacement assessment prepared pursuant to Part 3 of this Article, and may include additional information requested by the parent or guardian. The agency preparing the preplacement assessment may redact from the preplacement assessment provided to a placing parent or guardian detailed information reflecting the prospective adoptive parent's financial account balances and detailed information about the prospective adoptive parent's extended family members, including surnames, names of employers, names of schools attended, social security numbers, telephone numbers and addresses, and other similarly detailed information about extended family members obtained under G.S. 48-3-303. (1995, c. 457, s. 2; 2001-150, s. 6.)

§ 48-3-203. Agency placement adoption.

(a) An agency may acquire legal and physical custody of a minor for purposes of adoptive placement only by means of a relinquishment pursuant to Part 7 of this Article or by a court order terminating the rights and duties of a parent or guardian of the minor.

(b) An agency shall give any individual, upon request, a written statement of the services it provides, its procedure for selecting a prospective adoptive parent for a minor, including the role of the minor's parent or guardian in the selection process, and the procedure for an agency identified adoption and the disclosures permitted under G.S. 48-9-109. This statement shall include a schedule of any fee or expenses charged or required to be paid by the agency and a summary of the provisions of this Chapter that pertain to the requirements and consequences of a relinquishment and to the selection of a prospective adoptive parent.

(c) An agency may notify the parent when a placement has occurred and when an adoption decree is issued.

(d) An agency may place a minor for adoption only with an individual for whom a favorable preplacement assessment has been prepared. Placement shall be made as follows:

(1) If the agency has agreed to place the minor with the prospective adoptive parent selected by the parent or guardian, the minor shall be placed with the individual selected by the parent or guardian.

(2) If the agency has not agreed to place the minor with the prospective adoptive parent selected by the parent or guardian, the minor shall be placed with the prospective adoptive parent selected by the agency on the basis of the preplacement assessment. The selection may not be delegated, but may be based on criteria requested by a parent who relinquishes the child to the agency.

(d1) A minor who is in the custody or placement responsibility of a county department of social services shall not be placed with a selected prospective adoptive parent prior to the completion of an investigation of the individual's criminal history pursuant to G.S. 48-3-309 or G.S. 131D-10.3A and, based on the criminal history, a determination as to the individual's fitness to have responsibility for the safety and well-being of children.

(e) In addition to the authority granted in G.S. 131D-10.5, the Social Services Commission may adopt rules for placements by agencies consistent with the purposes of this Chapter.

(f) An agency may release identifying information as provided in G.S. 48-9-104. (1949, c. 300; 1953, c. 906; 1961, c. 186; 1969, c. 911, s. 7; c. 982; 1975, c. 702, ss. 1-3; 1977, c. 879, s. 5; 1985, c. 758, ss. 10, 11; 1995, c. 457, s. 2; 1998-229, s. 13; 2001-150, s. 7.)

§ 48-3-204. Recruitment of adoptive parents.

(a) The Social Services Commission may adopt rules requiring agencies to adopt and follow appropriate recruitment plans for prospective adoptive parents.

(b) The Division may maintain a statewide photo-listing service for all agencies within this State as a means of recruiting adoptive parents for minors who have been legally freed for adoption.

(c) Agencies and the Division shall cooperate with similar agencies in other states, and with national adoption exchanges in an effort to recruit suitable adoptive parents. (1995, c. 457, s. 2.)

§ 48-3-205. Disclosure of background information.

(a) Notwithstanding any other provision of law, before placing a minor for adoption, an individual or agency placing the minor, or the individual's agent, must compile and provide to the prospective adoptive parent a written document containing the following information:

(1) The date of the birth of the minor and the minor's weight at birth and any other reasonably available nonidentifying information about the minor that is relevant to the adoption decision or to the minor's development and well-being;

(2) Age of the biological parents in years at the time of the minor's birth;

(3) Heritage of the biological parents, which shall consist of nationality, ethnic background, and race;

(4) Education of the biological parents, which shall be the number of years of school completed by the biological parents at the time of the minor's birth; and

(5) General physical appearance of the biological parents.

In addition, the written document must also include all reasonably available nonidentifying information about the health of the minor, the biological parents, and other members of the biological parents' families that is relevant to the adoption decision or to the minor's health and development. This health-related information shall include each such individual's present state of physical and mental health, health and genetic histories, and information concerning any history of emotional, physical, sexual, or substance abuse. This health-related information shall also include an account of the prenatal and postnatal care received by the minor. The information described in this subsection, if known, shall, upon written request of the minor, be made available to the minor upon the minor reaching age 18 or upon the minor's marriage or emancipation.

(b) Information provided under this section, or any information directly or indirectly derived from such information, may not be used against the provider or against an individual described in subsection (a) of this section who is the subject of the information in any criminal action or any civil action for damages. In addition, information provided under this section may not be admitted in evidence against the provider or against an individual described in subsection (a) of this section who is the subject of the information in any other action or proceeding.

(c) The agency placing the minor shall receive and preserve any additional health-related information obtained after the preparation of the document described in subsection (a) of this section.

(d) The Division shall develop and make available forms designed to collect the information described in subsection (a) of this section. (1949, c. 300; 1957, c. 778, s. 7; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1979, c. 739, ss. 1, 2; 1981, c. 924, ss. 2, 3; 1983, c. 454, s. 6; 1993, c. 539, s. 411; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2.)

§ 48-3-206. Affidavit of parentage.

(a) To assist the court in determining that a direct placement was valid and all necessary consents have been obtained, the parent or guardian who placed the minor shall execute an affidavit setting out names, last known addresses, and marital status of the minor's parents or possible parents. If the placing parent or guardian is unavailable to execute the affidavit, the affidavit may be prepared by a knowledgeable individual who shall sign the affidavit and indicate the source of the individual's knowledge.

(b) In an agency placement, the agency shall obtain from at least one individual who relinquishes a minor to the agency an affidavit setting out the information required in subsection (a) of this section. This affidavit is not necessary when the agency acquires legal and physical custody of a minor for purposes of adoptive placement by a court order terminating the parental rights of a parent or guardian. (1949, c. 300; 1977, c. 879, s. 6; 1983, c. 454, s. 6; 1995, c. 457, s. 2; 2001-208, s. 14; 2001-487, s. 101.)

CASE NOTES

Editor's Note. — *The cases below were decided prior to the 1995 revision of Chapter 48.*

Construction of Section. — Construction of former G.S. 48-13 should not be narrow or technical, nor should compliance therewith be examined with a judicial microscope in order that every slight defect may be magnified. Rather, the construction ought to be fair and reasonable, so as not to defeat the act or the beneficial results where all material provisions of the statute have been complied with. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Timely Affidavit Required. — Where termination order, later held to be invalid for failure to use due diligence in ascertaining putative father's address, was filed with adoption petition in lieu of affidavit required by this section, subsequently filed affidavit did not relate back to original filing date of petition so as to cut off rights of putative father who filed legitimation petition to G.S. 49-10 before affidavit was filed. In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

§ 48-3-207. Interstate placements.

An interstate placement of a minor for purposes of adoption shall comply with the Interstate Compact on the Placement of Children, Article 38 of Chapter 7B of the General Statutes. (1995, c. 457, s. 2; 1998-202, s. 13(n).)

Legal Periodicals. — For article on interstate and foreign adoptions in North Carolina, see 40 N.C.L. Rev. 691 (1962).

Part 3. Preplacement Assessment.

§ 48-3-301. Preplacement assessment required.

(a) Except as provided in subsection (b) of this section, placement of a minor may occur only if a written preplacement assessment:

(1) Has been completed or updated within the 18 months immediately preceding the placement; and

(2) Contains a finding that the individual who is the subject of the assessment is suitable to be an adoptive parent, either in general or for a specific minor.

(b) A preplacement assessment is not required when a parent or guardian places a minor directly with a grandparent, sibling, first cousin, aunt, uncle, great-aunt, great-uncle, or great-grandparent of the minor.

(c) If a direct placement is made in violation of this section:

(1) The prospective adoptive parent shall request any preplacement assessment already commenced to be expedited, and if none has been commenced, shall obtain a preplacement assessment from an agency as authorized by G.S. 48-1-109; in either case, the assessment shall include the fact and date of placement;

(2) The court may not enter a decree of adoption until both a favorable preplacement assessment and a report to the court have been completed and filed, and the court may not order a report to the court for at least 30 days after the preplacement assessment has been completed; and

(3) If the person who placed the minor executes a consent before receiving a copy of the preplacement assessment, G.S. 48-3-608 shall determine the time within which that person may revoke. (1949, c. 300; 1957, c. 778, s. 2; 1967, c. 880, s. 2; 1987, c. 716, s. 1; 1993, c. 539, s. 410; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2; 1997-215, s. 19(a).)

§ 48-3-302. Request for preplacement assessment.

(a) An individual seeking to adopt may request a preplacement assessment at any time by an agency authorized by G.S. 48-1-109 to prepare preplacement assessments.

(b) An individual requesting a preplacement assessment need not have located a prospective adoptee when the request is made.

(c) An individual may have more than one preplacement assessment or may request that an assessment, once initiated, not be completed.

(d) If an individual is seeking to adopt a minor from a particular agency, the agency may require the individual to be assessed by its own employee, even if the individual has already had a favorable preplacement assessment completed by another agency.

(e) If an individual requesting a preplacement assessment has identified a prospective adoptive child and has otherwise been unable to obtain a preplacement assessment, the county department of social services must, upon request, prepare or contract for the preparation of the preplacement assessment. As used in this subsection, "unable to obtain a preplacement assessment" includes the inability to obtain a preplacement assessment at the fee the county department of social services is permitted to charge the individual. Except as provided in this subsection, no agency is required to conduct a preplacement assessment unless it agrees to do so. (1949, c. 300; 1957, c. 778, s. 2; 1967, c. 880, s. 2; 1987, c. 716, s. 1; 1993, c. 539, s. 410; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2; 1997-215, s. 15.)

§ 48-3-303. Content and timing of preplacement assessment.

(a) A preplacement assessment shall be completed within 90 days after a request has been accepted.

(b) The preplacement assessment must be based on at least one personal interview with each individual being assessed in the individual's residence and any report received pursuant to subsection (c) of this section.

(c) The preplacement assessment shall, after a reasonable investigation, report on the following about the individual being assessed:

(1) Age and date of birth, nationality, race, or ethnicity, and any religious preference;

(2) Marital and family status and history, including the presence of any children born to or adopted by the individual and any other children in the household;

(3) Physical and mental health, including any addiction to alcohol or drugs;

(4) Educational and employment history and any special skills;

(5) Property and income, and current financial information provided by the individual;

(6) Reason for wanting to adopt;

(7) Any previous request for an assessment or involvement in an adoptive placement and the outcome of the assessment or placement;

(8) Whether the individual has ever been a respondent in a domestic violence proceeding or a proceeding concerning a minor who was allegedly abused, dependent, neglected, abandoned, or delinquent, and the outcome of the proceeding;

(9) Whether the individual has ever been convicted of a crime other than a minor traffic violation;

(10) Whether the individual has located a parent interested in placing a child with the individual for adoption and a brief, nonidentifying description of the parent and the child; and

(11) Any other fact or circumstance that may be relevant to a determination of the individual's suitability to be an adoptive parent, including the quality of the environment in the home and the functioning of any children in the household.

(12) The agency preparing the preplacement assessment may redact from the preplacement assessment provided to a placing parent or guardian detailed information reflecting the prospective adoptive parent's financial account balances and detailed information about the pro-

spective adoptive parent's extended family members, including surnames, names of employers, names of schools attended, social security numbers, telephone numbers and addresses, and other similarly detailed information about extended family members obtained under subsections (b) and (c) of this section.

When any of the above is not reasonably available, the preplacement assessment shall state why it is unavailable.

(d) The agency shall conduct an investigation for any criminal record as permitted by law. If a prospective adoptive parent is seeking to adopt a minor who is in the custody or placement responsibility of a county department of social services, a county department of social services shall have the prospective adoptive parent's criminal history and the criminal histories of all individuals 18 years of age or older who reside in the prospective adoptive home investigated pursuant to G.S. 48-3-309, and in accordance with G.S. 48-3-309(b), make a determination as to the prospective adoptive parent's fitness to have responsibility for the safety and well-being of children and as to whether other individuals required to be checked are fit for an adoptive child to reside with them in the home.

(e) In the preplacement assessment, the agency shall review the information obtained pursuant to subsections (b), (c), and (d) of this section and evaluate the individual's strengths and weaknesses to be an adoptive parent. The agency shall then determine whether the individual is suitable to be an adoptive parent.

(f) If the agency determines that the individual is suitable to be an adoptive parent, the preplacement assessment shall include specific factors which support that determination.

(g) If the agency determines that the individual is not suitable to be an adoptive parent, the replacement assessment shall state the specific concerns which support that determination. A specific concern is one that reasonably indicates that placement of any minor, or a particular minor, in the home of the individual would pose a significant risk of harm to the well-being of the minor.

(h) In addition to the information and finding required by subsections (c) through (g) of this section, the preplacement assessment must contain a list of the sources of information on which it is based.

(i) The Social Services Commission shall have authority to establish by rule additional standards for preplacement assessments. (1995, c. 457, s. 2; 1998-229, s. 14; 2001-150, s. 8; 2005-114, s. 2; 2007-276, s. 8.)

Effect of Amendments. — Session Laws 2007-276, s. 8, effective October 1, 2007, substituted "in accordance with G.S. 48-3-309(b)," for "based on the criminal history," near the middle of subsection (d).

§ 48-3-304. Fees for preplacement assessment.

(a) An agency that prepares a preplacement assessment may charge a reasonable fee for doing so, even if the individual being assessed requests that it not be completed. No fee may be charged except pursuant to a written agreement which must be signed by the individual to be charged prior to the beginning of the assessment. The fee agreement may not be based on the outcome of the assessment or any adoption.

(b) An assessment fee is subject to review by the court pursuant to G.S. 48-2-602 and G.S. 48-2-603 if the person who is assessed files a petition to adopt.

(c) The Department shall set the maximum fees, based on the individual's ability to pay and other factors, which may be charged by county departments of social services. The Department shall require waiver of fees for those unable to pay. Fees collected under this section shall be applied to the costs of preparing preplacement assessments and shall be used by the county department of social services to supplement and not to supplant appropriated funds. (1995, c. 457, s. 2.)

§ 48-3-305. Agency disposition of preplacement assessments.

(a) The agency shall give a copy of any completed or incomplete preplacement assessment to the individual who was the subject of the assessment. If the assessment contains a finding that an individual is not suitable to be an adoptive parent, the agency shall contemporaneously file the original with the Division.

(b) The agency shall retain a copy of a completed or incomplete preplacement assessment for at least five years. (1995, c. 457, s. 2.)

§ 48-3-306. Favorable preplacement assessments.

An individual who receives a preplacement assessment containing a finding that the individual is suitable to be an adoptive parent shall provide a copy of the assessment to any person or agency considering the placement of a minor with the individual for adoption and shall also attach a copy of the assessment to any petition to adopt. (1995, c. 457, s. 2.)

§ 48-3-307. Assessments completed after placement.

(a) If a placement occurs before a preplacement assessment is completed, the prospective adoptive parent shall deliver a copy of the assessment when completed, whether favorable or unfavorable, to the parent or guardian who placed the minor. A prospective adoptive parent, who cannot after the exercise of due diligence personally locate the parent or guardian who placed the minor, may deposit a copy of the preplacement assessment in the United States mail, return receipt requested, addressed to the address of the parent or guardian given in the consent, and the date of receipt by the parent or guardian for purposes of G.S. 48-3-608 shall be deemed to be the date of delivery or last attempted delivery.

(b) If a petition for adoption is filed before the preplacement assessment is completed, the prospective adoptive parent shall attach to the petition an affidavit explaining why the assessment has not been completed and, upon completion of the assessment, shall file it with the court in which the petition is pending.

(c) A prospective adoptive parent shall file or cause to be filed a certificate indicating that the prospective adoptive parent has delivered a copy of the assessment to the parent or guardian who placed the minor for adoption. (1995, c. 457, s. 2; 2001-150, s. 9.)

§ 48-3-308. Response to unfavorable preplacement assessment.

(a) Each agency shall have a procedure for allowing an individual who has received an unfavorable preplacement assessment to have the assessment reviewed by the agency. In addition to the authority in G.S. 131D-10.5, the Social Services Commission shall have authority to adopt rules implementing this section.

(b) An individual who receives an unfavorable preplacement assessment may, after exhausting the agency's procedures for internal review, prepare and file a written response with the Division and the agency. The Division shall attach the response to the unfavorable assessment.

(c) The Division shall acknowledge receipt of the response but shall have no authority to take any action with respect to the response.

(d) If an unfavorable preplacement assessment is completed and filed with the Division and a minor has been placed with a prospective adoptive parent who is the subject of the unfavorable assessment, the Division shall notify the county department of social services, which shall take appropriate action.

(e) An unfavorable preplacement assessment and any response filed with the Division under this section shall not be public records as set forth in Chapter 132 of the General Statutes. (1995, c. 457, s. 2.)

§ 48-3-309. Mandatory preplacement criminal checks of prospective adoptive parents seeking to adopt a minor who is in the custody or placement responsibility of a county department of social services and mandatory preplacement criminal checks of all individuals 18 years of age or older who reside in the prospective adoptive home.

(a) The Department shall ensure that the criminal histories of all prospective adoptive parents seeking to adopt a minor who is in the custody or placement responsibility of a county department of social services and the criminal histories of all individuals 18 years of age or older who reside in the prospective adoptive home are checked prior to placement and, based on the criminal history, a determination is made as to the prospective adoptive parent's fitness to have responsibility for the safety and well-being of children and whether other individuals required to be checked are fit for an adoptive child to reside with them in the home. The Department shall ensure that all individuals required to be checked are checked prior to placement for county, state, and federal criminal histories.

(b) A county department of social services shall issue an unfavorable preplacement assessment to a prospective adoptive parent if an individual required to submit to a criminal history check pursuant to subsection (a) of this section has a criminal history. A county department of social services shall issue an unfavorable preplacement assessment to a prospective adoptive parent if the county department of social services determines, pursuant to G.S. 48-3-303(e), that, based on other criminal convictions, whether felony or misdemeanor, the prospective adoptive parent is unfit to have responsibility for the safety and well-being of children or other individuals required to be checked are unfit for an adoptive child to reside with them in the home.
histories

(c) The Department of Justice shall provide to the Department of Health and Human Services the criminal history of any individual required to be checked under subsection (a) of this section as requested by the Department and obtained from the State and National Repositories of Criminal Histories. The Department shall provide to the Department of Justice, along with the request, the fingerprints of any individual to be checked, any additional information required by the Department of Justice, and a form consenting to the check of the criminal record and to the use of fingerprints and other identifying information required by the State or National Repositories signed by the individual to be checked. The fingerprints of any individual to be checked shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of fingerprints to the Federal Bureau of Investigation for a national criminal history record check.

(d) At the time of the request for a preplacement assessment or at a subsequent time prior to placement, any individual whose criminal history is to be checked shall be furnished with a statement substantially similar to the following:

"NOTICE

> MANDATORY CRIMINAL HISTORY CHECK: NORTH CAROLINA LAW REQUIRES THAT A CRIMINAL HISTORY CHECK BE CONDUCTED PRIOR TO PLACEMENT ON PROSPECTIVE ADOPTIVE PARENTS SEEKING TO ADOPT A MINOR WHO IS IN THE CUSTODY OR PLACEMENT RESPONSIBILITY OF A COUNTY DEPARTMENT OF SOCIAL SERVICES AND ON ALL PERSONS 18 YEARS OF AGE OR OLDER WHO RESIDE IN THE PROSPECTIVE ADOPTIVE HOME.
>
> "Criminal history" means a county, State, or federal conviction of a felony by a court of competent jurisdiction or a pending felony indictment of a crime for child abuse or neglect, spousal abuse, a crime against a child, including child pornography, or for a crime involving violence, including rape, sexual assault, or homicide, other than physical assault or battery; a county, State, or federal conviction of a felony by a court of competent jurisdiction or a pending felony indictment for physical assault, battery, or a drug-related offense, if the offense was committed within the past five years; or similar crimes under federal law or under the laws of other states. Your fingerprints will be used to check the criminal history records of the State Bureau of Investigation (SBI) and the Federal Bureau of Investigation (FBI).
>
> If it is determined, based on your criminal history, that you are unfit to have responsibility for the safety and well being of children or have an adoptive child reside with you, you shall have the opportunity to complete, or challenge the accuracy of, the information contained in the SBI or FBI identification records.
>
> If the prospective adoptive parent is denied a favorable preplacement assessment by a county department of social services as a result of a criminal history check as required under G.S. 48-3-309(a), the prospective adoptive parent may request a review of the assessment pursuant to G.S. 48-3-308(a).
>
> Any person who intentionally falsifies any information required to be furnished to conduct the criminal history is guilty of a Class 2 misdemeanor."

Refusal to consent to a criminal history check by any individual required to be checked under G.S. 48-3-309(a) is grounds for the issuance by a county department of social services of an unfavorable preplacement assessment. Any person who intentionally falsifies any information required to be furnished to conduct the criminal history is guilty of a Class 2 misdemeanor.

(e) The Department shall notify the prospective adoptive parent's supervising county department of social services of the results of the criminal history check. In accordance with the federal and State law regulating the dissemination of the contents of the criminal history file, the Department shall not release or disclose any portion of an individual's criminal history to the prospective adoptive parent or any other individual required to be checked. The Department, however, shall ensure that the prospective adoptive parent or any other individual required to be checked is notified of the individual's right to review the criminal history information, the procedure for completing or challenging the accuracy of the criminal history, and the prospective adoptive parent's right to contest the preplacement assessment of the county department of social services.

A prospective adoptive parent who disagrees with the preplacement assessment of the county department of social services may request a review of the assessment pursuant to G.S. 48-3-308(a).

(f) All the information that the Department receives through the checking of the criminal history is privileged information and is not a public record but is for the exclusive use of the Department and those persons authorized under this section to receive the information. The Department may destroy the information after it is used for the purposes authorized by this section after one calendar year.

(g) There is no liability for negligence on the part of a State or local agency, or the employees of a State or local agency, arising from any action taken or omission by any of them in carrying out the provisions of this section. The immunity established by this subsection shall not extend to gross negligence, wanton conduct, or intentional wrongdoing that would otherwise be actionable. The immunity established by this subsection shall be deemed to have been waived to the extent of indemnification by insurance, indemnification under Article 31A of Chapter 143 of the General Statutes, and to the extent sovereign immunity is waived under the Tort Claims Act, as set forth in Article 31 of Chapter 143 of the General Statutes.

(h) The Department of Justice shall perform the State and national criminal history checks on prospective adoptive parents seeking to adopt a minor in the custody or placement responsibility of a county department of social services and all individuals 18 years of age or older who reside in the prospective adoptive home and shall charge the Department of Health and Human Services a reasonable fee only for conducting the checks of the national criminal history records authorized by this section. The Division of Social Services, Department of Health and Human Services, shall bear the costs of implementing this section. (1998-229, s. 15; 2005-114, s. 1; 2007-276, ss. 9, 10.)

Editor's Note. — This section was amended by Session Laws 2007-276, s. 9, in the coded bill drafting format provided by G.S. 120-20.1. The word "histories," in subsection (b) was not stricken through. The subsection has been set out in the form above at the direction of the Revisor of Statutes.

Effect of Amendments. — Session Laws 2007-276, ss. 9 and 10, effective October 1, 2007, in subsection (b), inserted "an individual required to submit to a criminal history check pursuant to subsection (a) of this section has a criminal history. A county department of social services shall issue an unfavorable preplacement assessment to a prospective adoptive parent if" and substituted "other criminal convictions, whether felony or misdemeanor" for "the criminal" and rewrote subsection (d).

Part 4. Transfer of Physical Custody of Minor by Health Care Facility or Attending Practitioner for Purposes of Adoption.

§ 48-3-401. "Health care facility" and "attending practitioner" defined.

As used in this Article:

(1) "Health care facility" includes a hospital and maternity home; and

(2) "Attending practitioner" includes a physician, licensed nurse, or other licensed professional provider of health care who assists in a birth. (1995, c. 457, s. 2.)

§ 48-3-402. Authorization required to transfer physical custody.

(a) A health care facility or attending practitioner who has physical custody may release a minor for the purpose of adoption to a prospective adoptive parent or agency not legally entitled to the custody of the minor if, in the presence of an employee of the health care facility or the attending practitioner:

(1) A parent, guardian, or other person or entity having legal custody of the minor signs an authorization of the transfer of physical custody; and

(2) The authorization states that the release is for the purpose of adoption.

(b) The health care facility or attending practitioner shall retain the authorization described in subsection (a) of this section for at least one year. (1995, c. 457, s. 2.)

Part 5. Custody of Minors Pending Final Decree of Adoption.

§ 48-3-501. Petitioner entitled to custody in direct placement adoptions.

Unless the court orders otherwise, when a parent or guardian places the adoptee directly with the petitioner, the petitioner acquires that parent's or guardian's right to legal and continuing physical custody of the adoptee and becomes a person responsible for the care and support of the adoptee, after the earliest of:

(1) The execution of consent by the parent or guardian who placed the adoptee;

(2) The filing of a petition for adoption by the petitioner; or

(3) The execution of a document by a parent or guardian having legal and physical custody of a minor temporarily transferring custody to the petitioner, pending the execution of a consent. (1949, c. 300; 1995, c. 457, s. 2.)

§ 48-3-502. Agency entitled to custody in placement by agency.

(a) Unless the court orders otherwise, during a proceeding for adoption in which an agency places the adoptee with the petitioner:

(1) The agency retains legal but not physical custody of the adoptee until the adoption decree becomes final; but

(2) The agency may delegate to the petitioner responsibility for the care and support of the adoptee.

(b) Before a decree of adoption becomes final, the agency may for cause petition the court to dismiss the adoption proceeding and to restore full legal and physical custody of the minor to the agency; and the court may grant the petition on finding that it is in the best interest of the minor. (1995, c. 457, s. 2.)

CASE NOTES

Editor's Note. — *Most of the cases below were decided prior to the 1995 revision of Chapter 48.*

Retention of Custody by Agency Until Occurrence of Specified Event. — Under former G.S. 48-9.1, the county department of social services or child placing agency to which a child had been surrendered by his parents retained legal custody of the child until the occurrence of one of the events specified therein, and legal custody never passed to any foster parent charged with the duty of caring for and supervising the child. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Action for Custody of Foster Child Governed by Section. — Action to obtain custody of a child placed in plaintiffs' home pursuant to a foster parent agreement was governed by former G.S. 48-9.1 and not by G.S. 7A-289.33 [see now G.S. 7B-1112]. Section 7A-289.33 [see now G.S. 7B-1112] sets forth the effects of a court order terminating the parental rights of a natural parent on grounds of abuse or neglect, and such a court order was not involved where the natural parents had voluntarily released their parental rights and surrendered their child for adoptive placement. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Standing of Foster Parents to Challenge Agency's Denial of Request to Adopt Child. — Since the welfare of the child is the controlling factor in an adoption proceeding, any agreement between foster parents and a department of social services concerning the adoption of a child who is placed in a home for foster care is subject to the court's independent judgment as to what is in the best interest of the child; consequently, in a child custody suit, defendant department of social services could not seek to deprive plaintiffs, as foster parents, of standing to challenge the reasonableness of defendant's denial of plaintiffs' request to adopt the minor child placed in their home. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Foster Parents Have No Standing to Bring Custody Action. — Nothing in the language of former G.S. 48-9.1(1) gave foster parents standing to contest the department's or agency's exercise of its rights as legal custodian; therefore, foster parents are without standing to bring an action seeking custody of minor child placed in their home by defendant. Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

But Transfer of Custody to Foster Parents Is Not Prohibited. — The case of Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370, (1981) does not prohibit the transfer of legal care, custody and control of a foster child to its foster parents. Oxendine stands for the proposition that foster parents have no standing to bring a custody action pursuant to G.S. 50-13.2 et seq. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Applied in In re Cunningham, 151 N.C. App. 410, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002).

Part 6. Consent to Adoption.

§ 48-3-601. Persons whose consent to adoption is required.

Unless consent is not required under G.S. 48-3-603, a petition to adopt a minor may be granted only if consent to the adoption has been executed by:

(1) The minor to be adopted if 12 or more years of age;

(2) In a direct placement, by:

  a. The mother of the minor;

  b. Any man who may or may not be the biological father of the minor but who:

    1. Is or was married to the mother of the minor if the minor was born during the marriage or within 280 days after the marriage is terminated or the parties have separated pursuant to a written separation agreement or an order of separation entered under Chapters 50 or 50B of the General Statutes or a similar order of separation entered by a court in another jurisdiction;

    2. Attempted to marry the mother of the minor before the minor's birth, by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and the minor is born during the attempted marriage, or within 280 days after the attempted marriage is terminated by annulment, declaration of invalidity, divorce,

or, in the absence of a judicial proceeding, by the cessation of cohabitation;

3. Before the filing of the petition, has legitimated the minor under the law of any state;
4. Before the earlier of the filing of the petition or the date of a hearing under G.S. 48-2-206, has acknowledged his paternity of the minor and
   - I. Is obligated to support the minor under written agreement or by court order;
   - II. Has provided, in accordance with his financial means, reasonable and consistent payments for the support of the biological mother during or after the term of pregnancy, or the support of the minor, or both, which may include the payment of medical expenses, living expenses, or other tangible means of support, and has regularly visited or communicated, or attempted to visit or communicate with the biological mother during or after the term of pregnancy, or with the minor, or with both; or
   - III. After the minor's birth but before the minor's placement for adoption or the mother's relinquishment, has married or attempted to marry the mother of the minor by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid; or
5. Before the filing of the petition, has received the minor into his home and openly held out the minor as his biological child; or
6. Is the adoptive father of the minor; and

c. A guardian of the minor; and

(3) In an agency placement by:

a. The agency that placed the minor for adoption; and

b. Each individual described in subdivision (2) of this section who has not relinquished the minor pursuant to Part 7 of Article 3 of this Chapter. (1949, c. 300; 1953, c. 906; 1957, c. 90; c. 778, ss. 3-5; 1961, c. 186; 1969, c. 534, s.1; c. 911, ss. 6, 7; c. 982; 1971, c. 1093, s. 13; c. 1185, s. 17; 1973, c. 1354, s. 5; 1975, c. 321, s. 1; c. 702, ss. 1-3; c. 714; 1977, c. 879, ss. 2, 3, 5; 1979, c. 107, s. 7; 2nd Sess., c. 1088, s. 1; 1983, cc. 30, 292; c. 454, ss. 2, 6; 1985, c. 758, ss. 5-11; 1987, c. 371, s. 1; 1995, c. 457, s. 2; 1997-215, s. 16.)

Legal Periodicals. — For 1997 legislative survey, see 20 Campbell L. Rev. 459.

For note, "Closing the Window of Opportunity: The Limited Rights of Putative Fathers Under G.S. 48-3-601 and In re Byrd," see 23 Campbell L. Rev. 305 (2001).

For casenote: "The Established Standard for Fathers Who Have Acknowledged Paternity and Who Are Seeking Custody of Their Illegitimate Child(ren): Rosero v. Blake, 357 N.C. 193 (2003)," see 26 N.C. Cent. L.J. 116 (2003).

CASE NOTES

Editor's Note. — *Most of the cases below were decided prior to the 1995 revision of Chapter 48.*

Jurisdiction, Generally. — Where neither the father nor the mother of the child was a party to the proceeding within the contemplation of the statute, and the clerk had no jurisdiction of their person, consequently he had no jurisdiction of the subject matter. Truelove v. Parker, 191 N.C. 430, 132 S.E. 295 (1926), discussed in 5 N.C.L. Rev. 67.

Consent is essential to an order of adoption. In re Daughtridge, 25 N.C. App. 141, 212 S.E.2d 519 (1975).

And parent's consent to adoption must be shown within the record and must relate to the particular persons seeking to adopt the child. In re Holder, 218 N.C. 136, 10 S.E.2d 620 (1940).

Except as Provided in Former §§ 48-5 and 48-6. — Under former G.S. 48-7, except as provided in former G.S. 48-5 and 48-6, before a child can be adopted the written consent of the parents or surviving parent or guardian of the person of the child must be obtained. In re Hoose, 243 N.C. 589, 91 S.E.2d 555 (1956).

Absent consent of the adoptive parents, the court was without jurisdiction to order the adoption of a child unless her adoptive parents had abandoned such child within the meaning of our statutes. In re Hoose, 243 N.C. 589, 91 S.E.2d 555 (1956).

Consent of a minor child's father was necessary, under G.S. 48-3-601(2)(b)(4), before the grandparents could adopt the child because the father acknowledged paternity and could make reasonable and consistent support payments. Miller v. Lillich, 167 N.C. App. 643, 606 S.E.2d 181, 2004 N.C. App. LEXIS 2300 (2004), cert. denied, — N.C. —, 613 S.E.2d 692 (2005).

No Discrimination Based on Gender Under Former Law. — Former 48-6 provided a means of identifying persons who are similarly situated with respect to the child and gave them similar rights, rather than making simply a gender-based distinction; hence, it did not discriminate against similarly situated individuals on the basis of gender. In re Baby Girl Dockery, 128 N.C. App. 631, 495 S.E.2d 417 (1998).

But Agency's Consent Is Simply an Additional Safeguard. — The consent of those in custody of the child under statutory provisions, unlike the absolute required consent of competent natural parents, is simply an additional safeguard to the welfare and best interests of the child. In re Daughtridge, 25 N.C. App. 141, 212 S.E.2d 519 (1975).

Consent of the county department of social services to the adoption was required by virtue of former G.S. 48-9(b). In re Daughtridge, 25 N.C. App. 141, 212 S.E.2d 519 (1975).

Rights of Social Services Following Termination of Rights. — Upon entry of an order terminating parental rights, the County Department of Social Services acquired the same rights that it would have acquired if the parent had consented to the adoption of that child under former G.S. 48-9(a)(1). Krauss v. Wayne County Dep't of Social Servs., 347 N.C. 371, 493 S.E.2d 428 (1997).

Consent Should Sometimes Be Withheld. — The General Assembly recognizes that there are cases in which consent might be and sometimes should be withheld by the person or agency qualified to give consent. In re Daughtridge, 25 N.C. App. 141, 212 S.E.2d 519 (1975).

But consent may not be unreasonably and unjustly withheld. In re Daughtridge, 25 N.C. App. 141, 212 S.E.2d 519 (1975).

When Court May Order Adoption to Proceed Without Agency's Consent. — Should a court find that an agency has unreasonably withheld its consent, the court has the right to order that the adoption proceed without the written consent of the agency, resulting, as a practical matter, in the adoption of the child proceeding with the consent of the court substituted for the consent of the agency. In re Daughtridge, 25 N.C. App. 141, 212 S.E.2d 519 (1975).

If the court finds that a failure to grant petition for adoption would be inimical to the best interests and welfare of the child, it may proceed as if the consent which it finds ought to have been given had been given. In re Daughtridge, 25 N.C. App. 141, 212 S.E.2d 519 (1975).

Consent Not Wrongfully Withheld. — The trial court erred in placing child with petitioners for the purpose of adoption, since adoptions are permitted only upon the statutory procedure set out in this Chapter, by a special proceeding before the clerk of superior court; moreover, there was no evidence to support the trial court's finding that the department of social services, which had custody of the child, "wrongfully and unreasonably withheld its consent for adoption." In re Sloop, 50 N.C. App. 201, 272 S.E.2d 611 (1980).

The language of subsection (d) of former § 48-7, that adoption by a stepparent does not affect the parent-child relationship with the natural parent, was a measure to protect that parent-child relationship from the otherwise sweeping effects of former G.S. 48-23(1), which otherwise might be construed to terminate the natural parent-child relationship. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 698, 343 S.E.2d 913 (1986).

The court insisted that the respondent had failed to provide the requisite support, pursuant to this section, for the biological mother and for his child although he asserted that he was prevented from complying by the mother's refusing his offer to stay with his mother during her pregnancy, the filing of the adoption petition just one day after the birth of the child, and the uncertainty as to whether he was, in fact, the father. Byrd ex rel. Byrd, 137 N.C. App. 623, 529 S.E.2d 465, 2000 N.C. App. LEXIS 502 (2000), aff'd sub nom. In re Adoption of Byrd, 354 N.C. 188, 552 S.E.2d 142 (2001).

Consent Not Wrongfully Withheld. — While putative father satisfied the statutory requirement for acknowledgement of paternity, as he readily and unconditionally acknowledged paternity of the unborn child for a substantial and sufficient amount of time after initially learning of the pregnancy, where he did not provide reasonable and consistent payments for the support of the mother or child or both during the period before the filing of the adoption petition, despite evidence of his ability to make some payment in support, his consent to child's adoption was not required, because all requirements of the statute must be met in order for putative father's consent to be necessary. In re Byrd, 354 N.C. 188, 552 S.E.2d 142, 2001 N.C. LEXIS 934 (2001).

Opportunity to Join Putative Father. — Even if putative father's consent to adoption was necessary, petitioners' failure to join him at the time they filed their original adoption petition did not authorize the trial court to dismiss the adoption proceeding without first giving petitioners the opportunity to join putative father within a reasonable time. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Acknowledgment May Not Be Conditioned on Establishing Biological Link. — This section does not allow a potential father's acknowledgment of his paternity to be conditioned on establishing a biological link with the child. Consequently, the respondent who conditioned his acknowledgment of his paternity of the child failed to preserve his consent rights for adoption although he offered to provide the biological mother a place to live during her pregnancy and attempted a variety of jobs to provide for the child. Byrd ex rel. Byrd, 137 N.C. App. 623, 529 S.E.2d 465, 2000 N.C. App. LEXIS 502 (2000), aff'd sub nom. In re Adoption of Byrd, 354 N.C. 188, 552 S.E.2d 142 (2001).

Adopted Children as Lineal Descendants Under Former § 30-3(b). — Natural children of one spouse born during a previous marriage, if adopted by second spouse with consent of their surviving natural parent, were considered lineal descendants by the second marriage for purposes of former G.S. 30-3(b), which determined a dissenting spouse's share. In re Estate of Edwards, 77 N.C. App. 302, 335 S.E.2d 39 (1985), aff'd, 316 N.C. 546, 343 S.E.2d 913 (1986).

Mother of illegitimate child must be made a party to proceedings for the adoption of the child, and her consent to the adoption, or proof of her abandonment of the child in the statutory or legal sense, must be made to appear as a jurisdictional matter. In re Holder, 218 N.C. 136, 10 S.E.2d 620 (1940).

Withholding of Consent. — The General Assembly recognizes that there are cases in which consent might be and sometimes should be withheld by the person or agency qualified to give consent. In re Daughtridge, 25 N.C. App. 141, 212 S.E.2d 519 (1975).

Legitimation Proceeding Held Without Effect upon Mother's Prior Consent to Adoption. — A legitimation proceeding brought by the putative father of a child born out of wedlock, wherein the child was declared legitimate, had no effect upon the prior written consent to adoption given by the unwed mother under former G.S. 48-6. In re Doe, 11 N.C. App. 560, 181 S.E.2d 760, cert. denied and appeal dismissed, 279 N.C. 394, 183 S.E.2d 244 (1971).

Marriage After Commencement of Proceedings. — Where proceeding for adoption of a child born out of wedlock was instituted in conformity with former G.S. 48-6 upon the written consent of its mother, but its mother and reputed father married prior to an order of reference directing the superintendent of public welfare (now director of social services) of the county to make a full investigation to determine if the child was a proper child for adoption, and the natural parents intervened and moved to vacate and dismiss the proceeding, it was held that at the time of the reference and at the time the court came to determine whether the child was the proper subject for adoption the status of the child had changed from illegitimate to legitimate, and the motion of the interveners to vacate the proceeding and for the custody of their child should have been allowed, it being required in a proceeding for the adoption of a legitimate child that its natural parents be parties or their consent to the adoption be made to appear unless they have abandoned the child. In re Doe, 231 N.C. 1, 56 S.E.2d 8 (1949).

Standing of Foster Parents to Challenge Agency's Denial of Request to Adopt Child. — Since the welfare of the child is the controlling factor in an adoption proceeding, any agreement between foster parents and a department of social services concerning the adoption of a child who is placed in a home for foster care is subject to the court's independent judgment as to what is in the best interest of the child; consequently, in a child custody suit, defendant department of social services could not seek to deprive plaintiffs, as foster parents, of standing to challenge the reasonableness of defendant's denial of plaintiffs' request to adopt the minor child placed in their home. Oxendine v. Catawba County Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

Foster Parents Have No Standing to Bring Custody Action. — Nothing in the language of former G.S. 48-9.1(1) gave foster parents standing to contest the department's or agency's exercise of its rights as legal custodian; therefore, foster parents were without standing to bring an action seeking custody of minor child placed in their home by defendant. Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

But Transfer of Custody to Foster Parents Is Not Prohibited. — The case of Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370, (1981) does not prohibit the transfer of legal care, custody and control of a foster child to its foster parents. Oxendine stands for the proposition that foster parents have no standing to bring a custody action pursuant to G.S. 50-13.2 et seq. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

Evidence held sufficient to support findings that social worker made a misrepresentation of an existing fact, with knowledge that it was false and with the intent to deceive 17-year-old parents into signing adoption consent forms, and that a prudent person could have reasonably relied on her statements concerning the adoption process and the contents of the forms and signed the forms without reading them. In re Baby Boy Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986), cert. denied, 318 N.C. 695, 351 S.E.2d 750 (1987).

Biological father's consent was not necessary to allow an adoption to proceed where he failed to unequivocally acknowledge his paternity prior to the filing of the adoption petition and failed to express a desire to be the child's father. In re Adoption of Shuler, 162 N.C. App. 328, 590 S.E.2d 458, 2004 N.C. App. LEXIS 115 (2004).

Consent Not Required of Father Who Did Not Provide Support. — Putative father's consent to the adoption of his minor child was not required, pursuant to G.S. 48-3-601(2)(b)(4)(II), as the father's mere offers of support were insufficient under the statute to require the consent of the father to the adoption. Despite possessing adequate wherewithal, the father, a teenager who had obtained employment, never provided any actual financial payments to the mother, much less the reasonable and consistent payments required under the subsection. In re Anderson, 360 N.C. 271, 624 S.E.2d 626, 2006 N.C. LEXIS 5 (2006).

Applied in In re Cunningham, 151 N.C. App. 410, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002).

Cited in Rosero v. Blake, 357 N.C. 193, 581 S.E.2d 41, 2003 N.C. LEXIS 605 (2003), cert. denied, 540 U.S. 1177, 124 S. Ct. 1407, 158 L. Ed. 2d 78 (2004); A Child's Hope, LLC v. Doe, 178 N.C. App. 96, 630 S.E.2d 673, 2006 N.C. App. LEXIS 1291 (2006).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinions below were decided prior to the 1995 revision of Chapter 48.*

Giving of Consent with Knowledge of Identity of Adoptive Parents. — Except where consent is given to a licensed child-placing agency or a county director of social services in accordance with former G.S. 48-9, consent to an adoption must be given with the knowledge of the identity of the adoptive parents. See opinion of Attorney General to Mrs. Robin L. Peacock, Supervisor of Adoptions, Division of Social Services, Department of Human Resources, 43 N.C.A.G. 247 (1973).

As to consent to adoption by person in charge of county, see opinion of Attorney General to Miss Louise W. Creef, Steno II, In Charge, Dare County Department of Social Services, 40 N.C.A.G. 648 (1970).

§ 48-3-602. Consent of incompetent parents.

If a parent as described in G.S. 48-3-601 has been adjudicated incompetent, then the court shall appoint a guardian ad litem for that parent and, unless the child already has a guardian, a guardian ad litem for the child to make a full investigation as to whether the adoption should proceed. The investigation shall include an evaluation of the parent's current condition and any reasonable likelihood that the parent will be restored to competency, the relationship between the child and the incompetent parent, alternatives to adoption, and any other relevant fact or circumstance. If the court determines after a hearing on the matter that it will be in the best interest of the child for the adoption to proceed, the court shall order the guardian ad litem of the parent to execute a consent for that parent. (1949, c. 300; 1953, c. 906; 1961, c. 186; 1969, c. 911, s. 7; c. 982; 1975, c. 702, ss. 1-3; 1977, c. 879, s. 5; 1985, c. 758, ss. 10, 11; 1995, c. 457, s. 2; 1997-215, s. 11(d).)

§ 48-3-603. Persons whose consent is not required.

(a) Consent to an adoption of a minor is not required of a person or entity whose consent is not required under G.S. 48-3-601, or:

(1) An individual whose parental rights and duties have been terminated under Article 11 of Chapter 7B of the General Statutes or by a court of competent jurisdiction in another state;
(2) A man described in G.S. 48-3-601(2), other than an adoptive father, if (i) the man has been judicially determined not to be the father of the minor to be adopted, or (ii) another man has been judicially determined to be the father of the minor to be adopted;
(3) Repealed by Session Laws 1997-215, s. 11(a).
(4) An individual who has relinquished parental rights or guardianship powers, including the right to consent to adoption, to an agency pursuant to Part 7 of this Article;
(5) A man who is not married to the minor's birth mother and who, after the conception of the minor, has executed a notarized statement denying paternity or disclaiming any interest in the minor;
(6) A deceased parent or the personal representative of a deceased parent's estate; or
(7) An individual listed in G.S. 48-3-601 who has not executed a consent or a relinquishment and who fails to respond to a notice of the adoption proceeding within 30 days after the service of the notice.
(8) An individual notified under G.S. 48-2-206 who does not respond in a timely manner or whose consent is not required as determined by the court.
(9) An individual whose actions resulted in a conviction under G.S. 14-27.2 or G.S. 14-27.3 and the conception of the minor to be adopted.

(b) The court may issue an order dispensing with the consent of:
(1) A guardian or an agency that placed the minor upon a finding that the consent is being withheld contrary to the best interest of the minor; or
(2) A minor 12 or more years of age upon a finding that it is not in the best interest of the minor to require the consent. (1949, c. 300; 1957, c. 90; c. 778, ss. 3, 4; 1969, c. 534, s. 1; 1971, c. 1185, s. 17; 1975, c. 321, s. 1; c. 714; 1977, c. 879, ss. 2, 3; 1979, c. 107, s. 7; 2nd Sess., c. 1088, s. 1; 1983, c. 292; 1985, c. 758, ss. 5-9; 1987, c. 371, s. 1; 1995, c. 457, s. 2; 1997-215, ss. 11(a), 17; 1998-202, s. 13(o); 2004-128, s. 9.)

Editor's Note. — Subdivision (a)(9), added by Session Laws 2004-128, s. 9, effective December 1, 2004, is applicable to offenses committed on or after that date.

Legal Periodicals. — For survey of 1978 family law, see 57 N.C.L. Rev. 1084 (1979).

CASE NOTES

Editor's Note. — *The cases below were decided prior to the 1995 revision of Chapter 48.*

"Abandonment" Defined. — "Abandonment" imports any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); In re Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (1978).

"Abandonment" has been defined as willful neglect and refusal to perform the natural and legal obligations of parental care and support. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

Abandonment Judicially Determined. — Under the former law, the existence of abandonment as ground for an adoption without parental consent must be judicially determined. Truelove v. Parker, 191 N.C. 430, 132 S.E. 295 (1926).

Abandonment Must Be Willful. — Where there was evidence in behalf of defendant father tending to show that plaintiff took possession of his children against his will and prevented him from performing his parental duty, as well as evidence to the contrary, it was held that when the jury found for defendant the case did not fall within the meaning of the former section. Howell v. Solmon, 167 N.C. 588, 83 S.E. 609 (1914).

Willfulness is as much an element of abandonment within the meaning of this section as it is of the crime of abandonment described in G.S. 14-322 and former G.S. 14-326. In re Hoose, 243 N.C. 589, 91 S.E.2d 555 (1956); In re Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (1978).

Abandonment requires a willful intent to escape parental responsibility and conduct in effectuation of such intent. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

"Willful" Defined. — The word "willful" means something more than an intention to do a thing. It implies doing the act purposely and deliberately. Clark v. Jones, 67 N.C. App. 516, 313 S.E.2d 284, cert. denied, 311 N.C. 756, 321 S.E.2d 128 (1984); In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

Willful intent is a question of fact to be determined from the evidence. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

Purpose to Forego Parental Duties. — To constitute abandonment by a parent of his child, so as to deprive him of the right to prevent the adoption of the child, there must be some conduct on the part of the parent which evinces a purpose to forego his parental duties. Truelove v. Parker, 191 N.C. 430, 132 S.E. 295 (1926).

Mere Failure to Contribute to Support of Child Does Not Constitute Abandonment. — A mere failure of the parent of a minor child in the custody of a third person to contribute to its support does not in and of itself constitute abandonment, since explanations could be made which would be inconsistent with a willful intent to abandon. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); In re Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (1978); In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

But Continued Willful Failure to Support Would Evidence Abandonment. — A continued willful failure to perform the parental duty to support and maintain a child would be evidence that a parent had relinquished his claim to the child. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

It Is Not Necessary That Parent Absent Himself from Child Continuously. — To constitute an abandonment within the meaning of this section it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

If His Conduct Shows Intent to Forego All Obligations and Relinquish All Claims. — If the parent's conduct over the 6-month period evinces a settled purpose and a willful intent to forego all parental duties and obligations and to relinquish all parental claims to the child there has been abandonment within the meaning of this section. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

A child has been "willfully abandoned" when the conduct of the abandoning parent over the 6-month period reveals a settled purpose and willful intent to forego all parental duties and obligations and to relinquish all parental claims to the child. Rigby v. Stroud, 38 N.C. App. 373, 247 S.E.2d 792 (1978); Clark v. Jones, 67 N.C. App. 516, 313 S.E.2d 284, cert. denied, 311 N.C. 756, 321 S.E.2d 128 (1984).

Legal abandonment is not a transitory concept that may be recessed at the whim of the transgressor. In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

And Parent May Not Dissipate Its Effects by Expressing Desire for Child's Return. — Abandonment is not an ambulatory thing, the legal effects of which a delinquent parent may dissipate at will by the expression of a desire for the return of the discarded child. Boring v. Mitchell, 5 N.C. App. 550, 169 S.E.2d 79 (1969).

Conduct Amounting to Abandonment. — If a parent withholds his presence, his love, his care and the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962); In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

Failure to Provide for Medical Attention as Evidence of Abandonment. — Showing that child was in need of medical attention and father failed to provide funds or otherwise show concern about his condition tended to be some evidence of willful abandonment. In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

Abandonment Not Shown. — For case in which abandonment of an illegitimate child was not shown, see In re Jones, 153 N.C. 312, 69 S.E. 217 (1910).

Money Sent After Filing of Petition Irrelevant. — Where records indicated that father sent money for child's care after filing of petition for a declaration of abandonment, these funds were irrelevant to the issue of whether the child had been abandoned as alleged in the petition, and therefore this evidence would not be admissible. In re Cardo, 41 N.C. App. 503, 255 S.E.2d 440 (1979).

Commission of Crime Resulting in Incarceration. — The fact that a parent commits a crime which might result in incarceration is insufficient, standing alone, to show a settled purpose to forego all parental duties. In re Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (1978).

The fact that respondent committed the felony of crime against nature, was found guilty and was incarcerated did not evince a willful intent on his part to forego any responsibility to his child. In re Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (1978).

Where respondent's evidence tended to show that he was not aware that child had been placed in the custody of the Department of Social Services, that he was unable to locate his son, and that as a result of his incarceration, he was unable to make any payments to support the child, the fact that respondent was unable to locate his son and was unable to make support payments as a result of his incarceration was inconsistent with a willful intent to abandon his son. In re Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (1978).

As to sufficient allegation of abandonment, see Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

Instructions. — An instruction to the jury explaining that "willful means that the abandonment would be without just cause or excuse, unjustifiable and wrong; that the respondent had a purpose to do it without authority, careless of whether he had a right or not," was sufficient. Pratt v. Bishop, 257 N.C. 486, 126 S.E.2d 597 (1962).

An instruction as to abandonment alone, without an instruction as to the time period over which abandonment must exist, was an insufficient explanation of the law arising from the facts. McIntosh v. McIntosh, 20 N.C. App. 742, 202 S.E.2d 804 (1974).

Consent of Parent Guilty of Abandonment Need Not Be Obtained. — If it is determined that a child or children have been abandoned, the consent of the parent or guardian guilty of the abandonment of such child or children need not be obtained. Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961).

And If Child Has Been Abandoned for Six Months Parent Is Not Necessary Party. — If it is found that a child has been abandoned for at least six months immediately preceding the institution of an action or proceeding to declare the child an abandoned child, then such parents, surviving parent, or guardian of the person declared guilty of the abandonment shall not be necessary parties to any proceeding brought under this Chapter. Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961).

The time of abandonment is not determinative of jurisdiction, but is determinative of the question of whether or not the parents, surviving parent, or guardian of the person must be a party to the adoption proceeding. Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961).

Where a court of competent jurisdiction has declared a child to be an abandoned child, the court is not ousted of its jurisdiction, even though it may be found that abandonment occurred less than six months prior to the institution of the proceeding to determine whether the child had been abandoned. Hicks v. Russell, 256 N.C. 34, 123 S.E.2d 214 (1961).

The act of adoptive parents of child in entering into contract consenting to its adoption by another couple does not constitute constructive abandonment of the child so as to obviate the necessity of their consent to its adoption by such other couple. Therefore, when such consent is withdrawn within six months, the proceedings for adoption by such other couple should be dismissed upon motion. In re Hoose, 243 N.C. 589, 91 S.E.2d 555 (1956).

Effect of Judgment Retained for Further Orders. — Former G.S. 48-10, to which former G.S. 48-5 corresponded, provided that parents or guardians who had been declared by a juvenile court to be unfit to have the custody of the child were not necessary parties to adoption proceedings. It was held that this provision was intended to apply only to a final, absolute and unconditional determination of unfitness, and not to a judgment of unfitness retained "for further orders as the continued welfare of said child and changing conditions may require." In re Morris, 224 N.C. 487, 31 S.E.2d 539 (1944).

Recovery for Death by Wrongful Act. — The former section did not deprive the parent of the right to recover for the wrongful death of the child. Avery v. Brantley, 191 N.C. 396, 131 S.E. 721 (1926).

Procedure for Adopting Child Without Parent's Consent. — Prior to October 1, 1985, two procedures were available to enable a petitioning party to adopt a minor child without the consent of the opposing biological parent. First, under G.S. 7A-289.32 [see now G.S. 7B-1111], a court could terminate the parental rights of a biological parent upon a finding of one of the grounds enumerated therein, and then, pursuant to this section, once a district court had entered an order terminating the parental rights of a biological parent, that parent was no longer a necessary party to an adoption proceeding. Second, the court, under subsection (d) of this section, upon proper motion, was authorized to hold a hearing to determine whether an abandonment as defined in former G.S. 48-2(1)a and (1)b had taken place. However, effective October 1, 1985, these proceedings were merged into one termination of parental rights proceeding under G.S. 7A-289.32(8) [see now G.S. 7B-1111(a)(7)] to ascertain whether the parent had willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

Prior Termination of Parental Rights

Not Necessary. — While termination of a putative father's rights may precede an adoption petition, prior termination of his rights under Chapter 7A is not necessary if, under the applicable provisions of Chapter 48, his consent to the adoption is not necessary; his parental rights are then terminated by the final order of adoption under G.S. 48-23. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Opportunity to Join Putative Parent Should Have Been Granted. — Even if putative father's consent to adoption was necessary, petitioners' failure to join him at the time they filed their original adoption petition did not authorize the trial court to dismiss the adoption proceeding without first giving petitioners the opportunity to join putative father within a reasonable time. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Section 7A-289.32 [see now § 7B-1111] Compared. — The grounds which render a putative father's consent unnecessary under subdivision (a)(3) of former G.S. 48-6 are identical to the grounds for terminating his parental rights under G.S. 7A-289.32(6) [see now G.S. 7B-1111(a)(5)]. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Standing to Attack Adoption. — Where it was apparent that child was begotten during the period of separation between her natural mother and her mother's husband, which figured in the couple's divorce action as the basis of the court's judgment, the child had no standing in an action over 20 years later to attack her adoption on the grounds that her natural father was not made a party to the adoption proceedings, and that she herself was not represented by counsel or a guardian ad litem and did not give her consent to the adoption. Flinn v. Laughinghouse, 68 N.C. App. 476, 315 S.E.2d 72, appeal dismissed and cert. denied, 311 N.C. 755, 321 S.E.2d 132 (1984).

For case holding father's consent to adoption of illegitimate child by mother and her husband unnecessary under this section as it formerly read, see Jolly v. Queen, 264 N.C. 711, 142 S.E.2d 592 (1965).

Father's Knowledge of Existence of Child Irrelevant. — A putative father's knowledge of the existence of his illegitimate child is not relevant to a proper analysis of the necessity of a putative father's consent under subdivision (a)(3) of former G.S. 48-6. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Subdivision (a)(3) of former G.S. 48-6 reflected the same legislative choices evident in the termination of a putative father's rights under G.S. 7A-289.32(6) [see now G.S. 7B-1111(a)(5)]: under neither statute is the illegitimate child's future welfare dependent on whether or not the putative father knows of the child's existence at the time the petition is filed. In re Clark, 95 N.C. App. 1, 381 S.E.2d 835 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Father Not Entitled to Notice of Intent to File Petition to Adopt. — Although putative father is entitled to notice under subdivision (a)(3) of former G.S. 48-6 of any hearing held to determine the necessity of his consent, the statutes do not provide for any notice to the putative father of a petitioner's intent to file a petition to adopt his illegitimate child or otherwise terminate his parental rights. In re Clark, 95 N.C. App. 1, 381 S.E.2d 385 (1989), rev'd on other grounds, 327 N.C. 61, 393 S.E.2d 791 (1990).

Subsequently Filed Affidavit Did Not Relate Back to Original Filing Date. — Where termination order, later held to be invalid for failure to use due diligence in ascertaining putative father's address, was filed with an adoption petition in lieu of affidavit required by former G.S. 48-13, a subsequently filed affidavit did not relate back to original filing date of petition so as to cut off rights of a putative father who filed legitimation petition to G.S. 49-10 before affidavit was filed. In re Adoption of Clark, 327 N.C. 61, 393 S.E.2d 791 (1990).

Legitimation Proceeding Held Without Effect upon Mother's Prior Consent to Adoption. — A legitimation proceeding brought by the putative father of a child born out of wedlock, wherein the child was declared legitimate, had no effect upon the prior written consent to adoption given by the unwed mother under this section as it formerly read. In re Doe, 11 N.C. App. 560, 181 S.E.2d 760, cert. denied and appeal dismissed, 279 N.C. 394, 183 S.E.2d 244 (1971).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — *The opinions below were issued prior to the 1995 revision of Chapter 48.*

Effect of Finding on Subsequent Proceeding. — If during an adoption proceeding a clerk of court makes a finding that the child sought to be adopted has been abandoned by his parents, and if the proceeding is dismissed without any order of adoption being entered, the finding of abandonment made during the adoption proceeding will suffice as a finding of abandonment within the meaning of this section for the purpose of a subsequent adoption proceeding. See opinion of Attorney General to Mr. Louis O'Conner, Jr., Director, Welfare Programs Division, State Department of Social Services, 40 N.C.A.G. 646 (1969).

When Finding of Abandonment Under this Section Not Required. — Only a finding of abandonment and termination of parental rights per former G.S. 7A-288 will negate requirement of finding abandonment per this section. See opinion of Attorney General to Robin L. Peacock, N.C. Department of Social Services, 42 N.C.A.G. 305 (1973).

The putative father of a child born out of wedlock is entitled to notice prior to a judicial determination as to whether his written consent to the adoption of the child is required. See opinion of Attorney General to Mr. Robert H. Ward, Director, N.C. Division of Social Services, 47 N.C.A.G. 132 (1977).

§ 48-3-604. Execution of consent: timing.

(a) A man whose consent is required under G.S. 48-3-601 may execute a consent to adoption either before or after the child is born.

(b) The mother of a minor child may execute a consent to adoption at any time after the child is born but not sooner.

(c) A guardian of a minor to be adopted may execute a consent to adoption at any time.

(d) An agency licensed by the Department or a county department of social services in this State that places a minor for adoption shall execute its consent no later than 30 days after being served with notice of the proceeding for adoption.

(e) A minor to be adopted who is 12 years of age or older may execute a consent at any time. (1995, c. 457, s. 2.)

CASE NOTES

Authority of Court. — Trial court had full statutory authority to dismiss petitions for adoption based on the best interests of the three minor children regardless of whether an agency had previously consented to the adoptions. In re Cunningham, 151 N.C. App. 410, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002).

§ 48-3-605. Execution of consent: procedures.

(a) A consent executed by a parent or guardian or by a minor to be adopted who is 12 years of age or older must conform substantially to the requirements in G.S. 48-3-606 and must be signed and acknowledged under oath before an individual authorized to administer oaths or take acknowledgments.

(b) A parent who has not reached the age of 18 years shall have legal capacity to give consent to adoption and to release that parent's rights in a child, and shall be as fully bound as if the parent had attained 18 years of age.

(c) An individual before whom a consent is signed and acknowledged under subsection (a) of this section shall certify in writing that to the best of the individual's knowledge or belief, the parent, guardian, or minor to be adopted executing the consent:

(1) Read, or had read to him or her, and understood the consent;
(2) Signed the consent voluntarily;
(3) Received or was offered a copy of the consent; and
(4) Was advised that counselling services may be available through county departments of social services or licensed child-placing agencies.

(d) A consent by an agency must be executed by the executive head or another authorized employee and must be signed and acknowledged under oath in the presence of an individual authorized to administer oaths or take acknowledgments.

(e) A consent signed in another state or in another country in accord with the procedure of that state or country shall not be invalid solely because of failure to comply with the formalities set out in this Chapter.

(f) A consent to the adoption of an Indian child, as that term is defined in the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., must meet the requirements of that Act. (1949, c. 300; 1971, c. 1231, s. 1; 1995, c. 457, s. 2.)

CASE NOTES

Applied in In re Cunningham, 151 N.C. App. 410, 567 S.E.2d 153, 2002 N.C. App. LEXIS 773 (2002).

§ 48-3-606. Content of consent; mandatory provisions.

A consent required from a minor to be adopted, a parent, or a guardian under G.S. 48-3-601 must be in writing and state:

(1) The date and place of the execution of the consent;

(2) The name, date of birth, and permanent address of the individual executing the consent;

(3) The date of birth or the expected delivery date, the sex, and the name of the minor to be adopted, if known;

(4) That the individual executing the document is voluntarily consenting to the transfer of legal and physical custody to, and the adoption of the minor to be adopted by, the identified prospective adoptive parent;

(5) The name of a person and an address where any notice of revocation may be sent;

(6) That the individual executing the document understands that after the consent is signed and acknowledged in accord with the procedures set forth in G.S. 48-3-605, it may be revoked in accord with G.S. 48-3-608, but that it is otherwise final and irrevocable and may not be withdrawn or set aside except under a circumstance set forth in G.S. 48-3-609;

(7) That the consent shall be valid and binding and is not affected by any oral or separate written agreement between the individual executing the consent and the adoptive parent;

(8) That the individual executing the consent has not received or been promised any money or anything of value for the consent, and has not received or been promised any money or anything of value in relation to the adoption of the child except for lawful payments that are itemized on a schedule attached to the consent;

(9) That the individual executing the consent understands that when the adoption is final, all rights and obligations of the adoptee's former parents or guardian with respect to the adoptee will be extinguished, and every aspect of the legal relationship between the adoptee and the former parent or guardian will be terminated;

(10) The name and address of the court, if known, in which the petition for adoption has been or will be filed;

(11) That the individual executing the consent waives notice of any proceeding for adoption;

(12) If the individual executing the document is the minor to be adopted or the person placing the minor for adoption, a statement that the adoption shall be by a specific named adoptive parent;

(13) If the individual executing the document is the person placing the minor for adoption, that the individual executing the consent has provided the prospective adoptive parent, or the prospective adoptive parent's attorney, with the written document required by G.S. 48-3-205; and

(14) That the person executing the consent has:

a. Received or been offered an unsigned copy of the consent;
b. Been advised that counselling services may be available through county departments of social services or licensed child-placing agencies; and
c. Been advised of the right to employ independent legal counsel. (1995, c. 457, s. 2.)

§ 48-3-607. Consequences of consent.

(a) A consent executed pursuant to G.S. 48-3-605 and G.S. 48-3-606 may be revoked as provided in G.S. 48-3-608. A consent is otherwise final and irrevocable except under a circumstance set forth in G.S. 48-3-609.

(b) Except as provided in subsection (c) of this section, the consent of a parent, guardian, or agency that placed a minor for adoption pursuant to Part 2 of this Article vests legal and physical custody of the minor in the prospective adoptive parent and empowers this individual to petition the court to adopt the minor.

(c) Any other parental right and duty of a parent who executed a consent is not terminated until either the decree of adoption becomes final or the relationship of parent and child is otherwise terminated, whichever comes first. Until termination, the minor remains the child of a parent who executed a consent for purposes of any inheritance, succession, insurance, arrears of child support, and other benefit or claim that the minor may have from, through, or against the parent. (1949, c. 300; 1957, c. 778, s. 6; 1961, c. 186; 1969, c. 982; 1983, cc. 83, 688; 1985, c. 758, s. 12; 1987, c. 541, s. 1; 1991, c. 667, s. 1; 1995, c. 457, s. 2.)

Legal Periodicals. — For article, "Surrogate Parenthood: Finding a North Carolina Solution," see 18 N.C. Cent. L.J. 1 (1989).

CASE NOTES

Editor's Note. — *The cases below were decided prior to the 1995 revision of Chapter 48.*

Purpose. — The purpose of former G.S. 48-11 was obvious: to give stability to the adoptive process. It allows prospective adoptive parents, as well as the child, to settle into a stable home environment, to be disturbed only upon those occasions when, prior to the final order, county directors of social services or adoptive agencies conduct studies of the provisions being made for the child. It also gives the natural parents a period of intense review of their decision to allow the adoption. In re Kasim, 58 N.C. App. 36, 293 S.E.2d 247, cert. denied, 306 N.C. 742, 295 S.E.2d 478 (1982).

Instrument held sufficient revocation of consent to adoption. In re Hoose, 243 N.C. 589, 91 S.E.2d 555 (1956).

Letter mailed by natural mother to one of the petitioners, stating that she was withdrawing her consent to child's adoption, constituted sufficient notice of revocation under the law as it stood prior to Oct. 1, 1983, the effective date of subsection (b) of former G.S. 48-11, and was timely made inasmuch as less than three months (now 30 days) had elapsed since execution of the consent to adopt and no interlocutory or final order of adoption had been entered. In re Terry, 317 N.C. 132, 343 S.E.2d 923 (1986).

Evidence held sufficient to support findings that social worker made a misrepresentation of an existing fact with knowledge that it was false and with the intent to deceive 17-year-old parents into signing adoption consent forms, and that a prudent person could have reasonably relied on her statements concerning the adoption process and the contents of the forms and signed the forms without reading them. In re Baby Boy Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986), cert. denied, 318 N.C. 695, 351 S.E.2d 750 (1987).

As to revocation of consent within six months under former G.S. 48-11, see In re Hoose, 243 N.C. 589, 91 S.E.2d 555 (1956).

§ 48-3-608. Revocation of consent.

(a) A consent to the adoption of any infant who is in utero or any minor may be revoked within seven days following the day on which it is executed, inclusive of weekends and holidays. If the final day of the revocation period falls on a weekend or North Carolina or federal holiday, then the revocation period extends to the next business day. The individual who gave the consent may revoke by giving written notice to the person specified in the consent. Notice may be given by personal delivery, overnight delivery service, or registered or certified mail, return receipt requested. If notice is given by mail, notice is deemed complete when it is deposited in the United States mail, postage prepaid, addressed to the person to whom consent was given at the address specified in the consent. If notice is given by overnight delivery service, notice is deemed complete on the date it is deposited with the service as shown by the receipt from the service, with delivery charges paid by the sender, addressed to the person to whom consent was given at the address specified in the consent.

(b) In a direct placement, if:

(1) A preplacement assessment is required, and

(2) Placement occurs before the preplacement assessment is given to the parent or guardian who is placing the minor,

then that individual's time under subsection (a) of this section to revoke any consent previously given shall be either five business days after the date the individual receives the preplacement assessment or the remainder of the time provided in subsection (a) of this section, whichever is longer. The date of receipt is the earlier of the date of actual receipt or the date established pursuant to G.S. 48-3-307.

(c) If a person who has physical custody places the minor with the prospective adoptive parent and thereafter revokes a consent pursuant to this section, the prospective adoptive parent shall, immediately upon request, return the minor to that person. The revocation restores the right to physical custody and any right to legal custody to the person who placed the minor and divests the prospective adoptive parent of any right to legal or physical custody and any further responsibility for the care and support of the minor. In any subsequent proceeding, the court shall award reasonable attorneys' fees to the person who revoked if the prospective adoptive parent fails upon request to return the minor.

(d) If a person other than a person described in subsection (c) of this section revokes a consent pursuant to this section and this person's consent is required, the adoption cannot proceed until another consent is obtained or the person's parental rights are terminated. The person who revoked consent is not thereby entitled to physical custody of the minor. If the minor whose consent is required revokes consent, the county department of social services shall be notified for appropriate action.

(e) A second consent to adoption by the same adoptive parents is irrevocable. (1949, c. 300; 1957, c. 778, s. 6; 1961, c. 186; 1969, c. 982; 1983, cc. 83, 688; 1985, c. 758, s. 12; 1987, c. 541, s. 1; 1991, c. 667, s. 1; 1995, c. 457, s. 2; 1997-215, s. 8(a); 2001-150, s. 10.)

CASE NOTES

Consent Not Procured by Fraud. — Adoptive father's attempt to void his consent to the adoption of his wife's daughter based on fraud failed, because the adoptive father failed to prove that the wife made any misrepresentations with regard to any alleged plans on her part to separate or divorce; based on the wife telling the adoptive father of her unhappiness and the couple's frequent arguments with regard to the adoptive father's drug use, the adoptive father knew or should have known that there was some possibility that the parties would separate. Fakhoury v. Fakhoury, 171 N.C. App. 104, 613 S.E.2d 729, 2005 N.C. App. LEXIS 1163 (2005), cert. denied, 360 N.C. 62, 621 S.E.2d 622 (2005).

§ 48-3-609. Challenges to validity of consent.

(a) A consent shall be void if:
- (1) Before the entry of the adoption decree, the individual who executed the consent establishes by clear and convincing evidence that it was obtained by fraud or duress;
- (2) The prospective adoptive parent and the individual who executed the consent mutually agree in writing to set it aside;
- (3) The petition to adopt is voluntarily dismissed with prejudice; or
- (4) The court dismisses the petition to adopt and no appeal has been taken, or the dismissal has been affirmed on appeal and all appeals have been exhausted.

(b) If the consent of an individual who previously had legal and physical custody of a minor becomes void under subsection (a) of this section and no grounds exist under G.S. 48-3-603 for dispensing with this individual's consent, the court shall order the return of the minor to the custody of that individual and shall dismiss any pending adoption proceeding. If the court has reasonable cause to believe that the return will be detrimental to the minor, the court shall not order the return of the minor but shall notify the county department of social services for appropriate action.

(c) If the consent of an individual who did not previously have physical custody of a minor becomes void under subsection (a) of this section and no ground exists under G.S. 48-3-603 for dispensing with this individual's consent, the court shall dismiss any pending proceeding for adoption. If return of the minor is not ordered under subsection (b) of this section, the court shall notify the county department of social services for appropriate action. (1995, c. 457, s. 2.)

CASE NOTES

Consent Not Procured by Fraud. — Adoptive father's attempt to void his consent to the adoption of his wife's daughter based on fraud failed, because the adoptive father failed to prove that the wife made any misrepresentations with regard to any alleged plans on her part to separate or divorce; based on the wife telling the adoptive father of her unhappiness and the couple's frequent arguments with regard to the adoptive father's drug use, the adoptive father knew or should have known that there was some possibility that the parties would separate. Fakhoury v. Fakhoury, 171 N.C. App. 104, 613 S.E.2d 729, 2005 N.C. App. LEXIS 1163 (2005), cert. denied, 360 N.C. 62, 621 S.E.2d 622 (2005).

§ 48-3-610. Collateral agreements.

If a person executing a consent and the prospective adoptive parent or parents enter into an agreement regarding visitation, communication, support, and any other rights and duties with respect to the minor, this agreement shall not be a condition precedent to the consent itself, failure to perform shall not invalidate a consent already given, and the agreement itself shall not be enforceable. (1995, c. 457, s. 2.)

Part 7. Relinquishment of Minor for Adoption.

§ 48-3-701. Individuals who may relinquish minor; timing.

(a) A parent or guardian may relinquish all parental rights or guardianship powers, including the right to consent to adoption, to an agency. If both parents are married to each other and living together, both parents must act jointly in relinquishing a child to an agency.

(b) The mother of a minor child may execute a relinquishment at any time after the child is born but not sooner. A man whose consent is required under G.S. 48-3-601 may execute a relinquishment either before or after the child is born.

(c) A guardian may execute a relinquishment at any time. (1949, c. 300; 1953, c. 906; 1961, c. 186; 1969, c. 911, s. 7; c. 982; 1975, c. 702, ss. 1-3; 1977, c. 879, s. 5; 1985, c. 758, ss. 10, 11; 1995, c. 457, s. 2.)

§ 48-3-702. Procedures for relinquishment.

(a) A relinquishment executed by a parent or guardian must conform substantially to the requirements in this Part and must be signed and acknowledged under oath before an individual authorized to administer oaths or take acknowledgments.

(b) The provisions of G.S. 48-3-605(b), (c), (e), and (f), also apply to a relinquishment executed under this Part.

(c) An agency that accepts a relinquishment shall furnish each parent or guardian who signs the relinquishment a letter or other writing indicating the agency's willingness to accept that person's relinquishment. (1995, c. 457, s. 2; 1997-215, s. 7(a).)

§ 48-3-703. Content of relinquishment; mandatory provisions.

(a) A relinquishment executed by a parent or guardian under G.S. 48-3-701 must be in writing and state:

(1) The date and place of the execution of the relinquishment;

(2) The name, date of birth, and permanent address of the individual executing the relinquishment;

(3) The date of birth or the expected delivery date, the sex, and the name of the minor, if known;

(4) The name and address of the agency to whom the minor is being relinquished;

(5) That the individual voluntarily consents to the permanent transfer of legal and physical custody of the minor to the agency for the purposes of adoption, and

  a. The placement of the minor for adoption with a prospective adoptive parent selected by the agency; or

  b. The placement of the minor for adoption with a prospective adoptive parent selected by the agency and agreed upon by the individual executing the relinquishment;

(6) That the individual executing the relinquishment understands that after the relinquishment is signed and acknowledged in the manner provided in G.S. 48-3-702, it may be revoked in accord with G.S. 48-3-706 but that it is otherwise final and irrevocable except under the circumstances set forth in G.S. 48-3-707;

(7) That the relinquishment shall be valid and binding and shall not be affected by any oral or separate written agreement between the individual executing the consent and the agency;

(8) That the individual executing the relinquishment understands that when the adoption is final, all rights and duties of the individual executing the relinquishment with respect to the minor will be extinguished and all other aspects of the legal relationship between the minor child and the parent will be terminated;

(9) That the individual executing the relinquishment has not received or been promised any money or anything of value for the relinquishment of the minor, and has not received or been promised any money or anything of value in relation to the relinquishment or the adoption of the minor except for lawful payments that are itemized on a schedule attached to the relinquishment;

(10) That the individual executing the relinquishment waives notice of any proceeding for adoption;

(11) That the individual executing the relinquishment has provided the agency with the written document required by G.S. 48-3-205, or that the individual has provided the agency with signed releases that will permit the agency to compile the information required by G.S. 48-3-205; and

(12) That the individual executing the relinquishment has:
  a. Received or been offered an unsigned copy of the relinquishment;
  b. Been advised that counseling services are available through the agency to which the relinquishment is given; and
  c. Been advised of the right to employ independent legal counsel. (1995, c. 457, s. 2.)

§ 48-3-704. Content of relinquishment; optional provisions.

In addition to the mandatory provisions listed in G.S. 48-3-703, a relinquishment may also state that the relinquishment may be revoked upon notice by the agency that an adoption by a specific prospective adoptive parent, named or described in the relinquishment is not completed. In this event the parent's time to revoke a relinquishment is 10 days, inclusive of weekends and holidays, from the date the parent receives such notice from the agency. The revocation shall be in writing and delivered in a manner specified in G.S. 48-3-706(a) for revocation of relinquishments. An agency, which after the exercise of due diligence cannot personally locate the parent entitled to this notice, may deposit a copy of the notice in the United States mail, return receipt requested, addressed to the address of the parent given in the relinquishment, and the date of receipt by the parent is deemed to be the date of delivery or last attempted delivery. If a parent does not revoke the relinquishment in the time and manner provided in this section, the relinquishment is deemed a general relinquishment to the agency, and the agency may place the child for adoption with a prospective adoptive parent selected by the agency. (1995, c. 457, s. 2; 1997-215, s. 19.1(a); 2001-208, s. 15; 2001-487, s. 101.)

§ 48-3-705. Consequences of relinquishment.

(a) A relinquishment executed pursuant to G.S. 48-3-702 through G.S. 48-3-704 may be revoked as provided in G.S. 48-3-706 and is otherwise final and irrevocable except under a circumstance set forth in G.S. 48-3-707.

(b) Upon execution, a relinquishment by a parent or guardian entitled under G.S. 48-3-201 to place a minor for adoption:

(1) Vests legal and physical custody of the minor in the agency; and

(2) Empowers the agency to place the minor for adoption with a prospective adoptive parent selected in the manner specified in the relinquishment.

(c) A relinquishment terminates:

(1) Any right and duty of the individual who executed the relinquishment with respect to the legal and physical custody of the minor.

(2) The right to consent to the minor's adoption.

(3) Repealed by Session Laws 1997-215, s. 19.1(b).

(d) Except as provided in subsection (c) of this section, parental rights and duties of a parent who executed a relinquishment are not terminated until the decree of adoption becomes final or the parental relationship is otherwise legally terminated, whichever occurs first. Until termination the minor remains the child of a parent who executed a relinquishment for purposes of any inheritance, succession, insurance, arrears of child support, and other benefit or claim that the minor may have from, through, or against the parent. (1949, c. 300; 1953, c. 906; 1957, c. 778, s. 6; 1961, c. 186; 1967, c. 926, s. 1; 1969, c. 911, ss. 7, 9; c. 982; 1973, c. 476, s. 138; 1975, c. 702, ss. 1-3; 1977, c. 879, s. 5; 1983, c. 454, ss. 4, 7; cc. 83, 688; 1985, c. 758, ss. 10-12; 1987, c. 541, s. 1; 1991, c. 667, s. 1; 1995, c. 457, s. 2; 1997-215, s. 19.1(b).)

CASE NOTES

When legal and physical custody of minor child vested in the Department of Social Services (DSS), it was then authorized to proceed in its discretion with placing child for adoption, and the trial court had no authority to interfere with the DSS's placement decision. In re Asbury, 125 N.C. App. 143, 479 S.E.2d 229 (1996).

§ 48-3-706. Revocation of relinquishments.

(a) A relinquishment of any infant who is in utero or any minor may be revoked within seven days following the day on which it is executed, inclusive of weekends and holidays. If the final day of the period falls on a weekend or a North Carolina or federal holiday, then the revocation period extends to the next business day. The individual who gave the relinquishment may revoke by giving written notice to the agency to which the relinquishment was given. Notice may be given by personal delivery, overnight delivery service, or registered or certified mail, return receipt requested. If notice is given by mail, notice is deemed complete when it is deposited in the United States mail, postage prepaid, addressed to the agency at the agency's address as given in the relinquishment. If notice is given by overnight delivery service, notice is deemed complete on the date it is deposited with the service as shown by the receipt from the service, with delivery charges paid by the sender, addressed to the agency at the agency's address as given in the relinquishment.

(b) If a person who has physical custody relinquishes a minor and thereafter revokes a relinquishment pursuant to this section, the agency shall upon request return the minor to that person. The revocation restores the right to physical custody and any right to legal custody to the person who relinquished the minor and divests the agency of any right to legal or physical custody and any further responsibility for the care and support of the minor. In any subsequent proceeding, the court may award the person who revoked reasonable attorneys' fees from a prospective adoptive parent with whom the minor was placed who refuses to return the minor and from the agency if the agency fails to cooperate in securing the minor's return.

(c) If a person other than a person described in subsection (b) of this section revokes a relinquishment pursuant to this section and this person's consent is required, the agency may not give consent for the adoption and the adoption cannot proceed until another relinquishment or a consent is obtained or parental rights are terminated. The person who revoked the relinquishment is not thereby entitled to physical custody of the minor.

(d) A second relinquishment for placement with the same adoptive parent selected by the agency and agreed upon by the person executing the relinquishment, or a second general relinquishment for placement by the agency with any adoptive parent selected by the agency, is irrevocable. (1949, c. 300; 1957, c. 778, s. 6; 1961, c. 186; 1969, c. 982; 1983, cc. 83, 688; 1985, c. 758, s. 12; 1987, c. 541, s. 1; 1991, c. 667, s. 1; 1995, c. 457, s. 2; 1997-456, s. 56.2(a); 2001-150, s. 11.)

§ 48-3-707. Challenges to validity of relinquishments.

(a) A relinquishment shall become void if:
(1) Before the entry of the adoption decree, the individual who executed the relinquishment establishes by clear and convincing evidence that it was obtained by fraud or duress.
(2) Before placement with a prospective adoptive parent occurs, the agency and the person relinquishing the minor agree to rescind the relinquishment.

(b) A relinquishment may be revoked upon the happening of a condition expressly provided for in the relinquishment pursuant to G.S. 48-3-704.

(c) If the relinquishment of an individual who previously had legal and physical custody of a minor is set aside under subsection (a) or (b) of this section and no grounds exist under G.S. 48-3-603 for dispensing with this individual's consent, the court shall order the return of the minor to the custody of that individual, and shall dismiss any pending proceeding for adoption. If the court has reasonable cause to believe that the return will be detrimental to the minor, the court shall not order the return of the minor but shall notify the county department of social services for appropriate action.

(d) If the relinquishment of an individual who did not previously have physical custody of a minor is set aside under subsection (a) or (b) of this section, and no grounds exist under G.S. 48-3-603 for dispensing with this individual's consent, the court shall dismiss any pending proceeding for adoption. If return of the minor is not ordered under subsection (c) of this section, the court shall notify the county department of social services for appropriate action. (1995, c. 457, s. 2; 1997-215, s. 19.1(c).)

ARTICLE 4.

Adoption of a Minor Stepchild by Stepparent.

§ 48-4-100. Application of Article.

This Article shall apply to the adoption of minors by their stepparents. (1995, c. 457, s. 2.)

§ 48-4-101. Who may file a petition to adopt a minor stepchild.

A stepparent may file a petition under this Article to adopt a minor who is the child of the stepparent's spouse if:
(1) The parent who is the spouse has legal and physical custody of the child, and the child has resided primarily with this parent and the stepparent during the six months immediately preceding the filing of the petition;
(2) The spouse is deceased or incompetent but, before dying or being adjudicated incompetent, had legal and physical custody of the child, and the child has resided primarily with the stepparent during the six months immediately preceding the filing of the petition; or
(3) For cause, the court permits a stepparent who does not meet the requirements of subdivisions (1) and (2) of this section to file a petition. (1995, c. 457, s. 2.)

§ 48-4-102. Consent to adoption of stepchild.

Except under circumstances described in G.S. 48-3-603, a petition to adopt a minor stepchild may be granted only if consent to the adoption has been executed by the adoptee if 12 or more years of age; and

(1) The adoptee's parents as described in G.S. 48-3-601; and
(2) Any guardian of the adoptee.

The consent of an incompetent parent may be given pursuant to the procedures in G.S. 48-3-602. (1949, c. 300; 1957, c. 778, s. 5; 1969, c. 911, s. 6; 1971, c. 1093, s. 13; 1973, c. 1354, s. 5; 1983, c. 30; c. 454, ss. 2, 6; 1995, c. 457, s. 2; 1997-215, s. 11(c).)

CASE NOTES

***Editor's Note.** — The case below was decided prior to the 1995 revision of Chapter 48.*

Biological Parent Need Not Join in Spouse's Petition for Adoption of Her Children. — Section 29-17(e) and subsection (d) of former G.S. 48-7 were enacted, not to retain adopted children's status as "lineal descendants" by the former marriage, but instead to provide that the parent-child relationship between adopted children and their biological parent is not severed by the parent's spouse's adoption of her children from a former marriage. Since the relationship remains intact in this limited situation, it is not necessary for such a biological parent to become a co-petitioner in her husband's adoption of her legitimate children of a former marriage. This biological parent, however, must consent to the adoption, as must any biological parent who does not come within the ambit of G.S. 48-6. In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

Wife's failure to "join" in her husband's petition for the adoption of her two minor children by a previous marriage in no way affected her relationship with the children and was immaterial to a determination of her husband's distributive share under former G.S. 30-3(b). In re Estate of Edwards, 316 N.C. 698, 343 S.E.2d 913, rehearing denied, 317 N.C. 704, 347 S.E.2d 40 (1986).

§ 48-4-103. Execution and content of consent to adoption by stepparent.

(a) A consent executed by a parent who is the stepparent's spouse:

(1) Must be signed and acknowledged before an individual authorized to administer oaths or take acknowledgments;
(2) Must be in writing and state or contain:
    a. The statements required by G.S. 48-3-606, except for those required by subdivisions (4), (9), (12), and (13) of that section;
    b. That the parent executing the consent has legal and physical custody of the child and is voluntarily consenting to the adoption of the child by the stepparent;
    c. That the adoption will not terminate the legal relation of parent and child between the parent executing the consent and the child; and
    d. That the adoption will terminate the legal relation of parent and child between the adoptee and the adoptee's other parent, including all right of the adoptee to inherit as a child from or through the other parent, and will extinguish any existing court order of custody, visitation, or communication with the adoptee, except that the other parent will remain liable for past-due child support payments unless legally released from this obligation.

(b) A consent executed by a minor stepchild's parent who is not the stepparent's spouse:

(1) Must be signed and acknowledged before an individual authorized to administer oaths or take acknowledgments; and
(2) Must be in writing and state or contain:

a. The statements required by G.S. 48-3-606, except for those required by subdivisions (4), (9), (12), and (13) of that section;
b. That the parent executing the consent is voluntarily consenting to:
   1. The transfer of any right the parent has to legal or physical custody of the child to the child's other parent and stepparent, and
   2. The adoption of the child by the stepparent; and
c. That the adoption will terminate the legal relation of parent and child between the adoptee and the parent executing the consent, including all rights of the adoptee to inherit as a child from or through the parent, and will extinguish any court order of custody, visitation, or communication with the adoptee, except that the parent executing the consent will remain liable for past-due child support payments unless legally released from this obligation.

(c) A consent executed by the guardian of a minor stepchild:
(1) Must be signed and acknowledged before an individual authorized to administer oaths or take acknowledgments; and
(2) Must be in writing and state or contain:
a. The statements required by G.S. 48-3-606, except for those required by subdivisions (4), (9), (12), and (13) of that section;
b. A statement that the guardian is voluntarily consenting to:
   1. The transfer of any right the guardian has to legal or physical custody of the adoptee to the adoptive stepparent; and
   2. The adoption of the adoptee by the stepparent;
c. That the adoption will not terminate the legal relation of parent and child between a parent who is or was the stepparent's spouse and the adoptee;
d. That the adoption will terminate the legal relation of parent and child between the adoptee and a parent who is not or has not been the stepparent's spouse, including all right of the adoptee to inherit from or through that parent, and will extinguish any court order of custody, visitation, or communication with the adoptee, except that a parent whose relation to the adoptee is terminated by the adoption will remain liable for past-due child support payments unless legally released from this obligation.

(d) G.S. 48-3-608(a) applies to consents executed pursuant to subsections (a) through (c) of this section. Unless so revoked, the consent is final and irrevocable except under a circumstance set forth in G.S. 48-3-609.

(e) A consent executed by an adoptee in a proceeding for adoption by a stepparent must be signed and acknowledged under oath before an individual authorized to administer oaths or take acknowledgments. The minor may revoke the consent at any time before the decree is entered by filing written notice with the court in which the petition is pending. (1949, c. 300; 1957, c. 778, s. 6; 1961, c. 186; 1969, c. 982; 1983, cc. 83, 688; 1985, c. 758, s. 12; 1987, c. 541, s. 1; 1991, c. 667, s. 1.)

§ **48-4-104:** Repealed by Session Laws 1997-215, s. 12(b).

§ 48-4-105. Visitation awards to grandparents pursuant to Chapter 50 of the General Statutes.

(a) An adoption under this Article does not terminate or otherwise affect visitation rights awarded to a biological grandparent of a minor pursuant to G.S. 50-13.2.

(b) An adoption under this Article does not affect the right of a biological grandparent to petition for visitation rights pursuant to G.S. 50-13.2A or G.S. 50-13.5(j). (1949, c. 300; 1953, c. 824; 1955, c. 813, s. 5; 1963, c. 967; 1967, c. 619, s. 5; 1983, c. 454, s. 6; 1985, c. 67, ss. 1-4; c. 575, s. 1; 1995, c. 457, s. 2.)

ARTICLE 5.

Adoption of Adults.

§ 48-5-100. Application of Article.

This Article shall apply to the adoption of adults, including married and emancipated minors. (1995, c. 457, s. 2.)

§ 48-5-101. Who may file for a petition to adopt an adult.

(a) An adult may adopt another adult, except for the spouse of the adopting adult, pursuant to this Article.

(b) If a prospective adoptive parent is married, both spouses must join in the petition unless the prospective adoptive parent is the adoptee's stepparent or unless the court waives this requirement for cause. (1967, c. 880, s. 3; 1969, c. 21, ss. 3-6; 1971, c. 1231, s. 1; 1973, c. 849, s. 3; 1975, c. 91; 1981, c. 657; 1989, c. 208; c. 727, s. 219(4); 1993, c. 553, s. 14; 1995, c. 457, s. 2.)

§ 48-5-102. Consent to adoption.

(a) Consent to the adoption of an adult is required only of:
  (1) The adult being adopted; and
  (2) The spouse of the petitioner in an adoption by the adult's stepparent, unless the court waives this requirement for cause.

(b) The consent of the adult being adopted must:
  (1) Be in writing and be signed and acknowledged before an individual authorized to administer oaths or take acknowledgments;
  (2) State that the adult agrees to assume toward the adoptive parent the legal relation of parent and child and to have all of the rights and be subject to all of the duties of that relationship; and
  (3) State that the adult understands the consequences the adoption may have for rights of inheritance, property, or support, including the loss of nonvested inheritance rights which existed prior to the adoption and the acquisition of new inheritance rights.

(c) The consent of the spouse of the petitioner in a stepparent adoption:
  (1) Must be in writing and be signed and acknowledged before an individual authorized to administer oaths or take acknowledgments; and
  (2) Must state that the spouse:
    a. Consents to the proposed adoption;
    b. Understands that the adoption may diminish the amount the spouse might take from the petitioner through intestate succession or by dissenting to the petitioner's will and may also diminish the amount of other entitlements that may become due the spouse and any other children of the petitioner through the petitioner; and
    c. Believes the adoption will be in the best interest of the adult being adopted and the prospective adoptive parent.

(d) Anyone who gives a consent under this Article may revoke the consent at any time before the entry of the decree of adoption by delivering a written notice of revocation to the individual to whom the consent was given. If a petition to adopt has been filed, the notice of revocation shall also be filed with the clerk of court in the county where the petition is pending. (1967, c. 880, s. 3; 1969, c. 21, ss. 3-6; 1971, c. 1231, s. 1; 1973, c. 849, s. 3; 1975, c. 91; 1981, c. 657; 1989, c. 208; c. 727, s. 219(4); 1993, c. 553, s. 14; 1995, c. 457, s. 2.)

§ 48-5-103. Adoption of incompetent adults.

(a) If an adult being adopted has been adjudicated incompetent, then that adult's guardian shall have authority to consent in place of that adult.

(b) The consent of the guardian must:

(1) Be in writing and signed and acknowledged before an individual authorized to administer oaths or take acknowledgments;

(2) State that the guardian understands that the adoption will terminate the legal relationship of parent and child between the adult being adopted and the adult's former parents, including all rights of the adult to inherit as a child from or through the former parents, unless the adoption is by a stepparent, in which case the adoption will terminate the legal relationship of parent and child between the adult and the parent who is not married to the stepparent but will have no effect on the relationship between the adult and the parent who is married to the stepparent;

(3) State that the guardian understands that the adoption will create the legal relationship of parent and child between the adult and the petitioner, including the right of inheritance by, from, and through each other;

(4) State that the guardian consents to the proposed adoption and believes the adoption will be in the best interest of the adult; and

(5) State that the guardian understands that the adoption will not terminate the guardian's rights, duties, and powers.

(c) In any adoption of an adult who has been adjudicated incompetent, the court shall appoint a guardian ad litem other than the guardian to investigate and report to the court on the proposed adoption. (1995, c. 457, s. 2.)

ARTICLE 6.

Adoption by a Former Parent.

§ 48-6-100. Application of Article.

This Article shall apply to the adoption of adoptees by a former parent. (1995, c. 457, s. 2.)

§ 48-6-101. Readoption under other Articles.

A former parent may readopt a minor adoptee pursuant to Article 3 of this Chapter or, if applicable, Article 4 of this Chapter. A former parent may readopt an adult adoptee pursuant to Article 5 of this Chapter. (1995, c. 457, s. 2.)

§ 48-6-102. Readoption after a stepparent adoption.

(a) In addition to the methods set out in G.S. 48-6-101, a former parent may petition pursuant to this section to readopt an adoptee adopted by a stepparent.

(b) The petitioner's spouse shall not join the petition.

(c) Consent to the readoption must be executed by:

(1) The adoptee, if 12 or more years of age;
(2) The petitioner's spouse, if any;
(3) The adoptee's adoptive parent, if the adoptee is a minor;
(4) The adoptee's parent who is or was the spouse of the adoptive parent, if the adoptee is a minor; and
(5) Any guardian of the adoptee.

(d) The consent executed by the adoptee shall conform to the requirements of G.S. 48-4-103(e).

(e) The consent executed by the petitioner's spouse shall conform to the requirements of G.S. 48-5-102(c).

(f) The consent executed by the adoptive parent shall conform to the requirements of G.S. 48-4-103(b).

(g) The consent of the adoptee's parent who was the spouse of the adoptive parent shall conform to the requirements of G.S. 48- 4-103(a) except for those required by G.S. 48-4-103(a)(2)b.

(h) A consent executed by the guardian of a minor adoptee shall conform to the requirements of G.S. 48-4-103(c).

(i) An adoption under this section does not affect the relationship between the adoptee and the parent who was married to the adoptive parent.

(j) An adoption under this section does not terminate or otherwise affect any existing order of custody. (1949, c. 300; 1983, c. 454, s. 6; 1995, c. 457, s. 2.)

Article 7.

[Reserved.]

Article 8.

[Reserved.]

Article 9.

Confidentiality of Records and Disclosure of Information.

§ 48-9-101. Certain terms defined.

(a) For purposes of this Article, "records" means any petition, affidavit, consent or relinquishment, transcript or notes of testimony, deposition, power of attorney, report, decree, order, judgment, correspondence, document, invoice, receipt, certificate, or other printed, written, microfilmed or microfiched, video-taped or tape-recorded material or electronic data processing records regardless of physical form or characteristics pertaining to a proceeding for adoption under this Chapter.

(b) Notwithstanding G.S. 48-1-101, for purposes of this Article, "adult" means an individual who has attained 21 years of age. (1995, c. 457, s. 2; 2007-262, s. 1.)

Effect of Amendments. — Session Laws 2007-262, s. 1, effective January 1, 2008, substituted "Certain terms" for "Records" in the section heading; designated the existing provisions as subsection (a); and added subsection (b).

§ 48-9-102. Records confidential and sealed.

(a) All records created or filed in connection with an adoption, except the decree of adoption and the entry in the special proceedings index in the office of the clerk of court, and on file with or in the possession of the court, an agency, the State, a county, an attorney, or other provider of professional services, are confidential and may not be disclosed or used except as provided in this Chapter.

(b) During a proceeding for adoption, records shall not be open to inspection by any person except upon an order of the court finding that disclosure is necessary to protect the interest of the adoptee.

(c) When a decree of adoption becomes final, all records and all indices of records on file with the court, an agency, or this State shall be retained permanently and sealed. Sealed records shall not be open to inspection by any person except as otherwise provided in this Article.

(d) All records filed in connection with an adoption, including a copy of the petition giving the date of the filing of the original petition, the original of each consent and relinquishment, additional documents filed pursuant to G.S. 48-2-305, any report to the court, any additional documents submitted and orders entered and a copy of the final decree, shall be sent by the clerk of superior court to the Division within 10 days after the decree of adoption is entered or 10 days following the final disposition of an appeal pursuant to G.S. 48-2-607(b). The original petition and final decree shall be retained by the clerk.

(e) The Division must cause the papers and reports related to the proceeding to be permanently indexed and filed.

(f) The Division shall transmit a report of each adoption and any name change to the State Registrar if the adoptee was born in this State. In the case of an adoptee who was not born in this State, the Division shall transmit the report and any name change to the appropriate official responsible for issuing birth certificates or their equivalent.

(g) In any adoption, the State Registrar may, in addition to receiving the report from the Division, request a copy of the final order and any separate order of name change directly from the clerk of court. (1949, c. 300; 1957, c. 778, s. 7; 1961, c. 186; 1967, c. 619, ss. 6, 7; c. 880, s. 3; 1969, c. 21, ss. 3-6; c. 982; 1971, c. 1231, s. 1; 1973, c. 476, s. 138; c. 849, s. 3; 1975, c. 91; 1979, c. 739, ss. 1, 2; 1981, c. 657; c. 924, ss. 2, 3; 1983, c. 454, s. 6; 1989, c. 208; c. 727, s. 219(4); 1993, c. 539, s. 411; c. 553, s. 14; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2; 1997-215, s. 9(a)-(c); 2001-208, s. 11; 2001-487, s. 101.)

Legal Periodicals. — For comment, "The Adoptee's Right of Access to Sealed Adoption Records in North Carolina," see 16 Wake Forest L. Rev. 563 (1980).

For survey of 1981 family law, see 60 N.C.L. Rev. 1379 (1982).

CASE NOTES

Editor's Note. *— The cases below were decided prior to the 1995 revision of Chapter 48.*

Requirement that adoption records be sealed reflects legislative recognition of potential harm to adopted children and their adoptive families, and ultimately to society, which may arise from unwarranted revelation of private facts about adoptions, and suggests that the circumstances surrounding a particular adoption and the identities of the parties involved are ordinarily not matters of public interest. Hall v. Post, 85 N.C. App. 610, 355 S.E.2d 819 (1987), rev'd on other grounds, 323 N.C. 259, 372 S.E.2d 711 (1988).

Service of Motion and Notice of Hearing upon Director of Social Services Required. — Former G.S. 48-25(c) requires that before a director of social services shall be required to disclose any information acquired in contemplation of the adoption of a child, the director must be served with the motion and notice of hearing. In re Spinks, 32 N.C. App.

422, 232 S.E.2d 479 (1977).

There is no requirement that the natural parents be served. In re Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

Failure to Grant Protective Order. — An appellate court could not hold that a district court in a child custody proceeding erred in failing to grant the defendant county department of social services a "protective order based upon confidentiality of records as set out in [former] G.S. 48-25," where the record on appeal did not reveal exactly what type of "protective order" was requested by the defendant and did not even clearly reveal that the district court, after being presented with a proper motion by the defendant for any such order, refused to grant it. Francis v. Durham County Dep't of Social Servs., 41 N.C. App. 444, 255 S.E.2d 263 (1979).

§ 48-9-103. Release of nonidentifying information.

(a) An adoptive parent, an adoptee who is an adult at the time of the request, or a minor adoptee who is a parent or an expectant parent may request a copy of any document prepared pursuant to G.S. 48-3-205 and a copy of any additional nonidentifying health-related information about the adoptee's original family that has been submitted to a court, agency, or the Division. A minor seeking treatment pursuant to G.S. 90-21.1 may request that a copy of this information be sent to the treating physician.

(b) If a request under this section is made to the agency that placed the adoptee or prepared the report to the court, the agency shall furnish the individual making the request or the treating physician named by a minor making the request with a copy of any relevant report or information that is included in the sealed records of the agency. If a request under this section is made to the court that issued the decree of adoption, the court shall refer the individual to the Division, or, if known to the court, the agency that placed the adoptee or prepared the report to the court. The Division may refer the individual to the agency that prepared the report to the court. If the agency no longer exists, the Division may furnish the information to an agency convenient to the requesting party.

(c) Any report or information released under this section shall be edited by the sender to exclude the name, address, or other information that could reasonably be expected to lead directly to the identity of an adoptee at birth or an adoptee's parent at the adoptee's birth or other member of the adoptee's original family and shall contain an express reference to the confidentiality provisions of this Chapter.

(d) An individual who is denied access to a report or information requested under this section may petition the clerk of original jurisdiction for review of the reasonableness of the denial.

(e) If the court or the agency receives information from an adoptee's former parent or from an adoptee's former relative about a health or genetic condition that may affect the health of the adoptee or the adoptee's child, an appropriate employee shall make a reasonable effort to contact and forward the information to an adoptee who is 18 or more years of age, or an adoptive parent of an adoptee who is under 18 years of age.

(f) Nothing in this section shall prohibit an agency from disclosing nonidentifying information about the adoptee's present circumstances, in the nature of information required under G.S. 48-3-205, to a former parent, an adult sibling, or the guardian of a minor sibling on request.

(g) The Department shall prescribe a reasonable procedure for verifying the identity, age, or other relevant characteristics of an individual who requests or provides a report or information under this section and the Department, the court, or agency may charge a reasonable fee for locating and making copies of a report or information.

(h) No request under this section shall be made to the State Registrar of Vital Statistics. (1949, c. 300; 1957, c. 778, s. 7; 1961, c. 186; 1969, c. 982; 1973,

c. 476, s. 138; 1979, c. 739, ss. 1, 2; 1981, c. 924, ss. 2, 3; 1983, c. 454, s. 6; 1993, c. 539, s. 411; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2.)

§ 48-9-104. Release of identifying information.

(a) Except as provided in G.S. 48-9-109(2) or (3), no person or entity shall release from any records retained and sealed under this Article the name, address, or other information that reasonably could be expected to lead directly to the identity of an adoptee, an adoptive parent of an adoptee, an adoptee's parent at birth, or an individual who, but for the adoption, would be the adoptee's sibling or grandparent, except upon order of the court for cause pursuant to G.S. 48-9-105.

(b) A child placing agency licensed by the Department or a county department of social services may agree to act as a confidential intermediary for a biological parent or adult adoptee or adult lineal descendant of a deceased adoptee, without appointment by the court pursuant to G.S. 48-9-105, in order to obtain and share nonidentifying birth family health information or facilitate contact or share identifying information with adult adoptees, adult lineal descendants of deceased adoptees, and biological parents with the written consent of all parties to the contact or the sharing of information. Further, a child placing agency licensed by the Department or a county department of social services may agree to act as a confidential intermediary for the adoptive parents of a minor adoptee, without appointment by the court pursuant to G.S. 48-9-105, to obtain and share nonidentifying birth family health information. An agency that agrees to provide confidential intermediary services may charge a reasonable fee for doing so, which fee must be pursuant to written agreement signed by the individual to be charged. The Division shall establish guidelines for confidential intermediary services. (1949, c. 300; 1957, c. 778, s. 7; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1979, c. 739, ss. 1, 2; 1981, c. 924, ss. 2, 3; 1983, c. 454, s. 6; 1993, c. 539, s. 411; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2; 2001-150, s. 12; 2007-262, s. 3.)

Effect of Amendments. — Session Laws 2007-262, s. 3, effective January 1, 2008, designated the existing provisions as subsection (a); inserted "or (3)" near the beginning of subsection (a); and added subsection (b).

CASE NOTES

Applied in In re Anderson, 360 N.C. 271, 624 S.E.2d 626, 2006 N.C. LEXIS 5 (2006).

§ 48-9-105. Action for release of identifying and other nonidentifying information.

(a) Any information necessary for the protection of the adoptee or the public in or derived from the records, including medical information not otherwise obtainable, may be disclosed to an individual who files a written motion in the cause before the clerk of original jurisdiction. In hearing the petition, the court shall give primary consideration to the best interest of the adoptee, but shall also give due consideration to the interests of the members of the adoptee's original and adoptive family.

(b) The movant must serve a copy of the motion, with written proof of service, upon the Department and the agency that prepared the report for the court. The clerk shall give at least five days' notice to the Department and the agency of every hearing on this motion, whether the hearing is before the clerk or a judge of the district court; and the Department and the agency shall be entitled to appear and be heard in response to the motion.

(c) In determining whether cause exists for the release of the name or identity of an individual, the court shall consider:

(1) The reason the information is sought;
(2) Any procedure available for satisfying the petitioner's request without disclosing the name or identity of another individual, including having the court appoint a representative to contact the individual and request specific information;
(3) Whether the individual about whom identifying information is sought is alive;
(4) To the extent known, the preference of the adoptee, the adoptive parents, the adoptee's parents at birth, and other members of the adoptee's original and adoptive families, and the likely effect of disclosure on these individuals;
(5) The age, maturity, and expressed needs of the adoptee;
(6) The report or recommendation of any individual appointed by the court to assess the request for identifying information; and
(7) Any other factor relevant to an assessment of whether the benefit to the petitioner of releasing the information sought will be greater than the benefit to any other individual of not releasing the information.

(d) An individual who files a motion under this section may also ask the court to authorize the release by the State Registrar of a certified copy of the adoptee's original certificate of birth. (1949, c. 300; 1985, c. 448; 1995, c. 88, s. 6; 1995, c. 457, s. 2.)

Legal Periodicals. — For survey of 1977 law on domestic relations, see 56 N.C.L. Rev. 1045 (1978).

For comment, "The Adoptee's Right of Access to Sealed Adoption Records in North Carolina," see 16 Wake Forest L. Rev. 563 (1980).

CASE NOTES

Editor's Note. — *The cases below were decided prior to the 1995 revision of Chapter 48.*

Circumvention of Section Under Guise of Waiver of Attorney-Client Privilege. — In a child custody action, the trial court was correct in preventing circumvention of this section under the guise of a waiver of the attorney-client privilege, where the plaintiff subpoenaed the files of the plaintiff's former counsel, who were employed to aid plaintiff and her deceased husband in adopting their first child, and the files most likely contained duplicates of many of the papers protected by former G.S. 48-24, 48-25 and 48-26. Sheppard v. Sheppard, 38 N.C. App. 712, 248 S.E.2d 871 (1978), cert. denied, 296 N.C. 586, 254 S.E.2d 34 (1979).

Discretion of Trial Judge. — Under this section, disclosure is permitted when the trial judge determines it to be in the best interests of the child or the public. In re Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

In making the determination that disclosure of any necessary information would be in the best interest of the child or the public, the judge should carefully weigh the interests of the child and the public, including the interests of the adoptive parents and the natural parents. Any conflict should be resolved in favor of the best interest of the child. In re Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

Finding of Fact Required. — There must be a finding of fact that the information sought to be revealed is necessary for the best interest of the child or the public before an order may be entered requiring disclosure of the information. In re Spinks, 32 N.C. App. 422, 232 S.E.2d 479 (1977).

§ 48-9-106. Release of original certificate of birth.

Upon receipt of a certified copy of a court order issued pursuant to G.S. 48-9-105 authorizing the release of an adoptee's original certificate of birth, the State Registrar shall give the individual who obtained the order a copy of the original certificate of birth with a certification that the copy is a true copy of a record that is no longer a valid certificate of birth. (1995, c. 457, s. 2.)

§ 48-9-107. New birth certificates.

(a) Upon receipt of a report of the adoption of a minor from the Division, or the documents required by G.S. 48-9-102(g) from the clerk of superior court in the adoption of an adult, or a report of an adoption from another state, the State Registrar shall prepare a new birth certificate for the adoptee that shall contain the adoptee's full adoptive name, sex, state of birth, and date of birth; the full name of the adoptive father, if applicable; the full maiden name of the adoptive mother, if applicable; and any other pertinent information consistent with this section as may be determined by the State Registrar. The new certificate shall contain no reference to the adoption of the adoptee and shall not refer to the adoptive parents in any way other than as the adoptee's parents.

(b) In an adoption by a stepparent, the State Registrar shall prepare a new birth certificate pursuant to subsection (a) of this section except:

(1) The adoptive parent and the parent whose relation with the adoptee remains unchanged shall be listed as the adoptee's mother and father on the new birth certificate; and

(2) The city and county of birth of the adoptee shall be the same on the new birth certificate as on the original certificate.

The names of the adoptee's parents shall not be changed as provided in subdivision (1) of this subsection if the petitioner, the petitioner's spouse, the adoptee if age 12 or older, and any living parent whose parental rights are terminated by the adoption jointly file a request that the parents' names not be changed with the court prior to the entry of the adoption decree. The Division shall send a copy of this request with its report to the State Registrar or other appropriate official in the adoption of a minor stepchild, and the clerk of superior court shall send a copy with the documents required by G.S. 48-9-102(g) in the adoption of an adult stepchild.

(c) The State Registrar shall seal the original certificate of birth and all records in the possession of that office pertaining to the adoption. These records shall not be unsealed except as provided in this Article. The State Registrar shall provide certified typed copies or abstracts of the new certificate of birth of an adoptee prepared pursuant to subsection (a) of this section to the adoptee, the adoptee's children, the adoptive parents, and the adoptee's spouse, brothers, and sisters. For purposes of this subsection, "parent", "brother", and "sister" shall mean the adoptee's adoptive parent, brother, or sister and shall not mean a former parent, brother, or sister.

(d) At the time of preparing the new birth certificate pursuant to subsection (a) of this section, the State Registrar shall notify the register of deeds or appropriate official in the health department in the county of the adoptee's birth to remove the adoptee's birth certificate from the records and forward it to the State Registrar for retention under seal with the original certificate of birth in the State Registrar's office. The register of deeds shall also delete all index entries for that birth certificate. The State Registrar shall not issue copies of birth certificates for adoptees to registers of deeds. Only the State Registrar shall issue certified copies of such records, and these copies shall be prepared as prescribed in subsection (c) of this section.

(e) The State Registrar may by rule prescribe requirements for reports of adoptions from other states. (1949, c. 300; 1951, c. 730, ss. 1-4; 1955, c. 951, s. 1; 1967, c. 880, s. 3; c. 1042, ss. 1-3; 1969, c. 21, s. 2-6; c. 977; 1971, c. 1231, s. 1; 1973, c. 476, s. 128; c. 849, ss. 1-3; 1975, c. 91; 1981, c. 657; 1983, c. 454, s. 6; 1989, c. 208; c. 727, s. 219(3), (4); 1993, c. 553, s. 14; 1995, c. 457, s. 2; 1997-215, s. 18.)

Legal Periodicals. — For comment, "The Adoptee's Right of Access to Sealed Adoption Records in North Carolina," see 16 Wake Forest L. Rev. 563 (1980).

§ 48-9-108. Restoration of original birth certificates if a decree of adoption is set aside.

If a final decree of adoption is set aside, the court shall send a certified copy of the order within 10 days after it becomes final to the State Registrar if the adoptee was born in this State or to the appropriate official responsible for issuing birth certificates or their equivalent if the adoptee was not born in this State. The court shall also send a copy to the Division. If the adoptee desires to have the adoptive name shown on the original birth certificate when it is restored, the order must include this directive. Upon receipt of such an order, the State Registrar shall seal the certificate issued under this section and restore the adoptee's original certificate of birth. This sealed file may subsequently be opened only by direction of a valid court order pursuant to G.S. 48-9-105 and G.S. 48-9-106. (1995, c. 457, s. 2.)

§ 48-9-109. Certain disclosures authorized.

Nothing in this Article shall be interpreted or construed to prevent:

(1) An employee of a court, agency, or any other person from:
  a. Inspecting permanent, confidential, or sealed records, other than records maintained by the State Registrar, for the purpose of discharging any obligation under this Chapter.
  b. Disclosing the name of the court where a proceeding for adoption occurred, or the name of an agency that placed an adoptee, to an individual described in G.S. 48-9-104 who can verify his or her identity.
  c. Disclosing or using information contained in permanent and sealed records, other than records maintained by the State Registrar, for statistical or other research purposes as long as the disclosure will not result in identification of a person who is the subject of the information and subject to any further conditions the Department may reasonably impose.

(2) In agency placements, a parent or guardian placing a child for adoption and the adopting parents from authorizing an agency to release information or from releasing information to each other that could reasonably be expected to lead directly to the identity of an adoptee, an adoptive parent of an adoptee, or an adoptee's placing parent or guardian. The consent to the release of identifying information shall be in writing and signed prior to the adoption by any placing parent or guardian and the adopting parents and acknowledged under oath in the presence of an individual authorized to administer oaths or take acknowledgments. Any consent to release identifying information shall be filed under G.S. 48-2-305.

(3) The Division from sharing information from its records regarding the identity of birth parents with an agency acting as a confidential intermediary pursuant to G.S. 48-9-104(b), if the information is needed by the agency to carry out its duties as a confidential intermediary. Any information disclosed to the agency pursuant to this subdivision shall not be redisclosed by the agency except as allowed by G.S. 48-9-104(b). (1995, c. 457, s. 2; 2001-150, s. 13; 2007-262, s. 4.)

Effect of Amendments. — Session Laws 2007-262, s. 4, effective January 1, 2008, added subdivision (3).

ARTICLE 10.

Prohibited Practices in Connection with Adoption.

§ 48-10-101. Prohibited activities in placement.

(a) No one other than a person or entity specified in G.S. 48-3-201 may place a minor for adoption. No one other than a person or entity specified in G.S. 48-3-201, or an adoption facilitator, may solicit potential adoptive parents for children in need of adoption. No one other than an agency or an adoption facilitator, or an individual with a completed preplacement assessment that contains a finding that the individual is suitable to be an adoptive parent or that individual's immediate family, may solicit for adoption a potential adoptee.

(b) No one other than a county department of social services, an adoption facilitator, or an agency licensed by the Department in this State may advertise in any periodical or newspaper, or by radio, television, or other public medium, that any person or entity will place or accept a child for adoption.

(b1) Notwithstanding subsections (a) and (b) of this section, this Article shall not prohibit a person from advertising that the person desires to adopt. This subsection shall apply only to a person with a current completed preplacement assessment finding that person suitable to be an adoptive parent. The advertisement may be published only in a periodical or newspaper or on radio, television, cable television, or the Internet. The advertisement shall include a statement that (i) the person has a completed preplacement assessment finding that person suitable to be an adoptive parent, (ii) identifies the name of the agency that completed the preplacement assessment, and (iii) identifies the date the preplacement assessment was completed. Any advertisement under this subsection may state whether the person is willing to provide lawful expenses as permitted by G.S. 48-10-103.

(c) A person who violates subsection (a), (b), or (b1) of this section is guilty of a Class 1 misdemeanor.

(d) The district court may enjoin any person from violating this section. (1975, c. 335, s. 2; 1981, c. 275, s. 6; 1993, c. 539, s. 413; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2; 2001-150, s. 14.)

§ 48-10-102. Unlawful payments related to adoption.

(a) Except as provided in G.S. 48-10-103, a person or entity may not pay or give, offer to pay or give, or request, receive or accept any money or anything of value, directly or indirectly, for:

(1) The placement of a minor for adoption;
(2) The consent of a parent, a guardian, or an agency to the adoption of a minor;
(3) The relinquishment of a minor to an agency for purposes of adoption; or
(4) Assisting a parent or guardian in locating or evaluating a potential adoptive parent or in transferring custody of a minor to the adoptive parent.

(b) A person who violates this section is guilty of a Class 1 misdemeanor. For each subsequent violation, a person is guilty of a Class H felony which may include a fine of not more than ten thousand dollars ($10,000).

(c) The district court may enjoin any person or entity from violating this section. (1975, c. 335, s. 1; 1991, c. 335, s. 1; 1993, c. 539, ss. 412, 1264; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2.)

CASE NOTES

Editor's Note. *— Some of the cases below were decided prior to the 1995 revision of Chapter 48.*

Violation of Section. — Actions of adopting parents and their attorney in making funds available for the purpose of bringing a biological mother into the State so as to facilitate the adoption of her unborn child, including supporting her and the child through the date of birth and returning the mother to her home state, constituted a violation of this section. In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991).

Cancellation of Child Support Arrearages Against Public Policy. — Where the trial court concluded that mother was equitably estopped from collecting the child support arrearages and the sole basis for the estoppel was that the mother had promised she would "not pursue the action for child support arrears" in exchange for the father's consent to adoption, the agreement violated this section in that both the mother and the father gave and received consideration for the placement of the child for adoption. Thus the agreement was void as being contrary to the public policy and could not be used in equity to estop the mother from enforcing her judgment for the full amount of the child support arrearages. State ex rel. Raines v. Gilbert, 117 N.C. App. 129, 450 S.E.2d 1 (1994).

Father's agreement to consent to the adoption of his child violated § 48-37 and was void as contrary to public policy, in that it was in exchange for the termination of his child support obligations and the mother's agreement not to pursue child support, either prospective or in arrears; therefore, the consent agreement cannot be used to estop DSS from reopening the child support case and seeking reimbursement for the public assistance paid subsequent to the consent order. Stanly County Dep't of Social Servs. ex rel. Dennis v. Reeder, 127 N.C. App. 723, 493 S.E.2d 70 (1997).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The opinion below was issued prior to the 1995 revision of Chapter 48.*

Arrangement by Prospective Adoptive Parents to Pay Transportation Expenses and Medical Costs for Expectant Mother. — Under former G.S. 48-37 as it read prior to the 1991 amendment, prospective adoptive parents who entered into an arrangement with an expectant mother to pay her transportation expenses to North Carolina as well as all medical costs incident to the birth of the child pursuant to an independent adoption placement violated the provisions of this section. See opinion of Attorney General to Renee P. Hill, 45 N.C.A.G. 24 (1975).

§ 48-10-103. Lawful payments related to adoption.

(a) An adoptive parent, or another person acting on behalf of an adoptive parent, may pay the reasonable and actual fees and expenses for:

(1) Services of an agency in connection with an adoption;

(2) Medical, hospital, nursing, pharmaceutical, traveling, or other similar expenses incurred by a mother or her child incident to the pregnancy and birth or any illness of the adoptee;

(3) Counseling services for a parent or the adoptee that are directly related to the adoption and are provided by a licensed psychiatrist, licensed psychologist, licensed marriage and family therapist, licensed professional counselor, licensed or certified social worker, fee-based practicing pastoral counselor or other licensed professional counselor, or an employee of an agency;

(4) Ordinary living expenses of a mother during the pregnancy and for no more than six weeks after the birth;

(5) Expenses incurred in ascertaining the information required under G.S. 48-3-205 about an adoptee and the adoptee's biological family;

(6) Legal services, court costs, and traveling or other administrative expenses connected with an adoption, including any legal service connected with the adoption performed for a parent who consents to the adoption of a minor or relinquishes the minor to an agency; and

(7) Preparation of the preplacement assessment and the report to the court.

(b) A birth parent, or another person acting on the parent's behalf, may receive or accept payments authorized in subsection (a) of this section; or a provider of a service listed in subsection (a) of this section may receive or accept payments for that service.

(c) A payment authorized by subsection (a) of this section may not be made contingent on the placement of the minor for adoption, relinquishment of the minor, consent to the adoption, or cooperation in the completion of the adoption. Except as provided in subsection (d) of this section, if the adoption is not completed, a person who has made payments authorized by subsection (a) of this section may not recover them; but neither is this person liable for any further payment unless the person has agreed in a signed writing with a provider of a service to make this payment regardless of the outcome of the proceeding for adoption.

(d) A prospective adoptive parent may seek to recover a payment if the parent or other person receives or accepts it with the fraudulent intent to prevent the proposed adoption from being completed.

(e) An agency may charge or accept a reasonable fee or other compensation from prospective adoptive parents. In assessing a fee or charge, the agency may take into account the income of adoptive parents and may use a sliding scale related to income in order to provide services to persons of all incomes. (1975, c. 335, s. 1; 1991, c. 335, s. 1; 1993, c. 539, ss. 412, 1264; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2; 2001-487, s. 40(c).)

CASE NOTES

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Violation of Section. — Actions of adopting parents and their attorney in making funds available for the purpose of bringing a biological mother into the State so as to facilitate the adoption of her unborn child, including supporting her and the child through the date of birth and returning the mother to her home state, constituted a violation of former G.S. 48-25. In re P.E.P., 329 N.C. 692, 407 S.E.2d 505 (1991).

Cancellation of Child Support Arrearages Against Public Policy. — Where the trial court concluded that mother was equitably estopped from collecting the child support arrearages and the sole basis for the estoppel was that the mother had promised she would "not pursue the action for child support arrears" in exchange for the father's consent to adoption, the agreement violated this section in that both the mother and the father gave and received consideration for the placement of the child for adoption. Thus the agreement was void as being contrary to the public policy and could not be used in equity to estop the mother from enforcing her judgment for the full amount of the child support arrearages. State ex rel. Raines v. Gilbert, 117 N.C. App. 129, 450 S.E.2d 1 (1994).

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§ 48-10-104. Failure to disclose nonidentifying information.

An adoptive parent, an adoptee, or any person who is the subject of any information required under G.S. 48-3-205 or authorized for release under Article 9 of this Chapter may bring a civil action for equitable or monetary relief or both against a person who fraudulently or intentionally misrepresents or fails to disclose information required under G.S. 48-3-205 or Article 9 of this Chapter. (1995, c. 457, s. 2.)

§ 48-10-105. Unauthorized disclosure of information.

(a) Except as authorized in G.S. 48-3-205 or in Article 9 of this Chapter, no identifying or nonidentifying information contained in a report or records described therein may be disclosed by present or former employees or officials of the court, an agency, the State, a county, an attorney or other provider of professional services, or any person or entity who wrongfully obtains such a report or records.

(b) A person who knowingly makes an unauthorized disclosure of identifying information is guilty of a Class 1 misdemeanor.

(c) The district court may enjoin from further violations any person who makes an unauthorized disclosure.

(d) Notwithstanding the penalties provided in subsection (b) of this section, an individual who is the subject of any of this information may bring a civil action for equitable or monetary relief or both against any person or entity who makes an unauthorized disclosure of the information. (1949, c. 300; 1957, c. 778, s. 7; 1961, c. 186; 1969, c. 982; 1973, c. 476, s. 138; 1979, c. 739, ss. 1, 2; 1981, c. 924, ss. 2, 3; 1983, c. 454, s. 6; 1993, c. 539, s. 411; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 457, s. 2.)

TABLES OF COMPARABLE SECTIONS FOR CHAPTER 48

Former to Present

Editor's Note. — The following table shows G.S. sections from Chapter 48 as effective until July 1, 1996 and their comparable section numbers in Chapter 48 as effective July 1, 1996. Where there is no comparable, new number, the term "None" has been inserted.

Present Section	Former Section
48-1	48-1-100
48-2	48-1-101, 48-1-102
48-3(a)	48-1-104
48-3(b)	None
48-3(c)	48-3-302(e)
48-3.1	None
48-4(a)	48-1-103, 48-2-301(b)
48-4(b)	None
48-4(c), (d)	48-2-100(b)
48-4(e)	48-1-103
48-5(a), (b)	48-3-601, 48-3-603
48-5(c), (e)	48-3-603
48-5(d)	48-2-302(c)
48-6(a), (a1)	48-3-601, 48-3-603
48-6(b)	None
48-7(a), (b)	48-2-401, 48-3-601
48-7(c)	48-2-402
48-7(d)	48-1-106(d), 48-4-102
48-7(e)	48-1-106(d)
48-8	48-3-605(b)
48-9(a), (c)	48-3-601
48-9(b)	48-2-305
48-9(d)	48-3-602
48-9.1	48-3-502, 48-3-705
48-9.2	48-2-205
48-10	48-3-601
48-11	48-3-607(a), 48-3-608, 48-3-705(a), 48-3-706, 48-4-103(d)
48-12	48-2-100(a), 48-2-101, 48-2-102
48-13	48-3-206
48-14	48-2-606(c), 48-9-102
48-15(a)	48-2-303
48-15(b), (c), (d)	48-2-304
48-15(e)	None
48-16	48-1-109(a), 48-2-501 et seq.

Present Section	Former Section
48-17	None
48-18(a)	48-3-501
48-18(b)	48-2-204
48-19	48-1-109(a), 48-2-501 et seq.
48-20	48-2-604
48-21	None
48-22	48-2-606
48-23	48-1-106, 48-1-107, 48-4-105
48-24	48-9-102
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48-25(d), (e)	48-3-205(a), 48-9-103
48-26	48-9-105
48-27	None
48-28	48-2-607(a)
48-29	48-1-105, 48-9-107
48-30	None
48-31	None
48-32	48-6-100 et seq.
48-33	None
48-34, 48-35	1995 Sess. Laws c. 457, s. 11
48-36(a)	48-1-103, 48-1-104, 48-2-100, 48-2-101, 48-2-301(b), 48-5-101, 48-5-102, 48-2-605
48-36(b)	48-1-106, 48-1-107
48-36(c)	None
48-36(d), (e)	48-1-105, 48-9-102, 48-9-107
48-36(f)	48-9-102
48-37	48-10-102, 48-10-103
48-38	48-10-101

Present to Former

Editor's Note. — The following table shows G.S. sections of Chapter 48 as effective July 1, 1996 and their comparable section numbers in Chapter 48 as effective until July 1, 1996, section numbers. Where there is no comparable, former Chapter 48 number, the term "None" has been inserted.

Present Section	Former Section
48-1-100	48-1
48-1-101	48-2
48-1-102	48-2(5)
48-1-103	48-4(a), (e), 48-36(a)
48-1-104	48-3(a), 48-36(a)
48-1-105	48-29(a), (e), 48-36(d)
48-1-106	48-7(d), 48-23, 48-36(b)
48-1-107	48-23, 48-36(b)
48-1-108	None
48-1-109	48-16(a), 48-19
48-2-100(a)	48-12(a), 48-36(a)
48-2-100(b)	48-4(c), (d), 48-36(a)
48-2-100(c)	None
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48-2-201	None
48-2-202	None
48-2-203	None
48-2-204	48-18(b)
48-2-205	48-9.2
48-2-301(a)	None
48-2-301(b), (c)	48-4(a) 48-36(a)
48-2-302(a), (b)	None
48-2-302(c)	48-5(d)
48-2-303	48-15(a)
48-2-304	48-15(b), (c), (d)
48-2-305	48-9(b)
48-2-306	None
48-2-401	48-7(b)
48-2-402	48-7(c)
48-2-403	None
48-2-404	None
48-2-405	None
48-2-406(a)	None
48-2-406(b), (c)	48-7(a)
48-2-407	None
48-2-501	48-16, 48-19
48-2-502	48-16, 48-19
48-2-503	48-16, 48-19
48-2-504	None
48-2-601	48-21
48-2-602	None
48-2-603	48-17, 48-21
48-2-604	48-20
48-2-605	48-36(a)
48-2-606(a), (b)	48-22
48-2-606(c)	48-14
48-2-607(a)	48-28
48-3-100	None
48-3-201	None
48-3-202	None
48-3-203(a)	48-9(a)
48-3-203(b)-(e)	None
48-3-204	None
48-3-205(a), (d)	48-25(d), (e)
48-3-205(b), (c)	None
48-3-206	48-13
48-3-207	None
48-3-301	48-3(c)
48-3-302(a)-(d)	None
48-3-302(e)	48-3(c)
48-3-303	None
48-3-304	None
48-3-305	None
48-3-306	None
48-3-307	None
48-3-308	None
48-3-401	None
48-3-402	None
48-3-501	48-18(a)
48-3-502	48-9.1
48-3-601	48-5(a), (b), 48-6(a)(2), (3), 48-7(a), 48-9(a), (c), 48-10
48-3-602	48-9(d)
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48-3-604	None
48-3-605(a), (c)-(f)	None
48-3-605(b)	48-8
48-3-606	None
48-3-607(a)	48-11
48-3-607(b), (c)	None
48-3-608	48-11
48-3-609	None
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48-3-703	None
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48-3-707	None
48-4-100	None
48-4-101	None
48-4-102	48-7(a), (d), 48-10
48-4-103(a)-(c), (e)	None
48-4-103(d)	48-11
48-4-104	48-16
48-4-105	48-23(2a)
48-5-100	None
48-5-101	48-36(a)
48-5-102 (a)	48-36(a)

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48-5-102(b)-(d)	None
48-5-103	None
48-6-100	None
48-6-101	None
48-6-102	48-32
48-9-101	None
48-9-102	48-24, 48-25(a), 48-36(d), (e), (f)
48-9-103	48-25(a), (c), (d), (e)
48-9-104	48-25(a), (c)
48-9-105	48-26
48-9-106	None
48-9-107	48-29, 48-36(d), (e)
48-9-108	None
48-9-109	None
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48-10-103	48-37
48-10-104	None
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